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PENNSYLVANIA'S DEVELOPING CHILD CUSTODY LAW

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I. INTRODUCTION

THE AREA OF LAW GENERALLY REFERRED TO AS "DOMESTIC RELATIONS" or "family" law has recently witnessed a marked flurry of activity in Pennsylvania. In particular, the specialized field of child custody litigation has received increased attention in Pennsylvania courts.¹ The Pennsylvania Superior Court has been in the forefront of change, tearing down artificial presumptive barriers and demanding a full-scale hearing on all the facts of the case.² If trial counsel fail in their duty to explore all relevant factors in a custody dispute, the superior court requires that the trial court itself must develop the case.³ Moreover, the superior court will not hesitate to reverse and remand if both counsel and the trial court have ignored its directives regarding full explanation of the issues and proper procedures.⁴ It is therefore apparent from such judicial vigor that Pennsylvania courts are determined to serve the best interests and welfare of a child embroiled in a custody dispute.

Because of this welcomed activism on the part of the courts, it is now necessary for both trial court and counsel to become more thorough in the preparation and trial of custody cases. Thus, it is the purpose of this paper to discuss the evolution of the new developments in Pennsylvania custody law in the hope that an understanding of the law's doctrinal roots will aid the practitioner in solving the complex problems in this field.

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1. For an excellent discussion on the topic of child custody litigation, see 1 PA. FAM. LAW., Jan. 1980, at 1-10.

2. See notes 6-122 & 171-74 and accompanying text *infra*.

3. See *Lewis v. Lewis*, ___ Pa. Super. Ct. ___, ___, 406 A.2d 781, 784 (1979).

4. See, e.g., *Lewis v. Lewis*, ___ Pa. Super. Ct. ___, ___, 406 A.2d 781 (1979) (reversed and remanded to receive evidence of living conditions at mother's home and of her ability to care for child); *Commonwealth ex rel. Cox v. Cox*, 255 Pa. Super. Ct. 508, 388 A.2d 1082 (1978) (reversed and remanded to receive evidence of living conditions, health of mother, relative financial situations of parties, and children's preferences).

II. PRESUMPTIONS IN CUSTODY LITIGATION

A. *The Demise of the Tender Years Doctrine*

Since the early nineteenth century⁵ and until recently, child custody cases in Pennsylvania were governed by the "tender years doctrine."⁶ This doctrine, based upon the presumption that the child's best interests ordinarily would be served by granting custody to the natural mother of a child of tender years,⁷ was developed to ease the task of resolving emotionally charged and factually complex custody cases.⁸ The so-called tender years presumption could be overcome by presenting compelling contrary evidence⁹ such as moral deficiency on the part of the mother,¹⁰ abandonment of the child,¹¹ or severe neglect and abuse.¹²

5. In Pennsylvania, the tender years doctrine is said to have had its origins in *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813). See *Commonwealth ex rel. Keller v. Keller*, 90 Pa. Super. Ct. 357, 359 (1927). In *Addicks*, the Pennsylvania Supreme Court stated that "[i]t is to [the children], that our anxiety is principally directed; and it appears to us, that considering their tender age, they stand in need of that kind of assistance which can be afforded by none so well as a mother." 5 Binn. at 521.

The children involved in the *Addicks* decision were ages seven and ten. *Id.* at 520. The tender years doctrine applied to children until about age 14, but not necessarily in every instance. See *Commonwealth ex rel. Shurat v. Gearhart*, 178 Pa. Super. Ct. 245, 249, 115 A.2d 395, 397 (1955). As the children grew older, less weight was accorded to the tender years presumption and more to the preference of the child. See *Williams v. Williams*, 223 Pa. Super. Ct. 29, 32, 296 A.2d 870, 871 (1972).

6. See *Commonwealth ex rel. Nevin v. Wells*, 222 Pa. Super. Ct. 98, 101, 292 A.2d 515, 516 (1972).

7. See, e.g., *Commonwealth ex rel. Lucas v. Kreischer*, 450 Pa. 352, 355, 299 A.2d 243, 245 (1973); *Commonwealth ex rel. Keller v. Keller*, 90 Pa. Super. Ct. 357, 359 (1927).

8. See *Commonwealth ex rel. Lee v. Lee*, 248 Pa. Super. Ct. 155, 157, 374 A.2d 1365, 1366 (1977).

9. See, e.g., *Commonwealth ex rel. Logue v. Logue*, 194 Pa. Super. Ct. 210, 215, 166 A.2d 60, 63-64 (1960) (child of tender years should be committed to care and custody of mother unless compelling reasons appear to the contrary); *Commonwealth ex rel. Buchner v. Barr*, 173 Pa. Super. Ct. 124, 126, 95 A.2d 355, 356 (1953) (natural mother is prima facie entitled to custody except for compelling reasons); *Commonwealth ex rel. Lucchetti v. Lucchetti*, 166 Pa. Super. Ct. 530, 531, 72 A.2d 617, 618 (1950) (though not absolute, courts recognize propriety of committing child of tender years to mother absent compelling reasons to the contrary).

10. See, e.g., *Commonwealth ex rel. Shaak v. Shaak*, 171 Pa. Super. Ct. 122, 126, 90 A.2d 270, 272 (1952) (loose morals coupled with neglect of child); *In re Latney*, 146 Pa. Super. Ct. 20, 23, 21 A.2d 521, 523 (1941) (low moral standards with bad general reputation).

11. See, e.g., *Commonwealth ex rel. Doberstein v. Doberstein*, 210 Pa. Super. Ct. 102, 105, 192 A.2d 154, 156 (1963) (custody of children awarded to father when mother abandoned retarded child but kept sister); *Commonwealth ex rel. Bosco v. Olson*, 173 Pa. Super. Ct. 319, 322-23, 98 A.2d 213, 214-15 (1953) (custody awarded to foster parents when parent delivered child to them unconditionally).

12. See, e.g., *In re Davis*, 237 Pa. Super. Ct. 516, 517-18, 352 A.2d 78, 79 (1975) (custody awarded to paternal grandparents when child was abused by mother's paramour); *Commonwealth ex rel. Harry v. Eastridge*, 172 Pa. Super. Ct. 49, 52, 91 A.2d 910, 912 (1952), *rev'd on other grounds*, 374 Pa. 172, 97 A.2d 350 (1953) (custody awarded to foster parents where children were ill-fed, abused, and generally not given proper care). The superior court, in *Harry*, listed the following as "essential" ingredients of a proper home: good housekeeping, proper food and clothing, proper supervision, religious training, and maternal interest in the child's welfare. *Id.* at 51, 91 A.2d at 911.

The force of the tender years doctrine began to ebb when, in 1972, in *Commonwealth ex rel. Parikh v. Parikh*,¹³ the Pennsylvania Supreme Court held that the presumption was "merely the vehicle through which a decision respecting the infant's custodial well-being may be reached where factual considerations do not otherwise dictate a different result."¹⁴ This new approach, which treated the tender years presumption not as a material "right," but as a procedural means of allocating the burden of proof,¹⁵ was based on the belief that the presumptive approach "precluded an impartial examination of all of the relevant factors, and subordinated that which should be the sole purpose of hearing: to determine what is in the best interest of the child."¹⁶ Under the *Parikh* approach, the mother would only be awarded custody under the doctrine if the judge determined, after a full hearing, that the child's best interests would be served equally well by living with either of the parents.¹⁷

The erosion of the tender years doctrine continued with the decision in *Commonwealth ex rel. Spriggs v. Carson*.¹⁸ In *Spriggs*, a plurality of the Pennsylvania Supreme Court determined that the doctrine should be eliminated even as a procedural device since it violated the equal rights amendment (ERA) of the Pennsylvania Constitution.¹⁹ The court criticized the doctrine as being predicated upon a "stereotypic" view of the "roles of men and women in a marital union."²⁰ More importantly, in regard to the best interests of the child standard, the court stated:

13. 449 Pa. 105, 296 A.2d 625 (1972).

