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THE CHILD CUSTODY PROVISIONS OF THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT

Two gardeners produced the tender roots of a promising new rose in the garden of life. Then they disagreed and separated, and now each seeks to have this tiny rose transplanted to his private garden. But science teaches that in order for this rose to reach its fullblown maturity and beauty it cannot be transplanted from garden to garden, but must be given permanency in location, accompanied with best of loving and tender care.¹

The child custody aspect of divorce law involves difficult social and legal questions regarding whether and when a child should be transplanted. When divorcing or divorced parents cannot agree on plans for their child, the courts must decide who is to be responsible for the care of the child. The judicial and statutory guidelines that trial courts follow in deciding the fate of the child are known as custody law, which has been described as “the most unsatisfactory, ineffectual, and frustrating area of family law.”²

The law of child custody is vague and amorphous. Although custody decisions have tremendous impact on the lives of the families involved, the body of law governing these decisions is imprecise and defies exact description or penetrating analysis. Changes in custody law are subtle, tentative and gradual, with few “landmark” decisions. Imprecision and subtlety in custody law result from judicial application of standards as general as “the best interest of the child.”³ The trial court enjoys broad discretion,⁴ and its judgment is not disturbed unless against the manifest weight of the evidence.⁵ Statutes and reported cases in this area of the law set only the outer boundaries for decisions at the trial level, where judgments are based on “elusive and subjective factors.”⁶

1. *Jingling v. Trtanj*, 99 Ill. App. 2d 64, 65, 241 N.E.2d 39, 40-41 (1968) (Hannah, J.).

2. ABA SECTION OF FAMILY LAW, PROCEEDINGS 27 (1963) (remarks of Harry M. Fain), quoted in Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody in and out of State*, 46 U. COLO. L. REV. 495, 495 (1975).

3. See, e.g., *Nye v. Nye*, 411 Ill. 408, 415, 105 N.E.2d 300, 304 (1952); *Drury v. Drury*, 65 Ill. App. 3d 290, 294, 382 N.E.2d 608, 611 (1978).

4. See, e.g., *Nye v. Nye*, 411 Ill. 408, 416, 105 N.E.2d 300, 304 (1952); *De Franco v. De Franco*, 67 Ill. App. 3d 760, 771, 384 N.E.2d 997, 1005 (1978).

5. See, e.g., *Caulkins v. Caulkins*, 68 Ill. App. 3d 284, 289, 385 N.E.2d 1117, 1121 (1979); *Drury v. Drury*, 65 Ill. App. 3d 290, 295, 382 N.E.2d 608, 612 (1978).

6. Schiller, *Child Custody: Evolution of Current Criteria*, 26 DEPAUL L. REV. 241, 241 (1977) [hereinafter cited as Schiller].

In 1977, Illinois adopted a new Marriage and Dissolution of Marriage Act.⁷ The custody provisions of this Act,⁸ borrowed from the Uniform Marriage and Divorce Act,⁹ codified Illinois custody law and set statutory standards for many aspects of child custody in divorce cases. This note will describe and analyze substantive divorce custody law in Illinois under the new statute.¹⁰ After brief historical and theoretical perspectives, the note will focus on original custody decisions, modification of custody decisions, *de facto* custody, removal of the child from the state, and visitation rights. These areas will be explored through description and analysis of case law prior to the new Act, the provisions of the Act, and judicial applications of the new Act. Decisions in other states with similar statutes¹¹ will be compared and contrasted. Particular attention will be given to consistency and predictability of custody decisions and to parental rights under the Act.

HISTORICAL PERSPECTIVE ON CHILD CUSTODY IN DIVORCE LAW

At common law, the father had the right to custody of his children,¹² a right which arose from the father's duty to support his child.¹³ A court of law had no power to take a minor child from the custody of his father,¹⁴ but the court of chancery could deprive the father of custody if he was guilty of "gross misconduct."¹⁵ Thus, the early standard provided for the father to have custody unless he was unfit.

The court of chancery developed an exception to the rule favoring paternal custody, by giving the mother custody of a child of tender

7. ILL. REV. STAT. ch. 40, §§ 101-802 (1977).

8. *Id.* §§ 601-610.

9. 9A UNIFORM LAWS ANNOTATED §§ 401-410.

10. Not within the scope of this note are jurisdictional issues involved in custody disputes in the courts of more than one state. Also not considered are the procedural aspects of the Illinois statute which provide for representation of the child at the discretion of the court, ILL. REV. STAT. ch. 40, § 506 (1977), recording of the court's interviews with the child, *id.* § 604, investigation and reports by independent agencies, *id.* § 605, and judicial supervision of custody arrangements, *id.* § 608.

11. ARIZ. REV. STAT. §§ 25-331 to 25-339 (1973). Arizona did not adopt the modification provisions of the uniform act, but rather set forth the best interest test for modification of custody after one year. *See id.* § 25-332; COLO. REV. STAT. §§ 14-10-123 to 14-10-132 (1973). Colorado's modification section applies only to the second and subsequent modification proceedings. *Id.* § 14-10-131; KY. REV. STAT. ANN. §§ 403.260 to 403.350 (Baldwin 1978); MONT. REV. CODES ANN. §§ 40-4-211 to 40-4-220 (1978). Montana omitted the uniform code provision that the court shall not consider the conduct of a present or proposed custodian that does not affect his relationship to the child.

12. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 589 (1877) [hereinafter cited as STORY]. *See also* J. SCHOULER, LAW OF THE DOMESTIC RELATIONS § 245 (4th ed. 1889).

13. Schiller, *supra* note 6, at 242.

14. STORY, *supra* note 12, at 589.

15. *Id.*

years, especially a daughter.¹⁶ In 1849, the Illinois Supreme Court adopted the “tender years doctrine” in *Miner v. Miner*,¹⁷ affirming an order giving custody of a seven-year-old girl to her mother over the objection of the father. The court based its holding on the “tender care which nature requires, and which it is the peculiar province of a mother to supply.”¹⁸ The tender years doctrine developed into a presumption in favor of maternal custody, and the mother was recognized as preferred custodian unless she was unfit.¹⁹

A parallel development was the growing importance of “the best interest of the child”²⁰ as a standard in custody decisions. The best interest of the child was mentioned by the *Miner* court as support for its adoption of the tender years doctrine,²¹ and the principle was later referred to by the Illinois Supreme Court as its “guiding star” in custody decisions.²²

In the 1970's, the changing social conditions in the United States and the altered perceptions of women's roles and rights were reflected in custody law decisions.²³ The tender years presumption in favor of maternal custody was abandoned at least partially,²⁴ and the primary standard for custody decisions was the best interest of the child.²⁵ This standard has all the advantages of flexibility and sexual equality and all the disadvantages of uncertainty and vagueness.

The previous Illinois divorce statute²⁶ allowed for consideration of a wide range of factors in custody decisions by providing that the trial court “may award the custody of the minor child or children of the marriage to either party as the interests of the child or children require . . .”²⁷ and “may . . . make such alteration in the . . . custody . . . of the children, as shall appear reasonable and proper.”²⁸ With these

16. *Id.*

17. 11 Ill. 43 (1849).

18. *Id.* at 50.

19. Schiller, *supra* note 6, at 243.

20. *See, e.g.*, *Harms v. Harms*, 323 Ill. App. 154, 55 N.E.2d 301 (1944).

21. 11 Ill. at 49.

22. *Nye v. Nye*, 411 Ill. 408, 415, 105 N.E.2d 300, 304 (1952).

23. Schiller, *supra* note 6, at 243-45.

24. *See Jines v. Jines*, 63 Ill. App. 3d 564, 380 N.E.2d 440 (1978); *Pratt v. Pratt*, 29 Ill. App. 3d 214, 330 N.E.2d 244 (1975); *Marcus v. Marcus*, 24 Ill. App. 3d 401, 320 N.E.2d 581 (1974). The presumption that maternal custody is in the best interest of a child of tender years is recited in *Rayburn v. Rayburn*, 45 Ill. App. 3d 712, 360 N.E.2d 142 (1977) and in *Myers v. Myers*, 51 Ill. App. 3d 830, 366 N.E.2d 1114 (1977).

25. *DeYoung v. DeYoung*, 62 Ill. App. 3d 837, 379 N.E.2d 396 (1978); *Huffman v. Huffman*, 50 Ill. App. 3d 217, 365 N.E.2d 270 (1977).

26. ILL. REV. STAT. ch. 40, §§ 1-21.4 (1975) (repealed 1977).

27. *Id.* § 14.