14. *Id.* at 109, 296 A.2d at 625. See also *In re Davis*, 237 Pa. Super. Ct. 516, 518, 352 A.2d 78, 79 (1975); *Commonwealth ex rel. Ulmer v. Ulmer*, 231 Pa. Super. Ct. 144, 146-47, 331 A.2d 665, 667 (1974).

15. See *Commonwealth ex rel. Lee v. Lee*, 248 Pa. Super. Ct. 155, 157, 374 A.2d 1365, 1366 (1977).

16. *Id.*

17. *Commonwealth ex rel. Veihdeffer, v. Veihdeffer*, 235 Pa. Super. Ct. 447, 449, 334 A.2d 613, 614 (1975); *Commonwealth ex rel. Grillo v. Shuster*, 226 Pa. Super. Ct. 229, 235-36, 312 A.2d 58, 62 (1973).

18. 470 Pa. 290, 299-300, 368 A.2d 635, 639-40 (1977) (plurality opinion).

19. *Id.* See PA. CONST. art. I, § 28. Section 28 of article I provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." *Id.* For a discussion of Pennsylvania's version of the ERA, see generally Momjian, *Family Law and the Pennsylvania ERA*, *Symposium: Recent Developments in Pennsylvania Family Law*, 25 VILL. L. REV. 677 (1980).

20. 470 Pa. at 299, 368 A.2d at 639. It should be noted that the primary basis for the *Spriggs* court's ruling was the failure of the superior court to accord proper weight to the opinions of the common pleas court judges who had heard the witnesses. See *id.* at 299, 368 A.2d at 639. The plurality stated, however, that the lower court "relied heavily on the 'tender years doctrine'" in reaching its decision to award custody to the mother. *Id.* The supreme court went on to say that

[w]hether the tender years doctrine is employed to create a presumption which requires the male parent to overcome its effect by presenting compelling contrary evidence of a

Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of "presumptions." Instead, we believe that our courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case then before the court.²¹

Because *Spriggs* was decided by only a plurality of the court, the decision left unclear the current status of the tender years presumption. The superior court, however, has interpreted the *Spriggs* decision as abolishing the doctrine.²² For example, although it did not rely upon *Spriggs* for its holding, the superior court in *Commonwealth ex rel. Lee v. Lee*²³ construed *Spriggs* as eliminating the tender years presumption even as a procedural device.²⁴ Furthermore, the court in *McGowan v. McGowan*,²⁵ relying upon both *Spriggs* and *Lee*,²⁶ held that the plurality opinion in *Spriggs* was controlling²⁷ and that the ERA had eliminated the tender years presumption.²⁸ Finally, a majority of the Pennsylvania Supreme Court recently acknowledged that *Spriggs* had discarded the tender years doctrine.²⁹

B. The Remaining Presumptions

In addition to its impact upon the tender years doctrine, the *Spriggs* decision arguably abrogated the established policy preference for awarding custody of a child to a resident parent over a nonresident parent.³⁰ The *Spriggs* plurality stated that this "rule of preference was obviously more tenable in the days of a less mobile society. In today's accessible and communicative world, the validity of this

particular nature, . . . or merely as a makeshift where the scales are balanced, . . . such a view is offensive to the concept of equality of the sexes which we have embraced as a constitutional principle within this jurisdiction.

Id. at 299-300, 368 A.2d at 639 (citations omitted). *Cf.* *Conway v. Dana*, 456 Pa. 536, 539, 318 A.2d 324 (1974) (ERA held to preclude presumption that father must accept principal burden of child support).

21. 470 Pa. at 300, 368 A.2d at 640.

22. *See* *Commonwealth ex rel. Lee v. Lee*, 248 Pa. Super. Ct. 155, 374 A.2d 1365 (1977); notes 23-29 and accompanying text *infra*.

23. 248 Pa. Super. Ct. 155, 374 A.2d 1365 (1977).

24. *See id.* at 161, 374 A.2d at 1367. The *Lee* court, after reviewing the lower court's application of the tender years presumption, concluded that "[t]his was error even under the law as it was before the supreme court decided [*Spriggs*]." *Id.*

25. 248 Pa. Super. Ct. 41, 374 A.2d 1306 (1977).

26. *Id.* at 44, 374 A.2d at 1308.

27. *Id.* at 44 n.1, 374 A.2d at 1308 n.1.

28. *Id.* at 44, 374 A.2d at 1308, *citing* PA. CONST. art. I, § 28; *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974).

29. *Ellerbe v. Hooks*, No. 78-463, slip op. at 6 (Pa. Sup. Ct. Jul. 16, 1980).

30. *See* 470 Pa. at 299, 368 A.2d at 639.

proposition is open to question."³¹ *Spriggs*, however, had no direct effect on several other presumptions or policy preferences which are a part of custody law. Because their status is not as certain as it was prior to *Spriggs*,³² a review of these presumptions or policy preferences may be helpful.

One such presumption which is deserving of discussion holds that against a third party, "the natural parent has a prima facie right to custody which may be forfeited [only] if convincing reasons appear that the child's best interests will be served by awarding custody to someone else."³³ This presumption is of questionable strength, however, because given the appropriate circumstances, courts will not hesitate to find "convincing reasons" to overcome this prima facie

31. *Id.* As with the question of the constitutional validity of the tender years presumption, however, the *Spriggs* court's discussion of the resident guardian preference did not form the basis for its decision. See note 20 *supra*.

32. See notes 33-64 and accompanying text *infra*.

33. Commonwealth *ex rel.* Witherspoon v. Witherspoon, 252 Pa. Super. Ct. 589, 590-91, 384 A.2d 936, 937 (1978), citing *In re* Custody of Hernandez, 249 Pa. Super. Ct. 274, 376 A.2d 648 (1977); *In re* Custody of Myers, 242 Pa. Super. Ct. 255, 363 A.2d 1242 (1976). *Accord*, Williams v. Miller, 254 Pa. Super. Ct. 227, 385 A.2d 992 (1978). This approach seems to have had its genesis in *In re* Custody of Hernandez, 249 Pa. Super. Ct. at 281, 376 A.2d at 652. In *Hernandez*, acceptance of the "prima facie right-convincing reasons" approach was based upon the court's conviction that this formulation of rights and burdens properly requires the third party to show cause why custody should not be granted to the parent, but avoids placing too great a burden on that party. *Id.* at 285, 376 A.2d at 654. The *Hernandez* court characterized the "convincing reasons" burden as "midway between the state's burden ('clear necessity') and the one parent's burden in a case where the dispute is with the other parent (preponderance of the evidence)." *Id.* Nevertheless, the court stated that "the evidentiary scale is tipped . . . hard, to the parent's side." *Id.* at 286, 376 A.2d at 654. Finally, the court concluded that, under this approach, the reasons presented by the third party must relate to the best interests of the child, not "merely to some characteristic of the parent that the third party or hearing judge may regard unfavorably." *Id.*

The acceptance of this approach by the *Hernandez* court invoked an explicit rejection of two other formulations. See *id.* at 283-86, 376 A.2d at 653-54. The court first rejected the rule that gives "the parents . . . a 'primary right' to custody of the child, although the right is not absolute and must yield to the child's best interest." *Id.* at 283, 376 A.2d at 653. The court found this approach unacceptable partly because the phrase "'primary right' connotes a property interest as though the child were a chattel," but more specifically because the formulation lacked a clear standard enunciating the type of evidence necessary to defeat the parent's right. *Id.* Similarly, the court rejected the articulation that "absent 'compelling reasons' to the contrary, it will be 'presumed' that the child's best interest will be served by being raised by his parents." *Id.* (citations omitted). The court found that this formulation mistakenly focused attention on the rights of the parties, instead of on the best interests of the child. *Id.* In addition, the court deemed the burden of proof placed on the third party to be too great under this second, rejected approach. *Id.* at 285, 376 A.2d at 653.

It should be noted that a majority of the Pennsylvania Supreme Court expressly adopted the *Hernandez* decision in the recent case of *Ellerbe v. Hooks*, No. 78-463, slip op. at 2 (Pa. Sup. Ct. Jul. 16, 1980). See notes 34 & 37-45 and accompanying text *infra*. But see *Ellerbe v. Hooks*, No. 78-463, slip op. at 1-5 (Pa. Sup. Ct. Jul. 16, 1980) (Flaherty, J., concurring) (suggesting that the presumption in favor of the natural parent should be abolished). For a discussion of Justice Flaherty's concurring opinion, see notes 42-45 and accompanying text *infra*. In view of the majority's holding in *Ellerbe*, it is submitted that the *Hernandez* decision would have to be modified or overruled in order for the presumption to be abolished.

right and will award custody to grandparents,³⁴ aunts and uncles,³⁵ or foster parents.³⁶

In *Ellerbe v. Hooks*,³⁷ the Pennsylvania Supreme Court recently reconsidered this presumption in light of *Spriggs* and held that it remains unchanged.³⁸ Ignoring the language in *Spriggs* which had inveighed against the use of presumptions in custody litigation,³⁹ the court stated that the *Spriggs* plurality had overturned the tender years doctrine solely because it violated the ERA.⁴⁰ The court noted, by contrast, that the presumption in question in *Ellerbe* was

34. See *Ellerbe v. Hooks*, No. 78-463 (Pa. Sup. Ct. Jul. 16, 1980). In *Ellerbe*, a father sought custody of his daughter who had lived with her grandmother since she was less than two years old. *Id.*, slip op. at 7. At the time of the trial court's order awarding custody to the grandmother, the child was 11 years old. *Id.* The supreme court upheld the trial court's order citing the child's preference to remain with her grandmother and the numerous relationships the girl had established during the years with her grandmother, her neighborhood, and her classmates, which would have been disrupted by a contrary award. *Id.* See also *In re Davis*, 237 Pa. Super. Ct. 516, 352 A.2d 78 (1975). In *Davis*, a child living with her mother and the mother's paramour showed signs of having been abused. *Id.* at 517-18, 352 A.2d at 79. The mother admitted slapping and spanking the child and testified that her paramour had slapped the child and, on one occasion, had thrown the child against a wall. *Id.* The court concluded that the evidence demonstrated a general lack of concern for the child and upheld the custody award to the paternal grandparents. *Id.* at 517-19, 352 A.2d at 79. Cf. *Fisher v. Rabinowitz*, 102 Mont. Co. L.R. 227 (1977) (grandparents who refused to release child to mother bent on putting child up for adoption held to stand *in loco parentis* and, hence, were entitled to same consideration as natural parent vis-à-vis third-party adoption agency).

35. See *Commonwealth ex rel. Murphy v. Walters*, 258 Pa. Super. Ct. 418, 392 A.2d 863 (1978). In *Murphy*, the court reviewed the lower court's finding that the natural mother evidenced a lack of concern for her two children. *Id.* at 423, 392 A.2d at 866. The superior court concluded that the lower court was justified in finding that the mother lived with her children in a trailer littered with dog and cat manure, kept the children dirty and hungry, often had late night or overnight visitors causing neighbors to complain, and was concerned more about her eligibility for welfare than the well-being of her children. *Id.* at 421-23, 392 A.2d at 865-66. In granting custody to the children's aunt and uncle, the court remarked:

[A]lthough a parent has the legal right to custody of his or her child, this right is not absolute and will be forfeited by misconduct or other factors which substantially affect the welfare of the child. . . . The child's welfare is the paramount consideration, to which all other considerations including the rights of parents, are subordinate.

Id. at 423, 392 A.2d at 866 (citations omitted).

36. See *Commonwealth ex rel. Fritz v. Doe*, 25 Cumb. L.J. 186 (C.P. Pa. 1975). The mother in *Fritz* had relinquished her infant son to an adoption agency which subsequently placed the child with foster parents. *Id.* at 187-88. Reconsidering her decision to give up the child, the mother later sought, and was granted, an order vacating the relinquishment decree. *Id.* at 189. Since the order vacating the decree did not direct that custody of the child be returned to the mother, she instituted a habeas corpus proceeding. *Id.* at 189 n.4. At the time of the hearing on the petition, the child was approximately 3½ years old. *Id.* at 187. In finding that the best interests of the child required that he be left with his foster parents, the court relied upon testimony of the life-long, adverse effects on the child which might result from separating him from his "psychological parents." *Id.* at 191. The court also took cognizance of the natural mother's "immaturity and instability." *Id.* at 193. Cf. *Commonwealth ex rel. Bankert v. Children's Services*, 224 Pa. Super. Ct. 556, 563, 307 A.2d 411, 415 (1973) (reversing and remanding for further evidence on psychological impact of removing child from foster parents' custody in contest between foster parents and adoption agency).

37. No. 78-463 (Pa. Sup. Ct. Jul. 16, 1980).

38. *Id.*, slip op. at 6.

39. See 470 Pa. at 299-300, 368 A.2d at 640; notes 20-21 and accompanying text *supra*.

40. No. 78-463, slip op. at 6-7 (Pa. Sup. Ct. Jul. 16, 1980).

one granted to *either* parent, regardless of sex, and thus, did not violate the ERA.⁴¹

Justice Flaherty concurred in the majority's result (which left the child in the care of her grandmother), but took issue with the majority's continued acceptance of the presumption.⁴² Reiterating the language of *Spriggs* which questioned the wisdom of using presumptions to determine custody between parents,⁴³ Justice Flaherty queried why they should be any more acceptable in a contest between a parent and a third party.⁴⁴ In either case, he maintained, the sole question should be what is in the best interests of the child.⁴⁵

It is submitted that the significance of the *Ellerbe* decision lies in the majority's award of custody to the grandmother, and in Justice Flaherty's call in his concurring opinion for abolition of the presumption in favor of the natural parent. The majority in *Ellerbe* upheld the determination of the court of common pleas⁴⁶ and affirmed the award of custody to the grandmother.⁴⁷ In so doing, the supreme court reversed the ruling of the superior court,⁴⁸ concluding, after conducting its own review of the record, that convincing reasons appeared to rebut the presumption in favor of the natural parent.⁴⁹

It is respectfully submitted, however, that the more equitable approach is that taken by Justice Flaherty. Although it is not violative of the ERA to invoke presumptions in custody disputes between natural parents and a third party under *Spriggs*,⁵⁰ the *Spriggs* court warned against deciding matters as sensitive as custody by resorting to presumptions.⁵¹ Further, the majority approach is seemingly inconsistent with a number of recent cases which urge that all facets of a custody dispute should be examined thoroughly.⁵² Finally, it is submitted that the "natural parent presumption" is inconsistent with the best interests standard and is beginning to erode in the same way that the tender years presumption fell into disfavor.⁵³

41. *Id.*, slip op. at 7.

42. No. 78-463, slip op. at 1 (Pa. Sup. Ct. Jul. 16, 1980) (Flaherty, J., concurring). Justice Nix joined in the concurring opinion. *Id.*, slip op. at 5 (Flaherty, J., concurring).

43. *Id.*, slip op. at 2-3 (Flaherty, J., concurring). See text accompanying note 21 *supra*.

44. No. 78-463, slip op. at 3 (Pa. Sup. Ct. Jul. 16, 1980) (Flaherty, J., concurring).

45. *Id.*, slip op. at 5 (Flaherty, J., concurring).

46. *Hooks v. Ellerbe*, No. 255488 (C.P. Phila. Oct. 26, 1977).

47. No. 78-463, slip op. at 7 (Pa. Sup. Ct. Jul. 16, 1980).

48. *Hooks v. Ellerbe*, 257 Pa. Super. Ct. 219, 390 A.2d 791 (1978).