28. *Id.* § 19.

broad guidelines, the appellate courts of Illinois developed the principles of custody law in Illinois. The new Marriage and Dissolution of Marriage Act,²⁹ adopted in 1977, codified many of the principles of the case law and added a presumption in favor of continuity and stability in custody arrangements.³⁰

THEORETICAL PERSPECTIVE ON CHILD CUSTODY IN DIVORCE LAW

The development of custody law reflects shifting policy considerations and changing perceptions of children's roles and rights. When children were seen primarily as economic entities capable of producing income, receiving support and inheriting property, custody decisions emphasized parental rights and duties in economic terms.³¹ When children were seen as creatures to be socialized, the emphasis in custody decisions shifted. More weight was given to consideration of the quality of care received by the child and to sexual role modeling for the child.³²

Recent decisions under the best interest standard emphasize the rights of the child and the psychological welfare of the child. Two theoretical approaches to the best interest test have attempted to give substance to that vague standard. The controversial book *Beyond the Best Interests of the Child*³³ suggests that the court choose "the least detrimental available alternative for safeguarding the child's growth and development."³⁴ Addressing child placement generally, the authors suggest that the least detrimental alternative is a placement plan which maximizes the child's opportunity for being wanted and for maintaining a continuous relationship with a psychological parent.³⁵ Applying this standard to custody decisions in divorce law, the authors suggest that the child's need for continuity requires that custody decisions be final and unconditional rather than subject to modification and that visitation be controlled by the custodial parent.³⁶

Other theorists suggest the standard called the "psychological best

29. *Id.* §§ 101-802 (1977).

30. Commissioners' Note, UNIFORM MARRIAGE AND DIVORCE ACT § 409 [hereinafter referred to as Commissioners' Note].

31. See 5 FORDHAM L. REV. 460 (1936). See also *Hewitt v. Long*, 76 Ill. 399 (1875) (Breese, C.J., dissenting).

32. See, e.g., *Miner v. Miner*, 11 Ill. 43 (1849).

33. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) [hereinafter cited as GOLDSTEIN].

34. *Id.* at 53.

35. *Id.*

36. *Id.* at 37-38. See also Crouch, *An Essay on the Critical and Judicial Reception of BEYOND THE BEST INTERESTS OF THE CHILD*, 13 FAM. L.Q. 49 (1979).

interest of the child."³⁷ The psychological best interest approach includes weighing many different factors in the child and his social and emotional environment, including social stimulation, quantity and quality of parenting, the child's personality, and the stability offered. Proponents of this standard see custody decisions in clinical terms and suggest that all parties in a custody contest be evaluated psychologically by clinicians who assist the court in making custody decisions.³⁸ According to this approach, modification of custody decisions should be very difficult but not impossible.³⁹ Visitation is seen as the right of the child rather than the parent, and it is recognized that the child needs contact with the non-custodial parent in order to have a realistic rather than fantasied image of that parent.⁴⁰

Throughout the development of custody law, there has been an uneasy tension between parental rights and the rights of the child.⁴¹ Theoreticians have no difficulty opting for children's rights,⁴² and many court opinions contain dicta to the effect that parental rights must give way to the best interest of the child.⁴³ However, the precise nature of parental rights and the degree to which these rights can be limited in favor of the child's right have not yet been established.

The custody provisions of the Illinois Marriage and Dissolution of Marriage Act reflect the developing theories of custody law. In the Act's emphasis on psychological factors in determining custody⁴⁴ and its difficult standards for modification of custody,⁴⁵ it can be seen as embracing the psychological best interest theory rather than the least detrimental alternative theory. However, in its provisions for visitation,⁴⁶ the Act appears to recognize some residual parental rights. The provisions of the Illinois Act will be analyzed in terms of its purposes, the case law that preceded them, and that case law that has applied them.

37. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 67-74 (1969) [hereinafter cited as Watson]. See also Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).

38. Watson, *supra* note 37, at 74-76.

39. *Id.* at 80.

40. *Id.* at 85.

41. See text accompanying notes 107-15 and 176-78 *infra*.

42. See GOLDSTEIN, *supra* note 33, at 7; Watson, *supra* note 37, at 56.

43. See, e.g., *Chodzko v. Chodzko*, 66 Ill. 2d 28, 360 N.E.2d 60 (1976); *Soldner v. Soldner*, 69 Ill. App. 3d 97, 386 N.E.2d 1153 (1979).

44. ILL. REV. STAT. ch. 40, § 602 (1977).

45. *Id.* § 610.

46. *Id.* § 607.

ORIGINAL CUSTODY DETERMINATION

Under the new Illinois Act, a parent may commence an action for custody by filing a petition for dissolution of marriage, a petition for legal separation, a petition for a declaration of invalidity of a marriage, or a petition for custody.⁴⁷ A custody proceeding is commenced automatically upon filing for a dissolution of marriage.⁴⁸

A non-parent may file a petition for custody under this Act only if the child is not in the physical custody of either parent,⁴⁹ but a non-parent may be allowed to intervene in a custody proceeding commenced by one of the parents.⁵⁰ Other non-parent custody petitions must be filed under the Juvenile Court Act⁵¹ and must allege that the child is neglected, dependent, or in need of supervision.⁵²

The test used in originally determining custody is the best interest of the child.⁵³ Section 602(a) of the Act provides:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
 - (2) the wishes of the child as to his custodian;
 - (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
 - (4) the child's adjustment to his home, school and community;
- and
- (5) the mental and physical health of all individuals involved.⁵⁴

Case law has developed some guides for the courts in considering the factors that make up the best interest test. The agreement of the parents is to be considered, but the interest of the child, rather than the

47. *Id.* § 601(d)(1).

48. *Id.*

49. *Id.* § 601(d)(2).

50. *Id.* § 601(e).

51. *Id.* ch. 37, §§ 701-707.

52. *Id.* § 702-1; see also text accompanying notes 113-15 *infra*; Commissioners' Note, *supra* note 30, at § 401. A non-parent with physical custody of a child may not only have standing to file a petition for custody but, in a modification of custody proceeding, a non-parent need only show best interest to gain legal custody after the child is integrated into his home. See text accompanying notes 157-78 *infra*.

But see Henderson v. Henderson, 568 P.2d 177 (Mont. 1977). In *Henderson*, the paternal aunt picked up the children from the custodial father's home immediately after his death, then filed a petition for temporary custody, which the court granted. On appeal, the Montana Supreme Court reversed, distinguishing "custodial rights" from "actual and immediate control" in holding that the aunt did not have standing to petition for custody. *Id.* at 179.

53. ILL. REV. STAT. ch. 40, § 602(a) (1977).

54. *Id.*

parents, is paramount.⁵⁵ The wishes of the child are to be considered, but the child's preference by itself is not determinative.⁵⁶ Thus, a fourteen-year-old boy's wish to live with his father rather than his mother and stepfather was not controlling, and the court could properly order that he remain with his mother.⁵⁷ For the most part, however, appellate review of a custody determination consists of a review of all the evidence relating to the best interest of the child;⁵⁸ the judgment of the trial court is affirmed unless against the manifest weight of the evidence.⁵⁹

Finding Required

An important question concerns the nature of the finding required of the trial court in a contested original custody determination. May the court simply make a finding of best interest so long as the record shows consideration of the relevant factors? Or must the court make a specific finding as to each factor listed in the statute? In *Wurm v. Wurm*,⁶⁰ the Appellate Court of Illinois for the Third District reversed a custody order based on a finding of best interest, noting that the findings of the trial court omitted "those factors which the Act mandates that the trial court 'shall consider.'"⁶¹ The case was remanded for specific findings of fact as to the statutory criteria.⁶²

Although the holding in *Wurm* may appear to strain the language

55. The Act specifies that parental agreements regarding custody are not binding on the court. *Id.* § 502(b).

56. *Savre v. Savre*, 61 Ill. App. 3d 11, 377 N.E.2d 850 (1978) (modification of custody case).

57. *Id.*

58. *See, e.g.*, *Drury v. Drury*, 65 Ill. App. 3d 290, 382 N.E.2d 608 (1978); *McDonald v. McDonald*, 13 Ill. App. 3d 87, 299 N.E.2d 787 (1973). *McDonald* and *Drury* are custody modification cases. Since there are far more appeals of custody modification cases than of original custody cases, many of the principles of general custody law were developed in appellate opinions on custody modification.

59. *See, e.g.*, *Caulkins v. Caulkins*, 68 Ill. App. 3d 284, 289, 385 N.E.2d 1117, 1121 (1979); *Drury v. Drury*, 65 Ill. App. 3d 290, 295, 382 N.E.2d 608, 612 (1978).

60. 68 Ill. App. 3d 168, 385 N.E.2d 894 (1979).

61. *Id.* at 170, 385 N.E.2d at 896.

62. *Id.* at 171, 385 N.E.2d at 896. In *Wurm*, the decree of divorce was entered on April 18, 1977, and the supplemental order granting permanent custody was entered on November 4, 1977. The new Act took effect on October 1, 1977. In *West v. West*, 76 Ill. 2d 226, 390 N.E.2d 880 (1979), the Illinois Supreme Court reversed an appellate court judgment in similar circumstances, holding that the new statute ought not be applied to factual determinations already made at the trial level. Thus, *West* may overrule *Wurm* on the narrow issue of timing but never reached the substantive holding in *Wurm*.

The Third District later softened its *Wurm* holding and indicated that neither a recital of specific factors nor written findings of fact is required, but there must be some indication in the record that the trial court considered the factors listed in the statute. *In re Custody of Melear*, 76 Ill. App. 3d 706, 708-09, 395 N.E.2d 208, 210 (1979).

of the statute by reading "shall consider"⁶³ to mean "shall make a finding in regard to," other states with an identical statutory provision have reached similar conclusions.⁶⁴ The Montana Supreme Court reversed a custody judgment based on a finding of best interest and held that the lower court "should make a specific finding, stating the wishes of the children as to their custodian, and, if the court determines that the children's wishes are not to be followed, the court should state in its findings the reason it has chosen not to follow their wishes."⁶⁵ In another Montana case,⁶⁶ the court reviewed a custody judgment factor by factor, giving more weight to the factors at issue in the case.⁶⁷ Montana's approach appears to be to require specific findings of fact as to any statutory factors at issue.

A similar approach is seen in a Colorado Court of Appeals decision⁶⁸ vacating a judgment based on a finding of best interest and remanding with instructions to make findings as to the pertinent factors in the statute.⁶⁹ Relying on both the divorce act and the Colorado Rule of Civil Procedure⁷⁰ requiring separate findings of fact and conclusions of law, the court held: "[T]here must be some indication in the record that the trial court considered such of those factors as were pertinent, and the findings thereon must be sufficient to enable this court to determine on what grounds the trial court reached its decision. . . ."⁷¹

The *Wurm* holding, requiring specific findings as to the statutory factors in the best interest test, has not yet been considered by the other Illinois appellate courts. A consistent requirement that the trial courts make specific findings would have the effect of limiting the broad discretion of the trial court and facilitating meaningful review on appeal. The standards for custody decisions would become more specific as a body of case law developed, and court decisions would become more consistent and predictable. However, if each case situation is seen as a unique combination of complex factors that defies generalization, a requirement of specific findings would tend to limit the courts' ability to do justice in each situation.

63. ILL. REV. STAT. ch. 40, § 602(a) (1977).

64. See *In re Marriage of Jaramillo*, 543 P.2d 1281 (Colo. App. 1975); *In re Marriage of Kramer*, 580 P.2d 439 (Mont. 1978).

65. *In re Marriage of Kramer*, 580 P.2d 439, 444 (Mont. 1978).

66. *In re Marriage of Tweeten*, 563 P.2d 1141 (Mont. 1977).

67. *Id.* at 1143-44.

68. *In re Marriage of Jaramillo*, 543 P.2d 1281 (Colo. App. 1975).

69. *Id.* at 1282.

70. COLO. R. CIV. P. 52(a).

71. 543 P.2d at 1282. Arizona and Kentucky appellate courts have not addressed the issue of specific findings in custody determinations.

Because the demise of the presumption in favor of maternal custody has resulted in confusion and uncertainty in custody determinations, specific and certain standards should be developed to guide the courts in applying the best interest test. If these standards are developed through specific, reviewable findings as to the statutory factors in the best interest test, custody contests will become less frequent because outcomes will be more predictable. The holding in *Wurm* should be adopted by all the Illinois appellate courts.

Irrelevant Factors

The statute specifies that the trial court is not to consider conduct of a present or proposed custodian that does not affect his relationship to the child.⁷² This provision is designed to discourage parties from spying on each other or using marital misconduct in a custody contest.⁷³ Thus, there is no conflict in awarding custody to the parent found to be at fault in the dissolution of marriage proceedings.⁷⁴ Problem cases in this area involve the sexual conduct of the parent seeking custody. In some cases where the parent is living with someone of the opposite sex without marriage, the courts have held that this factor, by itself, is not to be considered in custody determinations.⁷⁵ However, other cases allow consideration of parental sexual conduct as a factor in determining custody by relating parental conduct to the child's moral health.⁷⁶ The Illinois Supreme Court addressed this issue in *Jarrett v. Jarrett*.⁷⁷ In the context of a modification of custody case, the trial court in *Jarrett* awarded custody to the father because the mother was living with an unmarried man. The Appellate Court of Illinois for the First District reversed, relying in part on section 602(b) of the new Act.⁷⁸ The father appealed to the state supreme court.

The Illinois Supreme Court defined the issue in *Jarrett* as "whether a change of custody predicated upon the open and continuing

72. ILL. REV. STAT. ch. 40, § 602(b) (1977).

73. Commissioners' Note, *supra* note 30, at § 402. For an example of the type of nocturnal spying to be discouraged, see *Nye v. Nye*, 411 Ill. 408, 417, 105 N.E.2d 300, 305 (1952) (Bristow, J., dissenting).

74. *Burris v. Burris*, 70 Ill. App. 3d 503, 388 N.E.2d 811 (1979); *Myers v. Myers*, 51 Ill. App. 3d 830, 366 N.E.2d 1114 (1977).

75. See, e.g., *Rippon v. Rippon*, 64 Ill. App. 3d 465, 381 N.E.2d 70 (1978) (modification of custody case). For a similar conclusion by a court in another jurisdiction, see *In re Marriage of Moore*, 35 Colo. App. 280, 531 P.2d 995 (1975).

76. See, e.g., *De Franco v. De Franco*, 67 Ill. App. 3d 760, 384 N.E.2d 997 (1978); *Gehn v. Gehn*, 51 Ill. App. 3d 946, 367 N.E.2d 508 (1977).

77. 78 Ill. 2d 337, 400 N.E.2d 421 (1979).

78. 64 Ill. App. 3d 932, 382 N.E.2d 12 (1978), *rev'd*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979).

cohabitation of the custodial parent with a member of the opposite sex is contrary to the manifest weight of the evidence in the absence of any tangible evidence of contemporaneous adverse effect upon the minor children."⁷⁹ Using tenuous and strained reasoning, the court held that continuing cohabitation by the custodial parent justifies removal of custody from that parent.

The court acknowledged that section 602(b) governs custody decisions and section 610 governs modification of custody⁸⁰ and that therefore the court is to "disregard any conduct of the custodian that does not affect his relationship to the child."⁸¹ In spite of this statutory standard, the court held that the mother's conduct justified a change in custody even though there was no evidence of an adverse effect on the children. The court reached this conclusion through the following steps of reasoning: (1) The mother's conduct was a Class B misdemeanor under Illinois law.⁸² (2) Nonmarital relationships are against Illinois public policy as interpreted by the court in *Hewitt v. Hewitt*.⁸³ (3) Daily exposure to a parent's disregard of existing standards of conduct "could well encourage the children to engage in similar activity in the future."⁸⁴ (4) Therefore, the children's moral development is endangered⁸⁵ and custody should be changed.⁸⁶

Two justices sharply dissented from the court's opinion in *Jarrett*. Chief Justice Goldenhersh, joined by Justice Moran, noted the major-

79. 78 Ill. 2d at 345, 400 N.E.2d at 423.

80. *Id.* at 342-44, 400 N.E.2d at 422-23. For a detailed discussion of the modification of custody provisions, see text accompanying notes 116-55 *infra*.

The trial court decision in *Jarrett* preceded the effective date of the new Act and thus appeals from the original decision technically are not governed by the Act. However, the supreme court stated that the relevant provisions of the Act codify prior decisional law and that the decision in *Jarrett* is "not affected by the applicability or nonapplicability of the new act." *Id.* at 344, 400 N.E.2d at 423.

81. *Id.* at 344-45, 400 N.E.2d at 423.

82. *Id.* at 345, 400 N.E.2d at 423-24. In Illinois, fornication is a misdemeanor if "open and notorious." ILL. REV. STAT. ch. 38, § 11-8 (1977). The court noted that the mother in *Jarrett* had acknowledged to her children and her neighbors that she was cohabiting without marriage; thus her behavior was open and notorious rather than private and discreet.

83. 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). In *Hewitt*, the Illinois Supreme Court refused to recognize a cause of action for breach of express or implied contract between unmarried cohabitants. The court indicated that it was Illinois policy under the statute to strengthen and preserve the integrity of marriage and safeguard family relationships and that any recognition of nonmarital relationships should come from the legislature. *Id.* at 64, 394 N.E.2d at 1210-11. In *Jarrett*, the court appears to have ignored the intent of the legislature to consider custody separate from the conduct of the custodian that does not affect the welfare of the child.

84. 78 Ill. 2d at 346-47, 400 N.E.2d at 424.

85. *Id.* at 347, 400 N.E.2d at 425.

86. The court distinguished cases in which the custodian's indiscretions are in the past rather than continuing and situations in which the parental behavior is not known to the children. *Id.*, 400 N.E.2d at 424-25.

ity's "nebulous concept of injury to the children's 'moral well-being and development'" and the "fragility" of the majority's "conclusion concerning 'prevailing public policy.'"⁸⁷ As the dissent pointed out, the effect of the decision in *Jarrett* is that a custodian's cohabitation *per se* justifies removal of custody.⁸⁸

The *Jarrett* decision is clearly unjustified, and it appears to reflect eagerness on the part of the court to condemn nonmarital cohabitation⁸⁹ rather than willingness to give effect to the new Act's custody provisions. It would be consistent with the court's position in *Jarrett* to remove children from any custodial parent presumptively guilty of any Class B misdemeanor⁹⁰ on the grounds that the children might emulate the parental behavior. Even if the court's consideration of parental conduct can be justified simply on the possibility that children may imitate parents,⁹¹ clearly the effect of parental misconduct should be weighed with all the other statutory factors in sections 602(b) and 610 of the Act rather than be considered as the determining factor.