49. No. 78-463, slip op. at 7 (Pa. Sup. Ct. Jul. 16, 1980).

50. See 470 Pa. at 299-300, 368 A.2d at 640; notes 18-21 and accompanying text *supra*.

51. See 470 Pa. at 299-300, 368 A.2d at 640; notes 20-21 and accompanying text *supra*.

52. See notes 6-28 and accompanying text *supra*; notes 65-122 & 171-74 and accompanying text *infra*.

53. See notes 13-29 and accompanying text *supra*. For an in-depth analysis of the *Ellerbe* decision, see 1 PA. FAM. LAW., Sept. 1980, at 64-73.

Another doctrine, most likely left unaffected by *Spriggs*, reflects a "policy preference" for keeping siblings together whenever possible.⁵⁴ This preference is based on the judicial belief that close ties among siblings should remain unbroken.⁵⁵ Thus, it has been stated that "[i]n the absence of compelling reasons to the contrary, children should be raised together."⁵⁶

Finally, there exists a rebuttable presumption that a child born while a husband and wife are living together is a legitimate child.⁵⁷ This presumption has been characterized as "one of the strongest known to the law,"⁵⁸ requiring evidence of "overwhelming weight" in order to overcome it.⁵⁹ Like the preference for uniting siblings, this presumption probably remains unaffected by *Spriggs*.

The presumptions discussed above are really no more than policy preferences which can be readily rebutted given the appropriate circumstances.⁶⁰ For this reason, they have been less of an obstacle to

54. See, e.g., *Commonwealth ex rel. Steuer v. Steuer*, 244 Pa. Super. Ct. 302, 309, 368 A.2d 732, 735 (1976) (custody of son awarded to mother, thereby reuniting brother with half-brothers); *Bowser v. Bowser*, 224 Pa. Super. Ct. 1, 6, 302 A.2d 450, 452 (1973) (custody of daughter awarded to father, thereby reuniting sisters); *Scheeler v. Ruby*, 2 Pa. D. & C.3d 772, 777-778 (C.P. Franklin County 1977) (custody of both children retained by mother who refused to separate them; court considered presence of half-sisters as stabilizing factor). *But see Commonwealth ex rel. Fetters v. Albright*, ___ Pa. Super. Ct. ___, ___, 405 A.2d 1260, 1261 (1979) (custody awarded to father over maternal grandparents, thereby splitting two brothers from half-brothers).

55. *Commonwealth ex rel. McKee v. Reitz*, 193 Pa. Super. Ct. 125, 129, 163 A.2d 908, 911 (1960), citing *Commonwealth ex rel. Reese v. Mellors*, 152 Pa. Super. Ct. 596, 33 A.2d 516 (1943).

56. *Commonwealth ex rel. Steuer v. Steuer*, 244 Pa. Super. Ct. 302, 307, 368 A.2d 732, 735 (1976) (citations omitted).

57. See *Commonwealth ex rel. Ermel v. Ermel*, 259 Pa. Super. Ct. 219, 221-23, 393 A.2d 796, 798 (1978); H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 5.3, at 172-73 (1968).

58. *Cairgle v. American Radiator and Standard Sanitary Corp.*, 366 Pa. 249, 255, 77 A.2d 439, 442 (1951). The *Cairgle* court went on to state that the presumption "can be overcome only by proof of facts establishing non-access or that the husband was impotent or had no sexual intercourse with his wife at any time when it was possible in the course of nature for the child to have been begotten." *Id.* (citations omitted).

For a recent application of this presumption, see *Commonwealth ex rel. Ermel v. Ermel*, 259 Pa. Super. Ct. 219, 221-23, 229, 393 A.2d 796, 798, 801 (1978) (putative father awarded visitation rights because of mother's failure to rebut the presumption).

59. See *Cairgle v. American Radiator and Standard Sanitary Corp.*, 366 Pa. 249, 258, 77 A.2d 439, 443 (1951); note 58 *supra*. In *Cairgle*, certain minor children of a widow sought Workmen's Compensation benefits. 366 Pa. at 251, 77 A.2d at 440. The right of the children to recover depended upon whether they were the legitimate children of the decedent. *Id.* Since the court found that the wife of the decedent had been living in a meretricious relationship with another man away from her husband, that the children were given the name of the other man, and that the other man had supported the children, the court held that the presumption of legitimacy was rebutted, even though there was evidence that the children's mother had engaged in sexual relations with her husband. *Id.* at 258, 77 A.2d at 443. Similarly, in *Buiston v. Dodson*, 257 Pa. Super. Ct. 1, 390 A.2d 216 (1978), a man claiming to be the natural father of a child, born while its mother was married to another man, was able to overcome the presumption. *Id.* at 3-4, 390 A.2d at 216.

60. See notes 30-59 and accompanying text *supra*.

sound judicial decisionmaking than the tender years doctrine had been. Nonetheless, their continued existence and application could result in a decision that is contrary to the best interests of the child.⁶¹ In view of the abrogation and criticism of other presumptions by Pennsylvania courts,⁶² it is submitted that more of them will lose their force in the coming years. As the United States Supreme Court remarked in *Stanley v. Illinois*:⁶³

[P]rocedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disclaims present relatives in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.⁶⁴

III. EVIDENTIARY PRINCIPLES

The paramount concern in any custody case is the determination of what is in the best interests of the child.⁶⁵ This standard necessitates a thorough consideration of those circumstances which will aid the child's physical, intellectual, moral, and spiritual development.⁶⁶ All evidentiary principles applicable to custody cases, therefore, have for their purpose the furtherance of such an inquiry.

A. Burden of Proof

In the litigation of most legal issues, there is usually a controlling principle of law that governs the disposition of the controversy and a standard of proof that must be met in order for a party to prevail.⁶⁷ Since the controlling principle of law in custody cases is the best interests of the child standard, the party who convinces the court by

61. See, e.g., *Commonwealth ex rel. Fetters v. Albright*, ___ Pa. Super. Ct. ___, 405 A.2d 1260 (1979). The court in *Fetters* was faced with a conflict between two presumptions: 1) a parent's prima facie right to custody vis-a-vis a third party; and 2) the policy of keeping siblings together. *Id.* at ___, 405 A.2d at 1261. See notes 33-56 and accompanying text *supra*. The court resolved this dilemma in favor of the father's prima facie right to custody and, thereby, separated his children from their stepbrother—a result arguably against the children's best interests. ___ Pa. Super. Ct. at ___, 405 A.2d at 1262.

62. See notes 5-31 and accompanying text *supra*.

63. 405 U.S. 645 (1972) (state statute presuming unmarried fathers to be unsuitable and neglectful parents held unconstitutional).

64. *Id.* at 656-57 (citations omitted).

65. See, e.g., *Commonwealth ex rel. Graham v. Graham*, 367 Pa. 553, 80 A.2d 829 (1951); *Commonwealth ex rel. Cutler v. Cutler*, 246 Pa. Super. Ct. 82, 369 A.2d 821 (1977); *In re Davis*, 237 Pa. Super. Ct. 516, 352 A.2d 78 (1975); PA. STAT. ANN. tit. 48, § 92 (Purdon 1965) (primary issue in custody proceeding is the best interest and welfare of the child).

66. *Commonwealth ex rel. Parikh v. Parikh*, 449 Pa. 105, 108-09, 294 A.2d 625, 627 (1972); *In re Davis*, 237 Pa. Super. Ct. 516, 518, 352 A.2d 78, 79 (1975).

67. See C. MCCORMICK, LAW OF EVIDENCE §§ 336-339 (2d ed. 1972).

a preponderance of the evidence that he or she will serve the child's best interests ordinarily prevails.⁶⁸ In *In re Custody of Hernandez*,⁶⁹ Judge Spaeth elaborated on this axiom, writing that "[t]he concern . . . is entirely with the child's physical, intellectual, moral, and spiritual well-being. . . . The burden of proof is shared equally by the contesting parents; thus the hearing judge awards custody according to what the preponderance of the evidence shows."⁷⁰

In view of the complexity and detail inherent in custody litigation, it is suggested that practitioners should keep sharply in focus the best interests principle and the fact that the burden of proof is shared. Since custody cases are often complex and can become mired in details, such attention to the issue at hand can only benefit the client and foster the appreciation of the court.