Possible Dispositions

An original custody judgment based on best interest of the child may result in custody with father or custody with mother, and the general rule is that neither parent enjoys a presumption in his or her favor.⁹² Siblings may be separated, with some children in mother's custody and some in father's custody,⁹³ but there is a presumption in favor of keeping brothers and sisters together.⁹⁴ Special circumstances justifying separation of children between the parents include the prefer-

87. *Id.* at 351, 400 N.E.2d at 426 (Goldenhersh, C.J., dissenting).

88. *Id.*, 400 N.E.2d at 427. In a separate dissent, Justice Moran, joined by Chief Justice Goldenhersh, further attacked the majority opinion as sanctioning change in custody based on a "conclusive presumption" that the mother's living arrangements harmed the children. *Id.* at 352-53, 400 N.E.2d at 427 (Moran, J., dissenting).

89. *See* *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

90. A Class B misdemeanor in Illinois is an offense punishable by imprisonment for not more than six months, ILL. REV. STAT. ch. 38, § 1005-8-3(a)(2) (1977), or a fine not to exceed \$500, *id.* § 1005-9-1(a)(3). Class B misdemeanors include violations of license requirements for lie detector operators, *id.* § 202-7, falsely reporting a crime, *id.* § 26-1(a)(5), and picketing a residence, *id.* § 21.1-2.

91. Such an interpretation would render meaningless the statutory provision that parental conduct that does not affect the relationship of the parent to the child not be considered in custody determinations, for any conduct known or potentially known by the children may be emulated.

92. *See* text accompanying notes 24-25 *supra*.

93. *See In re Marriage of Dow*, 64 Ill. App. 3d 177, 380 N.E.2d 1174 (1978); *Temple v. Temple*, 52 Ill. App. 3d 851, 368 N.E.2d 192 (1977). For a collection of cases, *see* Annot., 98 A.L.R.2d 926 (1964).

94. *In re Marriage of Dow*, 64 Ill. App. 3d 177, 380 N.E.2d 1174 (1978); *Mikrut v. Mikrut*, 113 Ill. App. 2d 446, 251 N.E.2d 84 (1969).

ences of the children,⁹⁵ conflict between the parents,⁹⁶ and special needs of one of the children.⁹⁷

Joint custody is neither specifically authorized nor prohibited by the Illinois statute. Generally defined as an arrangement in which either the physical custody of the child alternates between the parents or the parents share legal custody, joint custody is a controversial concept because of judicial concern that divorcing and divorced parents are not likely to be able to cooperate fully in the care of their children.⁹⁸ Although the statute is silent on the subject of joint custody, in the few reported cases addressing the issue, Illinois courts have not actively disapproved of joint custody arrangements that were developed by agreement of the parents. For example, in *Nye v. Nye*,⁹⁹ the Illinois Supreme Court indirectly approved annual alternating custody. The parents in *Nye* had agreed to annual alternating custody at the time of their divorce, with the custodial parent to have possession of the marital home during the period of custody. The father later petitioned successfully for sole custody because of the sexual conduct of the mother. The appellate court reversed,¹⁰⁰ and the supreme court affirmed the reversal, holding that there was no change in circumstances sufficient to modify the original decree ordering alternating custody.¹⁰¹ Similarly, in *Roth v. Roth*,¹⁰² the Appellate Court of Illinois for the First District affirmed an order continuing an alternating custody arrangement but modifying the custody periods to correspond with the school year.¹⁰³

In contrast, the Appellate Court of Illinois for the Fifth District, in *Davis v. Davis*,¹⁰⁴ reversed a custody modification order which provided for custody to alternate every four months. Noting that the parents had been in extreme and prolonged conflict regarding custody of their children and that the alternating custody order required moving the children during the school year, the reviewing court held that the alternating custody order was an abuse of discretion.¹⁰⁵ The opinion described the disadvantages of joint or alternating custody and took the

95. *Umlauf v. Umlauf*, 128 Ill. 378, 21 N.E. 600 (1889).

96. *In re Marriage of Dow*, 64 Ill. App. 3d 177, 380 N.E.2d 1174 (1978).

97. *Id.*

98. *See Davis v. Davis*, 63 Ill. App. 3d 465, 470, 380 N.E.2d 415, 418-19 (1978). *See generally* Ramey, Stender & Smaller, *Joint Custody: Are Two Homes Better Than One?*, 8 GOLDEN GATE U.L. REV. 559 (1979).

99. 411 Ill. 408, 105 N.E.2d 300 (1952).

100. 343 Ill. App. 477, 99 N.E.2d 574 (1951).

101. 411 Ill. at 408, 105 N.E.2d at 300.

102. 52 Ill. App. 3d 220, 367 N.E.2d 442 (1977).

103. *Id.*

104. 63 Ill. App. 3d 465, 380 N.E.2d 415 (1978).

105. *Id.* at 470, 380 N.E.2d at 419.

position that "alternating custody awards should be made only in certain exceptional situations."¹⁰⁶

Davis can be distinguished from *Nye* and *Roth* in that the trial court in *Davis* imposed an alternating custody plan on parents who were in conflict, while the courts in *Nye* and *Roth* enforced alternating custody agreements. These results are defensible as a general approach to joint custody. Parental agreements are encouraged and enforced, on the presumption that agreements of parents are in the best interest of their child, while a child of parents in conflict is protected to some extent from continuous exposure to conflicts regarding his custody.

An original custody decree may award custody to a non-parent also. The issue of the rights of non-parents, usually grandparents, arises most frequently in the context of visitation rights¹⁰⁷ or in modification of custody cases where the non-parent has legal or physical custody of the child.¹⁰⁸ In original custody matters, the court is directed to determine custody in accordance with the best interest of the child.¹⁰⁹ There are no Illinois cases that address directly the question of what standard should be used in determining original custody between parents and non-parents when parents have physical custody. However, Illinois cases contain dicta to the effect that the parents' rights must give way to the best interest of the child.¹¹⁰ Conceivably, the best interest test might result in parents losing custody of their child to non-parents simply on a showing that the non-parent could better serve the child's interest. Two separate doctrines may be applied to consideration of custody disputes between parents and non-parents. The parental right doctrine gives the parent a superior claim to custody of his child, while the best interest of the child doctrine holds that whoever best serves the child's interest should be his custodian.¹¹¹ The courts have not faced directly the conflict between these two doctrines. In custody contests between parents and non-parents, unless there are serious questions regarding the parents' adequacy, courts seem to presume that parental custody is in the child's best interest,¹¹² thus avoiding the conflict.

A presumption in favor of parental custody is necessary to protect

106. *Id.*, 380 N.E.2d at 418.

107. See text accompanying notes 216-25 *infra*.

108. See text accompanying notes 156-70 *infra*.

109. ILL. REV. STAT. ch. 40, § 602(a) (1977).

110. See, e.g., *Chodzko v. Chodzko*, 66 Ill. 2d 28, 360 N.E.2d 60 (1976); *Baehr v. Baehr*, 56 Ill. App. 3d 624, 372 N.E.2d 412 (1978).

111. Annot., 25 A.L.R.3d 7, 20 (1969).

112. *Id.*

the rights of parents. Married parents' rights to the custody of their child can be disturbed only by the provisions of the Juvenile Court Act¹¹³ which removes the child from the custody of the parents "only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal."¹¹⁴ The Juvenile Court has jurisdiction only over children who are delinquent, dependent, neglected, or in need of supervision.¹¹⁵ Divorcing parents should be no more vulnerable than married parents to loss of their child to third parties.

MODIFICATION OF CUSTODY

An original custody order is subject to modification by the court as provided in section 610 of the Marriage and Dissolution of Marriage Act.¹¹⁶ The modification provision carries a presumption in favor of continuity of custody,¹¹⁷ establishing apparently difficult standards for modification.

A motion to modify a judgment cannot be made within two years of a custody order unless the court allows a motion on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health.¹¹⁸ When a petition to modify custody is permitted, the statute sets forth three separate tests to be applied. First, the court may modify a decree only upon a finding of a change in the circumstances of the

113. ILL. REV. STAT. ch. 37, §§ 701-707 (1977).

114. *Id.* § 701-2(1).

115. *Id.* § 702-1. For statutory definitions of the terms delinquent, neglected, dependent, and in need of supervision, *see id.* §§ 702-2 to 702-5.

116. *Id.* ch. 40, §§ 101-802. Section 610 provides:

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

(b) The court shall not modify a prior custody judgment unless it finds, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior judgment unless:

(1) the custodian agrees to the modification;

(2) the child has been integrated into the family of the petitioner with the consent of the custodian; or

(3) the child's present environment endangers seriously his physical, mental, moral or emotional health and the harm likely to be caused by a change of environment is outweighed by its advantages.

(c) Attorney fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.