B. *The Right to Cross-Examine the Authors of Reports*

It is settled practice in custody cases that a court will admit the reports of investigators, social workers, and doctors only if the offering party brings the author of the report into court for examination and cross-examination.⁷¹ As the court in *Kessler v. Gregory*⁷² stated: "In a custody case, 'reports of investigators, agents, and doctors cannot be received in evidence, or considered by the court, in a contested case. The investigators, agents, doctors, etc. must themselves be produced, sworn and examined as witnesses and be subject to cross-examination'".⁷³ It is significant that the superior court did not rely on traditional evidentiary rules, such as the hearsay rule or the opinion rule, to justify the exclusion. Rather, the court developed a special rule for custody cases, focusing on the fact that without cross-examination, the record would be insufficient to allow the court to meet its appellate function in determining whether the child's best

68. See note 65 and accompanying text *supra*.

69. 249 Pa. Super. Ct. 274, 376 A.2d 648 (1977). For a discussion of *Hernandez*, see note 33 *supra*.

70. 249 Pa. Super. Ct. at 280, 376 A.2d at 651 (1977) (citations and footnotes omitted). See also *Rummel v. Rummel*, ___ Pa. Super. Ct. ___, ___, 397 A.2d 13, 15 (1979) (quoting Judge Spaeth's formulation with approval).

71. See *Kessler v. Gregory*, ___ Pa. Super. Ct. ___, ___, 412 A.2d 605, 607 (1979); *Wood v. Tucker*, 231 Pa. Super. Ct. 461, 463, 332 A.2d 191, 192 (1974).

72. ___ Pa. Super. Ct. ___, 412 A.2d 605 (1979).

73. *Id.* at ___, 412 A.2d at 607, quoting *Wood v. Tucker*, 231 Pa. Super. Ct. 461, 463, 332 A.2d 191, 192 (1974), quoting *Commonwealth ex rel. Oncay v. Oncay*, 153 Pa. Super. Ct. 569, 570, 34 A.2d 839, 839 (1943). See also *Rummel v. Rummel*, ___ Pa. Super. Ct. ___, 397 A.2d 13 (1979) (holding that it was erroneous not to allow mother to examine report or cross-examine agency which prepared the report).

interests had been served.⁷⁴ Thus, the superior court, in order to perform its reviewing function in custody cases, seems to require that the record below must manifest a full explanation of all the facts through cross-examination.⁷⁵

C. *Res Judicata*

Pennsylvania courts are reluctant to interfere with an existing custodial arrangement in which the child is flourishing.⁷⁶ Only a substantial change in circumstances affecting the best interests and welfare of the child will justify modification of a prior custody order.⁷⁷ Moreover, and most importantly, the issues of the relative fitness of the parties and the best interests of the child may not be relitigated on the basis of facts known at the time of the initial hearing.⁷⁸

In spite of these rules, there is, and perhaps should be, much controversy over the applicability of *res judicata* in custody cases.⁷⁹ It has been stated that all doctrines, policies, and procedural dogma must yield to the best interests and welfare of the child.⁸⁰ Thus, there are significant custody cases where *res judicata* has been mentioned but not strictly followed in the sense that it precludes future proceedings on the case.⁸¹ For example, in *Commonwealth ex rel. Crawford v. Crawford*,⁸² the court delineated the role of the doctrine and asserted:

There is . . . no merit to the argument that the doctrine of *res judicata* bars further action in the instant case. Under ordinary principles of *res judicata*, a judgment or decree in the absence of fraud, is conclusive between the parties not only as to matters decided therein but those which might have been properly de-

74. ___ Pa. Super. Ct. at ___, 412 A.2d at 607.

75. *Id.* See also *Rummel v. Rummel*, ___ Pa. Super. Ct. ___, 397 A.2d 13 (1979).

76. See, e.g., *Commonwealth ex rel. Cutler v. Cutler*, 246 Pa. Super. Ct. 82, 369 A.2d 821 (1977); *Commonwealth ex rel. Foster v. Foster*, 225 Pa. Super. Ct. 436, 311 A.2d 663 (1973); *Commonwealth ex rel. Goldbaum v. Goldbaum*, 161 Pa. Super. Ct. 131, 53 A.2d 746 (1947).

77. See *Commonwealth ex rel. Swanson v. Barry*, 199 Pa. Super. Ct. 244, 184 A.2d 370 (1962); *Commonwealth ex rel. Heller v. Yellin*, 174 Pa. Super. Ct. 292, 101 A.2d 452 (1953).

78. *Commonwealth ex rel. O'Hey v. McCurdy*, 199 Pa. Super. Ct. 22, 24-25, 184 A.2d 290, 291 (1962).

79. See H. CLARK, *supra* note 57, § 17.7. For a discussion of the related issues of modification and the applicability of full faith and credit to custody awards, see generally Frank, *The End of Legal Kidnapping in Pennsylvania: The Development of a Decided Public Policy*, Symposium: Recent Developments in Pennsylvania Family Law, 25 VILL. L. REV. 784 (1980).

80. *Commonwealth ex rel. Crawford v. Crawford*, 170 Pa. Super. Ct. 151, 154, 84 A.2d 237, 238 (1951).

81. See notes 82-87 and accompanying text *infra*.

82. 170 Pa. Super. Ct. 151, 84 A.2d 237 (1951).

cided. . . . However, *res judicata* has little place for strict application where the welfare of the child is involved. . . . It is settled that the welfare of children is the prime consideration in regulating custody and this principle has tempered the harsh application of the rule of *res judicata*.⁸³

In *Wick v. Wick*,⁸⁴ an appeal was taken by the aunt, uncle, and grandparents of a minor child from an order of the lower court which had granted visitation rights to these appellants.⁸⁵ The appellants maintained that the failure of the appellee mother "to appeal the earlier visitation order should have precluded her from relitigating appellants' visitation rights in a second proceeding, or at least should have required her to show a substantial change in circumstances affecting the child's welfare."⁸⁶ In an express rejection of appellants' urging that *res judicata* should apply where the welfare of the child is involved, the court stated:

The paramount concern in any case involving visitation must always be the welfare and best interests of the child. . . . With this in mind, it would be inappropriate for us to find that the mother in the case before us is barred from seeking a change in visitation, simply because she failed to appeal an order which she at first agreed to thinking the order at the time to be in the best interests of the child.⁸⁷

Therefore, other than precluding relitigation of the same set of facts which existed and were known at the first hearing,⁸⁸ the doctrine of *res judicata* plays virtually no role in custody cases in Pennsylvania.

D. Testimonial Privileges and the Constitutional Right to Privacy

Child custody practitioners have long concerned themselves with circumventing the assertion of privilege by a witness whose testimony could clarify certain issues and even control the eventual outcome of the dispute. Damaging out-of-court admissions, statements, and conduct of a party bearing upon his or her fitness as a custodial parent and other information relating to the physical, mental, emotional, and spiritual condition of specific parties have always been sought after as potent and relevant evidence.⁸⁹ On the other hand, litigants whose

83. *Id.* at 154, 84 A.2d at 238 (citations omitted).

84. ___ Pa. Super. Ct. ___, 403 A.2d 115 (1979).

85. *Id.* at ___, 403 A.2d at 115-16.

86. *Id.* at ___, 403 A.2d at 116.

87. *Id.* (citations omitted).

88. See note 78 and accompanying text *supra*.

89. See H. CLARK, *supra* note 57, § 17.4.

cases would suffer from the admission of this evidence have attempted to shield it from the court through the assertion of various privileges.