117. Commissioners' Note, *supra* note 30, at § 409.

118. ILL. REV. STAT. ch. 40, § 610(a) (1977).

child as known to the court (change in circumstances test). Second, there must be a finding that the modification is necessary to serve the best interest of the child (best interest test). Third, the present custodian is to be retained unless one of three special conditions exists: (1) the custodian agrees to the change;¹¹⁹ (2) the child has been integrated into the family of the petitioner with the consent of the custodian; or, (3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a modification is outweighed by its advantages (special conditions test).¹²⁰

Under the previous Illinois divorce statute, the court was empowered to "make such alterations in the . . . custody . . . of the children, as shall appear reasonable and proper."¹²¹ In case decisions under the old law, the change in circumstances and best interest tests were developed for modification of custody.¹²² The original custody decision was held to be *res judicata* for all the facts known to the court at the time of the decree.¹²³ A non-custodial parent was required to show that new or previously unknown circumstances existed and that a change in custody was in the best interest of the child.¹²⁴ The only presumption in favor of continuity of custody arrangements under the previous statute was the rule that a parent could forfeit his right to regain custody if he delayed unreasonably and was therefore guilty of laches.¹²⁵

The new statute appears to set a more difficult standard for modification of custody by directing that the court retain the present custodian unless the special conditions test is also satisfied. These more rigid standards for custody modification are consistent with current theory in the field of child development and child welfare to the effect that a child's need for stability and continuity is extremely important to his

119. Section 610(b)(1) has not been construed by the appellate courts. It clearly applies to change of custody by agreement of the parents, but its language may also allow the custodian to consent to custody changes to a third party. It is doubtful, however, that the legislature intended to make custody an assignable right.

In *Barclay v. Barclay*, 66 Ill. App. 3d 1028, 1032, 384 N.E.2d 564, 568 (1978), the appellate court used this section, along with section 610(b)(2) to support granting legal custody to third party *de facto* custodians.

120. ILL. REV. STAT. ch. 40, § 610(b) (1977).

121. *Id.* § 19 (1974) (repealed 1977).

122. *See, e.g.*, *Hendrickson v. Hendrickson*, 49 Ill. App. 3d 160, 364 N.E.2d 566 (1977); *Taylor v. Taylor*, 32 Ill. App. 2d 45, 176 N.E.2d 640 (1961).

123. *See Taylor v. Taylor*, 32 Ill. App. 2d 45, 176 N.E.2d 640 (1961); *Wade v. Wade*, 345 Ill. App. 170, 102 N.E.2d 356 (1951).

124. *See Taylor v. Taylor*, 32 Ill. App. 2d 45, 176 N.E.2d 640 (1961); *Wade v. Wade*, 345 Ill. App. 170, 102 N.E.2d 356 (1951).

125. *See, e.g.*, *Look v. Look*, 21 Ill. App. 3d 454, 315 N.E.2d 623 (1974).

healthy and normal development.¹²⁶ A special conditions test for modification of custody can be seen as a compromise between the old change in circumstances test and the controversial belief that custody decrees should be unconditional and final, with no possible judicial modification.¹²⁷

The language of the new Illinois statute presents some problems of interpretation and application. The first problem is the precise nature of the special conditions test in relation to the established tests of best interest and change in circumstances. The second is the finding of fact required by the new statute.

The official comments on the uniform act contemplate the possibility that the special conditions test may preclude modification of custody even if modification would otherwise be in the best interest of the child.¹²⁸ This interpretation, adopted by the Appellate Court of Illinois for the Second District¹²⁹ and by a Colorado Court of Appeals,¹³⁰ indicates that a petitioner for a change in custody must show special conditions in addition to best interest in order to succeed. However, this interpretation also leads to the anomalous conclusion that a court may be required to decide against the best interest of the child if the additional standard is not met.¹³¹

The Montana Supreme Court has construed the special conditions requirement of the uniform act as a "jurisdictional prerequisite" to consideration of the change in circumstances or the best interest tests.¹³² According to the Montana interpretation, the presence of the special conditions permitting a change in custody is a threshold question or precondition which must be satisfied before the best interest test can be applied.¹³³ Thus, a petitioner must first show the existence of one of the three special conditions before he can present evidence of a change in circumstances or best interest. While this construction avoids the incongruous ruling against best interest, it requires a

126. Commissioners' Note, *supra* note 30, at § 409. See also text accompanying notes 33-40 *supra*.

127. GOLDSTEIN, *supra* note 33, at 37.

128. Commissioners' Note, *supra* note 30, at § 409.

129. *In re Custody of Harne*, 66 Ill. App. 3d 820, 384 N.E.2d 460 (1978), *rev'd on other grounds*, 77 Ill. 2d 414, 396 N.E.2d 499 (1979).

130. *In re Marriage of Larington*, 561 P.2d 17 (Colo. App. 1976).

131. See *In re Custody of Harne*, 66 Ill. App. 3d 820, 384 N.E.2d 460 (1978), *rev'd on other grounds*, 77 Ill. 2d 414, 396 N.E.2d 499 (1979).

132. *Gianotti v. McCracken*, 569 P.2d 929 (Mont. 1977); *Holm v. Holm*, 560 P.2d 905 (Mont. 1977). See also Mahan, *Recent Developments in Family Law in Montana*, 39 MONT. L. REV. 1 (1978).

133. See *Gianotti v. McCracken*, 569 P.2d 929 (Mont. 1977).

strained reading of the statute. Also, this approach is not helpful in the usual custody contest between parents when the "endangers seriously" condition is at issue, since the showing of best interest is intertwined with the showing of serious danger.

Recently, the Illinois Supreme Court, in its first consideration of the special conditions test,¹³⁴ quoted but did not expressly adopt the "jurisdictional prerequisite" language of the Montana Supreme Court. The Illinois court simply described the special conditions as "statutory prerequisites"¹³⁵ to modification of custody judgments and did not address the conceptual problem of the relationship of the special conditions test to the best interest test.

Perhaps the special conditions test could best be construed as a statutory presumption that a change in custody is not in the best interest of the child unless the special conditions test is satisfied. This approach recognizes a meaningful presumption in favor of continuity of custody but avoids both the strained jurisdictional approach and the paradox of requiring decisions against the best interest of the child.

The second problem area in judicial interpretation and application of the statutory special conditions test has been the finding of fact required by the trial court. Illinois appellate courts, in the first opinions under the new statute, took the position that no specific findings of fact were required as to the special conditions test.¹³⁶ However, the Appellate Court of Illinois for the Second District, in *In re Custody of Harne*,¹³⁷ held that the trial court must make specific findings of fact and reversed a judgment based on best interest. In *Harne*, the maternal grandparent *de facto* custodians petitioned as intervenors when the father petitioned for legal custody. After the trial court ordered modification of custody to the father on the basis of best interest, counsel for the grandparents presented a motion for reconsideration based on the requirements of the special conditions test. The court responded:

I find it endangered their moral health and mental health since Grandma and Grandpa are too old to take care of them. If you want a ruling on that, I so make the judgment, whatever the wording is in 6-10. And I refuse to interview the children. . . . I will go over again, it is in the best interest of these children, their welfare, that their custody be reposed in their father and whatever the statute says and whatever the law is about their moral whatever you said, and I

134. *In re Custody of Harne*, 77 Ill. 2d 414, 396 N.E.2d 499 (1979).

135. *Id.* at 421, 396 N.E.2d at 502.

136. See *Drury v. Drury*, 65 Ill. App. 3d 290, 382 N.E.2d 608 (1978); *Doyle v. Doyle*, 62 Ill. App. 3d 786, 379 N.E.2d 387 (1978).

137. 66 Ill. App. 3d 820, 384 N.E.2d 460 (1978), *rev'd on other grounds*, 77 Ill. 2d 414, 396 N.E.2d 499 (1979).

find that's true, that grandma and grandpa are bad for them, whatever words you want to use; they are better with their father.¹³⁸

The appellate court reversed because the trial court had based the modification judgment on the best interest and had not made specific findings of fact.¹³⁹

The Illinois Supreme Court in *Harne* emphatically approved the requirement for specific findings of fact. Noting the policy favoring continuity of custody arrangements and finality of custody judgments, the court inferred legislative intent that there be specific findings. As additional support for its holding, the court noted that only with explicit findings of fact by the trial court could the appellate courts intelligently review the trial court judgments.¹⁴⁰

Other states with a similar modification of custody provision have also required specific findings of fact as to the special conditions test. A Colorado Court of Appeals opinion¹⁴¹ reversed a trial court modification order based on changed circumstances and best interest, noting that "for the sake of continuity and stability, the statute . . . dictates that 'the court shall retain the custodian established by the prior decree' absent the showing required by [the special conditions test]. The court's findings do not comply with those requirements. . . ."¹⁴² Montana's early decisions construing the modification provisions of the uniform act did not require specific findings of fact as to the special conditions test.¹⁴³ However, more recent Montana decisions have consistently required specific findings in applying the jurisdictional interpretation of the special conditions test.¹⁴⁴

Prior to the *Harne* decision, Illinois' implementation of the modification provisions of the new Act was inconsistent and indecisive, and the goals of certainty of custody judgments and stability of custody arrangements were not served as well as the Act contemplates. The Illinois Supreme Court has taken a necessary and positive step in requiring specific findings of fact as to the special conditions test. With

138. 66 Ill. App. 3d at 822, 384 N.E.2d at 462.

139. *Id.*

140. 77 Ill. 2d at 421, 396 N.E.2d at 502. After holding that specific findings are required, the Illinois Supreme Court held that the trial court's oral and written findings were sufficient to satisfy the statute. The judgment of the circuit court was affirmed. *Id.* at 421-22, 396 N.E.2d at 502-03.

Illinois Practice Rules do not require special findings of fact in nonjury cases as a general practice. ILL. REV. STAT. ch. 110A, § 366(b)(3)(i) (1977).

141. *In re Marriage of Larington*, 561 P.2d 17 (Colo. App. 1976).

142. *Id.* at 19.

143. See *Erhardt v. Erhardt*, 554 P.2d 758 (Mont. 1976); *Foss v. Leifer*, 550 P.2d 1309 (Mont. 1976).

144. See, e.g., *Schiele v. Sager*, 571 P.2d 1142 (Mont. 1977); *Gianotti v. McCracken*, 569 P.2d 929 (Mont. 1977).

specific, reviewable findings, a consistent and predictable body of case law can develop for custody modification. As the law develops, frivolous modification suits will be discouraged, and continuity of custody arrangements will be encouraged.

Modification of Stipulated Custody Arrangements

To the extent that a modification petition requires a showing by the petitioner of a change in circumstances and of special conditions,¹⁴⁵ a modification suit is more difficult to win than an original custody suit where the presumption in favor of continuity is irrelevant. However, in *De Franco v. De Franco*,¹⁴⁶ one line of cases in Illinois was cited as authority for the proposition that an original custody determination by agreement of the parties may be modified without regard to the stringent requirements of the modification section of the new Act. In cases where the original custody order was by stipulation, this line of authority holds that the court may hear *de novo* a petition for custody and make a custody determination based on the best interest test as this test is applied in original custody decisions.¹⁴⁷

The test for modification under the old statute was change in circumstances and best interest. The original judgment was considered to be *res judicata* for circumstances up to the time of judgment, so any petition for modification required a showing of change in circumstances to support a change in the earlier judgment.¹⁴⁸ In cases where the initial judgment was by stipulation, it was held that the original court had not exercised its discretion in judging the circumstances and that the non-custodial parent could therefore introduce at a modification hearing evidence of circumstances existing prior to the original hearing but not known to the court at the time of the original hearing.¹⁴⁹ Thus, a modification decision in those circumstances could be based on the best interest test, as in an original custody determination.

145. See text accompanying notes 116-27 *supra*.

146. 67 Ill. App. 3d 760, 384 N.E.2d 997 (1978). In *De Franco*, the appellate court advanced the questionable proposition that the court may use initial discretion in deciding custody according to the best interest test if the original custody order was by stipulation. The court then decided that the evidence was sufficient to meet the "more stringent" changed circumstances test. *Id.* at 766, 384 N.E.2d at 1001-02.

147. For the origins of this line of authority in case law prior to the new statute, see *Valencia v. Valencia*, 71 Ill. 2d 220, 375 N.E.2d 98 (1978) (reviewing a judgment entered prior to the effective date of the new statute); *McDonald v. McDonald*, 13 Ill. App. 3d 87, 299 N.E.2d 787 (1973); *Harms v. Harms*, 323 Ill. App. 154, 55 N.E.2d 301 (1944).

148. See text accompanying notes 121-24 *supra*.

149. *Schultz v. Schultz*, 38 Ill. App. 3d 678, 347 N.E.2d 749 (1976); *Harms v. Harms*, 323 Ill. App. 154, 55 N.E.2d 301 (1944).

This exception to the change in circumstances test is found in the new statute at section 610(b), which states in relevant part:

The court shall not modify a prior custody judgment unless it finds, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian. . . .¹⁵⁰

Thus, as the Appellate Court of Illinois for the Fourth District correctly pointed out in *Boggs v. Boggs*,¹⁵¹ a trial court may hear evidence of circumstances which existed prior to a stipulated custody judgment in considering a modification petition.¹⁵² However, the conclusion reached in *De Franco*¹⁵³ that the court may exercise initial discretion in such a case, is not warranted under the new statute which directs that the present custodian shall be retained unless the special conditions test is satisfied.¹⁵⁴ The new statute was properly applied in *Boggs*¹⁵⁵ because the court considered earlier circumstances to decide whether the child's present environment endangered seriously her emotional health and whether the advantages of change in custody outweighed any harm to the child caused by the change in custody.

Legal Modification of "De Facto" Custody

When the legal custodian allows the child to reside with someone else, the status of the child's custody becomes uncertain in several situations: first, if the legal custodian demands return of the child and the *de facto* custodian refuses and petitions for legal custody; second, if the non-custodial parent petitions for modification of the custody order and the *de facto* custodian intervenes with a petition for legal custody; and, third, if the legal custodian dies.

Early case law in the area of *de facto* custody looked to the parents' rights, holding that the natural parent's right must prevail unless the parent is unfit.¹⁵⁶ In *Wohlford v. Burckhardt*,¹⁵⁷ the Appellate Court of Illinois for the Second District considered the custody of a three-year-old girl who had lived with her maternal grandparents since infancy; the child's mother died shortly after her birth. When the father demanded custody, the trial court denied his petition, but the ap-

150. ILL. REV. STAT. ch. 40, § 610(b) (1977) (emphasis added).

151. 65 Ill. App. 3d 965, 383 N.E.2d 9 (1978).

152. *Id.* at 968, 383 N.E.2d at 12.

153. 67 Ill. App. 3d 760, 384 N.E.2d 997 (1978).

154. ILL. REV. STAT. ch. 40, § 610(b) (1977).

155. 65 Ill. App. 3d 965, 969, 383 N.E.2d 9, 12 (1978).

156. *Wohlford v. Burckhardt*, 141 Ill. App. 321, 325 (1908).

157. 141 Ill. App. 321 (1908).

pellate court reversed, holding that the father was entitled to custody unless unfit.¹⁵⁸

Later court decisions modified the harsh rule in *Wohlford*, holding that a parent could forfeit his natural right through unreasonable delay in claiming custody.¹⁵⁹ These courts found the welfare of the child to be a primary consideration.¹⁶⁰

The new statute's provision for *de facto* custody is part of the special conditions test for modification of custody: If the child has been integrated into the family of the petitioner with the consent of the custodian, the petitioner may be granted legal custody in a modification proceeding¹⁶¹ if he meets the change in circumstances and best interest tests.¹⁶² Since the *de facto* custody can be seen as a change in circumstances, the *de facto* custodian need only show best interest in order to gain legal custody. However, in a contest between the non-custodial parent and a non-parent *de facto* custodian, the non-custodial parent must meet the best interest test and the "endangers seriously" condition,¹⁶³ while the *de facto* custodian must show only best interest and integration into the family with the consent of the legal custodian.

The statutory tests were applied to a contest between parents in *Burnett v. Burnett*.¹⁶⁴ The father in *Burnett* was awarded custody of the couple's daughter at the time of their divorce. Two years later, he brought the child to live with the mother, but no change was made in the legal custody at that time. After carrying the custodial responsibilities for two years, the mother petitioned for legal custody, relying on section 610(b)(2) of the Act. The father claimed that he had not consented to integration of his daughter into his ex-wife's family, and, in the alternative, that he revoked his consent by picking up the child at school and taking her back into his home. The trial court found that the father had not consented and denied the mother's petition.¹⁶⁵ The Appellate Court of Illinois for the Second District reversed, holding

158. *Id.* at 325. See also *Cormack v. Marshall*, 211 Ill. 519, 71 N.E. 1077 (1904).

159. *Look v. Look*, 21 Ill. App. 3d 454, 315 N.E.2d 623 (1974).

160. *Id.* See also *Sholty v. Sholty*, 67 Ill. App. 2d 60, 214 N.E.2d 15 (1966); *Hermann v. Jenkins*, 34 Ill. App. 2d 255, 180 N.E.2d 359 (1962).

Death of the custodial parent is generally seen as a change in circumstances requiring modification of the custody order. In the absence of unfitness on the part of the non-custodial parent or *de facto* custody in a third party, the non-custodial parent gains custody. Thus, a maternal uncle who was named as custodian in the custodial mother's will could not gain custody without showing that the father was unfit. *Rish v. Rish*, 11 Ill. App. 2d 243, 136 N.E.2d 575 (1956).

161. ILL. REV. STAT. ch. 40, § 610(b)(2) (1977).

162. *Id.* § 610(b).

163. See text accompanying notes 118-20 *supra*.

164. 75 Ill. App. 3d 998, 394 N.E.2d 58 (1979).