The determination of whether a privileged relationship exists necessitates an interpretation of pertinent privilege statutes.⁹⁰ The number and scope of recognized privileges varies from state to state.⁹¹ In Pennsylvania, prior to the enactment of the new Divorce Code (Code),⁹² confidential communications to marriage counselors were not privileged,⁹³ whereas communications to licensed psychologists were.⁹⁴ Under the new Code, this distinction is abolished.⁹⁵ But since some counseling sessions are conducted with both parties present—leaving the adverse party free to divulge the entire conversation—the effect of the psychologist's privilege is practically nullified.⁹⁶ Communications to psychiatrists, who are medical doctors, are likewise privileged.⁹⁷ However, since the medical doctor's narrow privilege extends only to "communications which tend to

90. See notes 92-99 and accompanying text *infra*.

91. See C. MCCORMICK, *supra* note 67, § 101.

92. Divorce Code, Act No. 1980-26, 1980 Pa. Legis. Serv. 49 (Purdon) [hereinafter cited as DIVORCE CODE].

93. See Note, *A Suggested Privilege for Confidential Communications With Marriage Counselors*, 106 U. PA. L. REV. 266 (1957). It should be noted, however, that many marriage counselors are also physicians or psychologists and, therefore, communications to such individuals would be privileged under the statutes applicable to them in those capacities. See notes 94-97 and accompanying text *infra*.

94. See 42 PA. CONS. STAT. ANN. § 5944 (Purdon 1979). This section provides in pertinent part:

No person who has been licensed . . . to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

Id. (citation and footnote omitted).

95. DIVORCE CODE, *supra* note 92, § 703. The new Divorce Code has a privilege provision which provides that "[c]ommunications of a confidential character made by a spouse to an attorney, or a qualified professional shall be privileged and inadmissible in evidence in any matrimonial cause unless the party concerned waives such immunity." *Id.* Qualified professionals include all persons who, by virtue of their training and experience, are able to provide counseling. *Id.* § 104. This expressly includes marriage counselors, psychologists, psychiatrists, social workers, ministers, priests, and rabbis. *Id.* Although the scope of this privilege is unclear, it would seem that it is inapplicable to custody cases because a) a custody dispute may not qualify as a "marital cause," and b) the fact that mental states are in issue would most likely constitute a waiver. See notes 115-16 and accompanying text *infra*.

96. See *Commonwealth ex rel. Gilham v. Gilham*, 177 Pa. Super. Ct. 328, 110 A.2d 915 (1955).

97. See 42 PA. CONS. STAT. ANN. § 5928 (Purdon 1979). This section provides:

No physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall blacken the character of the patient, except in civil matters brought by such patient on account of personal injuries.

Id.

blacken the character of the patient,"⁹⁸ it is difficult for the psychiatrist to assert the privilege effectively in court.⁹⁹

The recent Pennsylvania Supreme Court decision in *In re B*,¹⁰⁰ however, may have rendered some of the foregoing issues concerning privilege moot. In that case, a psychiatrist asserted the doctor-patient privilege and refused to produce his records bearing upon the fitness of a mother.¹⁰¹ The doctor appealed the lower court's decision to hold him in contempt to the superior court which then transferred the case to the Pennsylvania Supreme Court on the grounds that the contempt sanction was criminal in nature and, therefore, subject to the supreme court's jurisdiction.¹⁰² The supreme court ruled that, although the doctor-patient privilege did not prohibit disclosure of medical records,¹⁰³ the patient's records were safeguarded by the right to privacy—a right protected by both the United States and Pennsylvania Constitutions and having its roots in a penumbra of constitutional provisions.¹⁰⁴ The court remarked:

The right of privacy derived from these constitutional underpinnings protects the privacy of intimate relationships like those existing in the family, marriage, motherhood, procreation and child rearing. . . . As such, the protection extends not only to the home, . . . but also to the doctor's office, the hospital, the hotel room, or as is otherwise required to safeguard the right to privacy involved in such intimate relationships.¹⁰⁵

1. *Applicability of In re B to Private Custody Cases*

The issue of privilege arose in *In re B* in the context of a *juvenile delinquency proceeding*¹⁰⁶ in which a mother's hospital records were subpoenaed to assist the court in determining who should have custody over her delinquent son.¹⁰⁷ It is submitted, however, that *In re B* cannot be cited as controlling in a private custody case for several reasons.

98. *Id.*

99. *See id.* The psychiatrists' privilege may now be broader under the new Code if the communications are sought to be admitted in a marital cause. *See* DIVORCE CODE, *supra* note 92, § 104; note 95 *supra*.

100. 482 Pa. 471, 394 A.2d 419 (1978).

101. *Id.* at 475, 394 A.2d at 420-21.

102. *Id.* at 476, 394 A.2d at 421.

103. *Id.* at 481, 394 A.2d at 423.

104. *Id.* at 484, 394 A.2d at 425, *citing* *Griswold v. Connecticut*, 381 U.S. 479 (1965); U.S. CONST. amend. I, III-V, IX; PA. CONST. art. I, §§ 1-4, 7-9, 11, 20, 23, 25-26.

105. 482 Pa. at 482, 394 A.2d at 424, *citing* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969).

106. 482 Pa. at 475, 394 A.2d at 420.

107. *Id.* at 485, 394 A.2d at 426.

First, *In re B* is inconsistent with the recent trend in this Commonwealth to require a full and open hearing when the trial court has at stake the best interests and welfare of the child.¹⁰⁸ This movement is premised on the belief that all information that bears upon the best interests issue is both useful and necessary for a resolution of the dispute.¹⁰⁹ It is submitted that *In re B* is contrary to this trend and may be a step in the wrong direction. By subordinating the state's interest in the placement of juveniles to the parent's right of privacy, the supreme court, at least in the juvenile delinquency context, has effectively barred the admission of certain kinds of evidence which would be probative of the fitness of the parent.¹¹⁰ Therefore, if *In re B* can be distinguished and held not to apply in private custody disputes, it should have limited effect.

A second reason for concluding that *In re B* is inapplicable to private custody cases is the fact that juvenile delinquency proceedings and private custody disputes are clearly dissimilar in nature. A private custody suit between parents of a minor child contains factors much different from those in a juvenile delinquency case, where one party is the state and the proceeding is of a more adversary character.¹¹¹ A classic illustration of the differences in nature and treatment of these proceedings is found in *Lewis v. Lewis (Lewis II)*,¹¹² wherein the superior court held that a child in a custody proceeding

108. See *Kimmey v. Kimmey*, ___ Pa. Super. Ct. ___, 409 A.2d 1178 (1979) (remanding for full explanation of lower court's decision to award custody to mother); *Rupp v. Rupp*, ___ Pa. Super. Ct. ___, 408 A.2d 883 (1979) (remanding for evidence of effect of mother's meretricious relationship on child, as well as for evidence of child's preference for particular parent and condition of each parent's premises); *Lewis v. Lewis*, ___ Pa. Super. Ct. ___, 406 A.2d 781 (1979) (remanding to obtain evidence regarding mother's ability to care for child and living quarters of each parent); *Sipe v. Shaffer*, ___ Pa. Super. Ct. ___, 396 A.2d 1359 (1979) (stating that judge "must make a comprehensive inquiry"); *Commonwealth ex rel. Cox v. Cox*, 255 Pa. Super. Ct. 508, 388 A.2d 1082 (1978) (remanding for further testimony about mother's physical condition as well as the financial and living conditions of each party). See notes 65-75 and accompanying text *supra*; notes 171-74 and accompanying text *infra*.

109. See cases cited note 108 *supra*. For a detailed analysis of these cases, see Note, *supra* note 1.

110. See 482 Pa. at 486, 394 A.2d at 426. The *In re B* court stated:

We applaud the court's concern about proper placement for a juvenile; the court's efforts to place the child with one of his parents are commendable.

We recognize that our holding may, in some cases, make it more difficult for the court to obtain all the information it might desire regarding members of the juvenile's family, or about the juvenile's friends, neighbors, and associates. The individual's right of privacy, however, must prevail in this situation.

Id. The dissent of Chief Justice Eagen is more in accordance with the trend in custody cases. He observed that "[b]ecause of the important state interest in treatment and welfare of juveniles, I do not believe the right of privacy should prevail under the circumstances of this case." *Id.* at 494, 394 A.2d at 430 (Eagen, C.J., dissenting).