165. *Id.* at 1000, 394 N.E.2d at 59.

that the consent requirement of the statute requires only acquiescence of the custodial parent to the change in physical custody and the integration into the family of the *de facto* custodian.¹⁶⁶ The appellate court went on to reject the contention that this consent can be revoked, noting that it would be inconsistent with the policy of stability and continuity to allow revocation of consent.¹⁶⁷

In *Barclay v. Barclay*,¹⁶⁸ the Appellate Court of Illinois for the Third District applied the statutory test of integration with consent and affirmed a judgment granting legal custody to the paternal grandparents over the objection of the non-custodial mother. In *Barclay*, the father was awarded legal custody of the couple's infant son and left the child with the paternal grandparents. Six years later, the grandparents petitioned for legal custody as intervenors, and the mother counterpetitioned for custody. The trial court found that the mother was capable of providing for her son but granted custody to the grandparents, using the best interest test.¹⁶⁹ Relying on section 610(b)(2), the appellate court affirmed, noting that the father as legal custodian had consented to the grandparents' *de facto* custody and that the mother had not tried earlier to gain custody.¹⁷⁰

A possible application of the *de facto* custody provisions of the new Act is in the area of stepparent custody after the death of the custodial parent. Although there are no cases directly on point, integration into the family of the petitioning stepparent may justify modification of legal custody to the stepparent after the death of the parent with legal custody.¹⁷¹ A similar result was reached in a recent Illinois case¹⁷² in which the court relied on the provisions of the Illinois Probate Act¹⁷³ to affirm a decree granting joint custody to mother and stepmother, with physical custody to remain with stepmother, following the death of the

166. *Id.*, 394 N.E.2d at 60.

167. *Id.* at 1001, 394 N.E.2d at 60.

168. 66 Ill. App. 3d 1028, 384 N.E.2d 564 (1978).

169. *Id.* at 1030, 384 N.E.2d at 566.

170. *Id.* at 1032, 384 N.E.2d at 568.

The statutory provisions for *de facto* custody were not applied in the *Harne* case, a contest between the father and the maternal grandparents. Apparently, the grandparents did not rely on the relevant provisions of the statute. Presumably, the result in the case would have been unchanged under the statutory test, because the court found that the children would be endangered by remaining with the grandparents. See text accompanying notes 137-40 *supra*.

171. Callow, *Custody of the Child and the Uniform Marriage and Divorce Act*, 18 S. D. L. REV. 551, 557 (1973).

172. *Cebzynski v. Cebzynski*, 63 Ill. App. 3d 66, 379 N.E.2d 713 (1978) (reviewing a judgment entered prior to the effective date of the new Marriage and Dissolution of Marriage Act).

173. ILL. REV. STAT. ch. 110½, §§ 1 to 30-3 (1977).

custodian father.¹⁷⁴ The Colorado Supreme Court reached a similar conclusion in a case which arose prior to Colorado's adoption of the uniform act.¹⁷⁵

The implications of the custody and modification provisions of the new Act for non-custodial parents are fairly serious. It appears that they may lose all possible rights to custody through a process of attrition. After an initial custody determination by stipulation or according to the best interest test, the non-custodial parent cannot gain custody without showing the special condition of consent, *de facto* custody, or danger.¹⁷⁶ Additionally, the custodian may abdicate or assign *de facto* custody to third parties, whose rights to custody become superior to those of the non-custodial parent.¹⁷⁷

If the potential rights of *de facto* custodians under the Act are fully recognized by the courts, protection of the rights of non-custodial parents may require statutory recognition and definition. Perhaps the statute should require consent of both parents to integration of the child into the family of a non-parent as a condition for permitting the non-parent to gain legal custody. With the present statute, assurances to the non-custodial parent that he can regain custody at any time are not realistic, and non-custodial parents should be advised to protect their rights as against third party custodians before the child becomes integrated into the family of a *de facto* custodian.¹⁷⁸

REMOVAL FROM THE STATE

Early Illinois cases uniformly refused divorced parents permission to move out of the state with their children.¹⁷⁹ The custodian was seen as an officer of the court who must remain within the geographical jurisdiction of the court.¹⁸⁰ Upon a showing of plans to leave the state, the custody of the child was transferred to the other parent.¹⁸¹ In 1952, the Appellate Court of Illinois for the Second District affirmed a trial

174. 63 Ill. App. 3d at 66, 379 N.E.2d at 713.

175. *Root v. Allen*, 151 Colo. 211, 377 P.2d 117 (1962).

176. See text accompanying notes 118-20 *supra*.

177. See text accompanying notes 162-75 *supra*.

178. For general discussion of different approaches to the rights of *de facto* custodians, see *Psychological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution*, 17 J. FAM. L. 545 (1979).

179. See *Hewitt v. Long*, 76 Ill. 399 (1875); *Miner v. Miner*, 11 Ill. 43 (1849); *Smith v. Smith*, 101 Ill. App. 187 (1901); *Chase v. Chase*, 70 Ill. App. 572 (1897).

The rule against removal was still in existence in 1949. See *Seaton v. Seaton*, 337 Ill. App. 651, 86 N.E.2d 435 (1949) (abstract).

180. See *Hewitt v. Long*, 76 Ill. 399, 410 (1875).

181. See *Chase v. Chase*, 70 Ill. App. 572 (1897).

court order allowing the custodial mother to move to New York with her son in order to be with her new husband.¹⁸² The appellate court relied on "modern ways of living" to change the old rule forbidding removal.¹⁸³ The court applied the best interest test in determining whether removal was properly granted.¹⁸⁴ The best interest test for removal was later codified in the previous Illinois statute.¹⁸⁵

The new Illinois Act provides that the court may grant leave to the custodian of minor children to remove them from Illinois "whenever such approval is in the best interests" of the children.¹⁸⁶ This provision is carried over from the previous divorce statute¹⁸⁷ and is not found in the Uniform Marriage and Divorce Act.¹⁸⁸

Recent appellate cases have almost always allowed the custodial parent to move out of Illinois with the child,¹⁸⁹ whether or not the custodian received permission from the court before moving.¹⁹⁰ Moving out of the country is similarly allowed.¹⁹¹ Although there is some authority to the effect that the custodial parent wishing to move has the burden of proving that the move is in the best interest of the child,¹⁹² in most cases the burden falls on the non-custodial parent opposing removal to show either that the move is not in the best interest of the child or that the intended move meets all the tests for a modification of custody.¹⁹³ This rule is consistent with the presumption that it is in the best interest of the child to remain with the custodial parent.¹⁹⁴ The

182. Schmidt v. Schmidt, 346 Ill. App. 436, 105 N.E.2d 117 (1952).

183. *Id.* at 444, 105 N.E.2d at 122.

184. *Id.*

185. ILL. REV. STAT. ch. 40, § 14 (1975) (repealed 1977).

186. *Id.* § 609 (1977).

187. *Id.* § 14 (1975) (repealed 1977).

188. 9A UNIFORM LAWS ANNOTATED §§ 401-410.

189. *See, e.g.*, Gray v. Gray, 57 Ill. App. 3d 1, 372 N.E.2d 909 (1978); Reddig v. Reddig, 12 Ill. App. 3d 1009, 299 N.E.2d 353 (1973); Norris v. Norris, 121 Ill. App. 2d 226, 257 N.E.2d 545 (1970). *But see* Quirin v. Quirin, 50 Ill. App. 3d 785, 365 N.E.2d 226 (1977) (explained in note 192 *infra*).

190. Jangling v. Trtanj, 99 Ill. App. 2d 64, 241 N.E.2d 39 (1968).

191. Dokos v. Dokos, 88 Ill. App. 2d 330, 232 N.E.2d 508 (1967).

192. Gallagher v. Gallagher, 60 Ill. App. 3d 26, 376 N.E.2d 279 (1978). In *Gallagher*, the parents had joint custody of the child; thus, mother's petition for removal was also a petition for modification of the custody order. The appellate court affirmed the order granting removal and stated that the parent seeking removal has the burden of showing that the planned removal will be to the advantage of the child and the custodian. *Id.* at 29-31, 376 N.E.2d at 281-83.

In *Quirin v. Quirin*, 50 Ill. App. 3d 785, 365 N.E.2d 226 (1977), the mother requesting leave to remove neither alleged nor offered to show that removal was in the best interest of the child. The appellate court reversed the order permitting removal, stating that the burden was on the party seeking removal to show best interest. *Id.* at 788, 365 N.E.2d at 228.

193. *See, e.g.*, Gray v. Gray, 57 Ill. App. 3d 1, 372 N.E.2d 909 (1978); Norris v. Norris, 121 Ill. App. 2d 226, 257 N.E.2d 545 (1970).

194. *See* text accompanying notes 117-20 *supra*.

appellate courts have held that removal by itself is not a sufficient change of circumstances to warrant modification of custody¹⁹⁵ and that the additional factor of inconvenience of visitation is not sufficient to warrant denial of a petition for removal.¹⁹⁶ Presumably, with more stringent requirements for modification of custody under the new Act, the non-custodial parent would be required to show that the proposed move seriously endangered the child before he could petition successfully for modification of custody as an alternative to granting removal.¹⁹⁷

The Appellate Court of Illinois for the First District, in *Gray v. Gray*,¹⁹⁸ refused to affirm a lower court order which both denied the custodian's petition for removal and also denied the non-custodial parent's petition for modification of custody, noting that a person "has a right to move around wherever his best opportunities for livelihood may be found and, of course, to have his family with him."¹⁹⁹ While the appellate courts have not addressed directly the federal constitutional right to travel as one aspect of the removal issue, denying permission to leave the state either by depriving a parent of custody or by refusing permission for removal may be a denial of that constitutionally protected right.²⁰⁰

In the area of removal as in the law of custody generally, the rights of the custodial parent have expanded while the rights of the non-custodial parent have receded. A non-custodial parent may lose any meaningful right to regular visitation when the custodial parent has an almost unrestricted right to move out of the state with the child.

VISITATION

The right of the non-custodial parent to visit his child has been recognized as one of a parent's natural rights, although a qualified right. In an 1878 opinion regarding a divorce decree which was silent as to visitation,²⁰¹ the Illinois Supreme Court stated that the father had a "legal right to visit his children, at convenient and proper times, in a

195. See, e.g., *Spencer v. Spencer*, 132 Ill. App. 2d 740, 270 N.E.2d 72 (1971); *Jingling v. Trtanj*, 99 Ill. App. 2d 64, 241 N.E.2d 39 (1968).

196. *Gray v. Gray*, 57 Ill. App. 3d 1, 372 N.E.2d 909 (1978).

197. See text accompanying notes 118-20 *supra*.

198. 57 Ill. App. 3d 1, 372 N.E.2d 909 (1978).

199. *Id.* at 6, 372 N.E.2d at 913, quoting *Spencer v. Spencer*, 132 Ill. App. 2d 740, 743, 270 N.E.2d 72, 74 (1971).

200. See *Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions*, 6 U.C.D. L. REV. 181 (1973). See generally *Dunn v. Blumstein*, 405 U.S. 330 (1972).

201. *Burge v. Burge*, 88 Ill. 164 (1878).

decent and respectful manner . . . [but] has no right, in any manner, to abuse the right, and if he should, he might properly be debarred the privilege."²⁰²

The present Illinois codification of parental visitation rights provides that a parent not granted custody is entitled to reasonable visitation unless the court finds that visitation seriously endangers the child's physical, mental, moral, or emotional health.²⁰³ A visitation order may be modified according to the best interest of the child.²⁰⁴ Thus, the best interest standard governs visitation, except for restriction or denial of visitation in which case a finding of serious danger is required.²⁰⁵

It has been recognized that the test for serious danger in restricting visitation is not identical to the test for serious danger in modifying custody. In *Crichton v. Crichton*,²⁰⁶ the trial court refused to restrict a father's visitation in spite of allegations regarding his "immoral propensities." In affirming the judgment, the Appellate Court of Illinois for the Third District noted that the wife was erroneously relying on custody cases rather than visitation cases.²⁰⁷ Thus, the court implied that the test of serious danger in restricting visitation is more severe than in modifying custody.

Under the "endanger seriously" test, a parent may be denied visitation temporarily because of mental illness²⁰⁸ and both parents may be denied visitation temporarily because of severe conflicts between the parents,²⁰⁹ but the opinions affirming such orders emphasize their temporary nature.

Although there is no authority for ordering a parent to visit his child,²¹⁰ children may be ordered to visit their non-custodial parent. For example, an Illinois appellate court affirmed an order directing two children to visit twice monthly their mother who was in the peniten-

202. *Id.* at 167.

203. ILL. REV. STAT. ch. 40, § 607(a) (1977).

204. *Id.* § 607(b).

205. *Id.*

206. 75 Ill. App. 3d 326, 393 N.E.2d 1319 (1979).

207. *Id.* at 329, 393 N.E.2d at 1321.

208. *Taraboletti v. Taraboletti*, 56 Ill. App. 3d 854, 372 N.E.2d 155 (1978).

209. *Malone v. Malone*, 5 Ill. App. 2d 425, 126 N.E.2d 505 (1955). In *Malone*, custody of two children was awarded to the father and custody of one child to the mother, with visitation denied to both parents. This decision arose out of a finding that the parents had "conducted themselves in a manner which [was] contrary to the best interest of the minor children, and that . . . visitation periods [had] heretofore resulted in accusation and counteraccusation of improper conduct toward said minor children." *Id.* at 428, 126 N.E.2d at 506.

210. Commissioners' Note, *supra* note 30, at § 407, suggests that parents should not be compelled to exercise their visitation privileges. There are no Illinois appellate cases on this point.

tiary serving a sentence for murder.²¹¹

The troublesome problem of refusal by the custodial parent to allow the other parent to exercise visitation rights was addressed in *Huckaby v. Huckaby*.²¹² In *Huckaby*, the parents had agreed to an order providing that the father's obligation to support the child would cease if the mother refused to allow visitation. Later, the mother refused to allow visitation, the father stopped paying for child support, and the mother petitioned for arrearages. The trial court gave effect to the agreed order and denied judgment for child support not paid.²¹³ The Appellate Court of Illinois for the Fifth District reversed, noting the statutory provision that makes the orders of the court independent of one another.²¹⁴ The court held that the duty to support cannot be bargained away and that appropriate sanctions for refusing to permit visitation would be contempt proceedings or consideration of a change in custody.²¹⁵

Grandparent Visitation

The Illinois statute does not provide expressly for grandparent visitation, but there is precedent in Illinois case law for grandparents to be granted the right to visit grandchildren after divorce of the parents.²¹⁶ Although the custodial parent is seen as having sole custody and control over the child,²¹⁷ the Illinois appellate courts have affirmed orders granting visitation to grandparents in special circumstances. For example, when the divorced non-custodial father had been killed in the war, his parents were allowed limited visitation with his son who was in the mother's custody;²¹⁸ when the father was in military service away from home, paternal grandparents were allowed visitation;²¹⁹ and when the mother was out of the country, the maternal grandparents were allowed visitation with the child left in the father's custody.²²⁰

The Illinois Supreme Court set the limits for grandparent visita-

211. *Frail v. Frail*, 54 Ill. App. 3d 1013, 370 N.E.2d 303 (1977).

212. 75 Ill. App. 3d 195, 393 N.E.2d 1256 (1979).

213. *Id.* at 197, 393 N.E.2d at 1258.

214. ILL. REV. STAT. ch. 40, § 509 (1977) provides:

If a party fails to comply with a provision of a judgment, order or injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended; but he may move the court to grant an appropriate order.

215. 75 Ill. App. 3d at 199-200, 393 N.E.2d at 1260.

216. *See, e.g., McKinney v. Cox*, 18 Ill. App. 2d 609, 153 N.E.2d 98 (1958); *Lucchesi v. Lucchesi*, 330 Ill. App. 506, 71 N.E.2d 920 (1947).

217. *Lucchesi v. Lucchesi*, 330 Ill. App. 506, 510, 71 N.E.2d 920, 922 (1947).

218. *Id.* at 511-12, 71 N.E.2d at 921-22.

219. *McKinney v. Cox*, 18 Ill. App. 2d 609, 153 N.E.2d 98 (1958).

220. *Temple v. Temple*, 52 Ill. App. 3d 851, 368 N.E.2d 192 (1977).

tion rights in *Chodzko v. Chodzko*.²²¹ In *Chodzko*, the maternal grandfather petitioned for the right to visit his grandchildren who were in his daughter's custody.²²² The trial court granted his petition, and the appellate court affirmed, relying on the best interest of the children.²²³ The supreme court reversed, holding that "giving of the visitation rights to the grandfather over the objections of the mother in the absence of any special circumstances justifying the interference with the superior custodial right of the natural parent was error."²²⁴ The court distinguished the special circumstances involved when the non-custodial parent is absent or dead.²²⁵ Thus, the Illinois rule regarding grandparent visitation rights appears to be: only in special circumstances.

CONCLUSION

In adopting the custody provisions of the Uniform Marriage and Divorce Act, the Illinois legislature took a decisive step toward the development of a consistent and predictable body of law to govern custody matters, and it established the basis for a presumption in favor of continuity and stability of custody arrangements. The presumption in favor of stability is consistent with current theories of human development, and the need for a consistent and predictable body of law arises from the abandonment of outmoded presumptions which previously guided the courts in making custody decisions.

The implementation and application of the new Act has just begun, and early decisions have been inconsistent and unpredictable. The requirement for reviewable findings of fact in original custody determinations, if adopted generally, will promote the development of meaningful case law. In addition, the recent Illinois Supreme Court decision requiring specific findings in custody modification judgments makes possible the development of a presumption in favor of continuity of custody and the development of some certainty and consistency in this area of the law. However, the *Jarrett*²²⁶ decision, removing children because of the custodian's nonmarital cohabitation,

221. 66 Ill. 2d 28, 360 N.E.2d 60 (1976).

222. *Id.* at 30, 360 N.E.2d at 61.

223. *Chodzko v. Chodzko*, 35 Ill. App. 3d 357, 362, 342 N.E.2d 122, 125 (1975).

224. 66 Ill. 2d at 35, 360 N.E.2d at 63.

225. *Id.* at 33-34, 360 N.E.2d at 62. See generally *Visitation Rights of a Grandparent Over the Objection of a Parent: The Best Interests of the Child*, 15 J. FAM. L. 51 (1976-77).

226. *Jarrett v. Jarrett*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979).

is clearly a step backward and a refusal to give effect to the statutory standards for custody decisions.

If the new statute is fully implemented and applied, the rights of parents, especially non-custodial parents, will be diminished. Eventually, the nature and quality of these rights will require definition, and the preservation of parental rights, in some form, will need to be assured.

As traditional roles and expectations within the American family give way to sexual equality and social experimentation, the legal system will need to adapt continually to facilitate dispute resolution and to protect the interests and rights of children and parents who rely on the legal system to make social and family decisions. Illinois has taken a beginning step in this continual adaptation.

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