111. See *In re Gault*, 387 U.S. 1 (1966).

112. ___ Pa. Super. Ct. ___, 414 A.2d 375 (1979). For further discussion of *Lewis II*, see notes 145-47, 179-85 & 214-16 and accompanying text *infra*.

does not have the absolute right to counsel that a child in a delinquency proceeding has.¹¹³ The *Lewis II* court declared:

[Juvenile] [p]roceedings . . . require appointment of counsel for the children. There, however, a third party [the state] is involved. The child may be adjudicated delinquent or deprived or removed from his natural parents.

Here there is no inherent adversarial process with regard to the children. . . . With counsel appointed in all cases, we see a danger of placing the child in a position adversarial to his parents, where no such adversarial atmosphere would be present at the hearing. Most custody cases reflect a genuine parental love for the children.¹¹⁴

A third factor which distinguishes *In re B* from private custody cases, and, therefore, renders it inapplicable to them, is that, since parental fitness is necessarily a key issue in a private custody case, the contesting parent, by actively seeking custody, puts his or her mental, physical, and emotional health in issue—much like the plaintiff victim who seeks damages for injuries sustained in an automobile accident is deemed to have waived all statutory and constitutional privileges.¹¹⁵ A trial court which must make a custody award should not be foreclosed from learning about the total health and stability of a litigant claiming not only to be a fit parent, but to be the more fit parent.

In a significant statement on the question of voluntary waiver, the supreme court in *In re B* recognized that

[t]he mother might have voluntarily submitted to psychiatric examination by a court-appointed psychiatric expert who could evaluate her ability to provide a proper home for her child, or who could, based on the findings of such examination, recommend appropriate alternative placement. Neither the doctor-patient privilege created by statute, nor the constitutionally protected zone of privacy would bar such an evaluation because the mother would not be relying detrimentally on either the doctor-patient privilege or upon her right of privacy *if she chose to submit* to such an evaluation.¹¹⁶

Therefore, it is submitted that if a party freely chooses to submit to the ardors of a custody contest, the crucial issue becomes the fitness

113. ___ Pa. Super. Ct. at ___, 414 A.2d at 378-79.

114. *Id.*

115. See *McCay v. Philadelphia Elec. Co.*, 447 Pa. 490, 291 A.2d 759 (1972) (admitting preexisting physical conditions as relevant to damages sustained in automobile accident).

116. 482 Pa. at 486, 394 A.2d at 426 (emphasis in original), *citing* *Whalen v. Roe*, 429 U.S. 589 (1977) (state-instituted reporting system for dangerous drugs held not to be invasion of privacy).

of the parents to serve the best interests and welfare of the child, and hence, the otherwise important societal interests of privilege and privacy must yield to the best interests standard. For this reason, and because of the fact that *In re B* was a juvenile delinquency proceeding, it should not be applied in the private custody context.

E. *The Evidentiary Role of Meretricious Relationships*

In recent decisions, Pennsylvania appellate courts have refused to permit trial courts to deny visitation or custody rights to a parent solely because that parent is living with another person in a meretricious relationship.¹¹⁷ If the lower court fails to analyze carefully the *effect* of the meretricious relationship upon the child, the matter will be remanded on appeal.¹¹⁸

In many instances, the child's relationship to the parent's companion is close, warm, and generally beneficial to the child's welfare.¹¹⁹ Continued exposure of the child to the relationship between the parent and companion may actually be in the best interests and welfare of the child and may constitute a valid reason to award custody of the child to that parent.¹²⁰ On the other hand, after carefully investigating the effect of such a relationship upon the youngster, the trial court may conclude that it will have a serious, adverse effect upon the child. In this situation, the court will refuse to award custody to the parent living with a companion who is not his or her spouse and may also order the noncustodial parent's visitation to take place without the presence of his or her paramour.¹²¹ It is clear, then, that merely establishing the existence of a meretricious relationship is of little probative value in a child custody case in Pennsylvania unless the relationship has a demonstrated effect on the "best interests" issue itself.¹²²

IV. THE IN-COURT EXAMINATION OF THE CHILD

A. *Apparently Clear Requirements*

As should be evident by now, in recent years, the Pennsylvania courts have become increasingly concerned with establishing a com-

117. *Commonwealth ex rel. Myers v. Myers*, 468 Pa. 134, 360 A.2d 587 (1976); *Commonwealth ex rel. Sorace v. Sorace*, 236 Pa. Super. Ct. 42, 344 A.2d 553 (1975).

118. *See Rupp v. Rupp*, ___ Pa. Super. Ct. ___, 408 A.2d 883 (1979).

119. *See Commonwealth ex rel. Staunton v. Austin*, 209 Pa. Super. Ct. 187, 194, 223 A.2d 892, 894 (1966).

120. *Id.*

121. *See Drum v. Drum*, ___ Pa. Super. Ct. ___, 397 A.2d 1192 (1979).

122. *See* notes 117-21 and accompanying text *supra*.

plete record upon which to base a sound custody decision.¹²³ This concern has focused particularly upon the procedures for taking the testimony of the child. In *Commonwealth ex rel. Morales v. Morales*,¹²⁴ for example, the court reversed and remanded the case for a new hearing because the lower court had entered a custody order without placing the testimony of the children on the record and without permitting counsel for both sides to be present in chambers while the testimony was being heard.¹²⁵ Specifically, the court deemed the decision of the court below to be unsupportable "due to the incorrect procedure followed in hearing the testimony of the children."¹²⁶ Further, the court held that "[i]f [the children's] testimony is to be taken out of the presence of the contending parties, counsel should be present and have an opportunity to examine them, . . . and their testimony should be on the record."¹²⁷ Similarly, in the subsequent case of *Williams v. Williams*,¹²⁸ the superior court held that where the preference of the child is the principal reason for a particular award of custody, the child's testimony must be on the record in order to support a finding of the child's preference.¹²⁹

In *Commonwealth ex rel. Grillo v. Shuster*,¹³⁰ the superior court recognized the frequent failure of lower courts to heed directives and to analyze all alternatives comprehensively in determining which

123. See notes 71-75 and accompanying text *supra*.

124. 222 Pa. Super. Ct. 373, 294 A.2d 782 (1972). The *Morales* decision involved an appeal taken by the appellant-mother from an order of the court of common pleas which awarded custody of three children, ages 10, 11, and 12, to the appellee-father. *Id.* at 374, 294 A.2d at 782. The superior court held that the lower court's order was not supported by the record because the oldest child had not been allowed to testify on the record by the lower court which reasoned that the testimony of the children had already been heard in chambers. *Id.* at 375, 294 A.2d at 783.

125. *Id.* at 375, 294 A.2d at 783.

126. *Id.*

127. *Id.* at 375-76, 294 A.2d at 783 (footnote omitted), citing Snellgrose Adoption Case, 432 Pa. 158, 166 n.3, 247 A.2d 596, 600 n.3 (1968).

128. 223 Pa. Super. Ct. 29, 296 A.2d 870 (1972).

129. *Id.* at 33, 296 A.2d at 872. In *Williams*, a husband and wife each sought custody of the couple's two children, ages 8 and 13. *Id.* at 30, 296 A.2d at 870. After the separation, the children remained with the mother pursuant to the terms of the separation agreement. *Id.* at 31, 296 A.2d at 871. However, both parents engaged in "child snatching." *Id.* In ruling in favor of the father, the lower court accorded great weight to the preference of the children to stay with their father. *Id.* at 32, 296 A.2d at 871. The superior court, however, held that the lower court was remiss for failing to include the children's testimony in the record. *Id.* at 33, 296 A.2d at 872. The court then reversed and remanded for a hearing in which the testimony of each child was to be made a part of the record. *Id.* For a discussion of child-snatching, see Frank, *supra* note 79.

130. 226 Pa. Super. Ct. 229, 312 A.2d 58 (1973). In *Grillo*, the mother sought custody of her three daughters, ages 6, 9, and 11. *Id.* at 230-31, 312 A.2d at 60. By agreement, custody of the children had been granted to the father, with whom the children had lived for three years prior to the hearing. *Id.* at 231, 312 A.2d at 60.

solution will serve the child's best interests.¹³¹ As the cause of this failure, the court singled out the policy of invoking presumptions to settle child custody decisions.¹³² In order to guard against an inordinate use of presumptions and to ensure a complete record, the court listed certain procedures to be followed in custody cases.¹³³ First, if testimony of the children is to be taken out of the presence of the contending parties, counsel should be present and have an opportunity to examine them.¹³⁴ Second, since a case will be remanded if an important issue or piece of evidence is not included in the record,¹³⁵ the children's testimony should be contained in the record.¹³⁶ Third, a judge in a custody case should give a complete explanation of all reasons underpinning a custody award in a comprehensive and clear opinion.¹³⁷ Finally, the hearing judge's opinion should mention important facts on the record and indicate how much weight those facts were given.¹³⁸ Although these requirements seem to be clearly defined, there have been a number of superior court cases in this area which portend a flexible approach to the rules stated above.¹³⁹ However, these decisions have just added confusion to an area which would best be served by clear rules.

B. Areas of Confusion

1. *The Necessity of a Transcript of the In-Camera Interview*

Although the language in *Morales*, *Williams*, and *Grillo* appears to dictate with certainty that failure to comply with stated require-

131. *Id.* at 232, 312 A.2d at 60.

132. *Id.* at 232-33, 312 A.2d at 60-61.

133. *Id.* at 234-37, 312 A.2d at 62-63.

134. *Id.* at 235, 312 A.2d at 62, citing *Snellgrose Adoption Case*, 432 Pa. 158, 166 n.3, 247 A.2d 596, 600 n.3 (1968).

135. See 226 Pa. Super. Ct. at 235, 312 A.2d at 62, citing *Commonwealth ex rel. Gifford v. Miller*, 213 Pa. Super. Ct. 269, 273-74, 248 A.2d 63, 66 (1968).

136. 226 Pa. Super. Ct. at 235, 312 A.2d at 62, citing *Commonwealth ex rel. Morales v. Morales*, 222 Pa. Super. Ct. 373, 375-76, 294 A.2d 782, 783 (1972). For a discussion of *Morales*, see notes 124-27 and accompanying text *supra*.

137. 226 Pa. Super. Ct. at 235, 312 A.2d at 62, citing *Commonwealth ex rel. Fox v. Fox*, 216 Pa. Super. Ct. 11, 17, 260 A.2d 470, 472-73 (1969).

138. 226 Pa. Super. Ct. at 237, 312 A.2d at 63. Applying these rules to the facts of the case, the *Grillo* court stated:

Perhaps the most important facts not mentioned in the hearing judge's opinion are what he was told by the three children. At the close of the hearing the children were individually questioned by the judge in chambers. Counsel were offered the right to be present but both declined. The substance of these conferences does not appear either in the transcript or in the opinion, nor does the opinion indicate the weight the hearing judge gave to what the children told him. The fact that we therefore do not know what the children told the judge by itself necessitates remand.

Id. at 237-38, 312 A.2d at 63 (footnote omitted).

139. See notes 140-52 and accompanying text *infra*.

ments will result, on appeal, in reversal and remand,¹⁴⁰ this rule has not always been strictly followed. In *Gunter v. Gunter*,¹⁴¹ the hearing judge spoke to a seven-year-old boy in chambers in the presence of the attorneys, but no transcript of the in-chambers proceeding was made.¹⁴² Although the court held that it was error for the hearing judge not to order a transcript, it refused to announce a "prophylactic rule" which would automatically call for a reversal and remand where the testimony of the child is not transcribed.¹⁴³

In reaching its conclusion, the *Gunter* court observed that

[i]t is arguable that for the sake of clarity we should announce a prophylactic rule that the failure to transcribe a child's testimony will by itself result in remand; certainly the failure is not to be condoned. So far, however, our cases have only gone to the point of ordering remand where given the failure to transcribe the child's testimony, the record is too incomplete to permit us to discharge our responsibility to exercise "the broadest type" of review.¹⁴⁴

This language from *Gunter* was quoted approvingly by the superior court in *Lewis II*¹⁴⁵ where the court refused to remand even though no stenographer was present when the hearing judge questioned the children in his chambers.¹⁴⁶ The *Lewis II* court held that "*Gunter* . . . does not go [so] far as to require a custody case to be automatically reversed and remanded "where an *in-camera* examination of a child is made and no testimony is recorded."¹⁴⁷ Thus, if the remainder of the record allows the superior court to perform its reviewing function, it may not always reverse. Exactly how specific the record must be, however, is unclear.

2. Presence of Counsel at the In Camera Interview

Recently the question of whether counsel must be present during an in-chambers conference with a child has again become open to

140. See notes 124-38 and accompanying text *supra*.

141. 240 Pa. Super. Ct. 382, 361 A.2d 307 (1976). The appeal arose from a lower court order transferring the custody of a seven-year-old boy from his mother to his father. *Id.* at 384, 361 A.2d at 308. The child had lived with his mother since birth. *Id.* at 392, 361 A.2d at 313.

142. *Id.* at 385, 361 A.2d at 309.

143. *Id.* at 386-89, 361 A.2d at 309-11.

144. *Id.* at 389, 361 A.2d at 311, citing *Commonwealth ex rel. Grillo v. Shuster*, 266 Pa. Super. Ct. 229, 312 A.2d 58 (1973); *Commonwealth ex rel. Holschuh v. Holland-Moritz*, 448 Pa. 437, 292 A.2d 380 (1972).

145. ___ Pa. Super. Ct. ___, 414 A.2d 375 (1979). For further discussion of *Lewis II*, see notes 112-14 and accompanying text *supra*; notes 179-85 & 214-16 and accompanying text *infra*.

146. ___ Pa. Super. Ct. at ___, 414 A.2d at 378. Both counsel, however, were present during the interview in the judge's chambers. *Id.*

147. *Id.*, citing *Gunter v. Gunter*, 240 Pa. Super. Ct. at 389, 361 A.2d at 311.

debate. Although *Morales*, *Grillo*, and subsequent cases¹⁴⁸ appear to stand for the proposition that counsel must be present during the interview, one case, not followed or mentioned in any subsequent decision, suggests that a court does not always err when it questions children in the absence of counsel.¹⁴⁹ In *Cheppa v. Cheppa*,¹⁵⁰ the court stated:

Notwithstanding the language of both *Morales* and *Grillo*, these two cases actually turned on the absence of a record of the children's testimony, rather than on the absence of counsel while the children testified. A record was kept in the instant case. The rights of both parents, of course, must be protected; however, the most important consideration for the lower court when attempting to ascertain the true feelings of a child must be to create an atmosphere in which the child will feel free to express himself. Such a setting is much less likely to exist when representatives of the parents (. . . who are going to repeat what the child said) are present. The hearing judge in the case before us made every effort to ask impartial questions, to put the children at ease, and to attempt to determine their true feelings towards their parents. Under the circumstances of this case, there was no error by the lower court in questioning the children without counsel being present.¹⁵¹

It should be noted, however, that three justices vehemently dissented from the majority opinion in *Cheppa* and took the position that the presence of counsel at an interview with the child is mandatory, whether or not the child's testimony is transcribed into the record.¹⁵² Again, it should be remembered that *Cheppa* has never been cited in any subsequent case.

148. See *Commonwealth ex rel. Lee v. Lee*, 248 Pa. Super. Ct. 155, 161-62, 374 A.2d 1365, 1368-69 (1977); *Commonwealth ex rel. Scott v. Rider*, 248 Pa. Super. Ct. 383, 285-87, 375 A.2d 149, 150-51 (1977). Regarding *Morales* and *Grillo*, see notes 123-39 and accompanying text *supra*.

149. See *Cheppa v. Cheppa*, 246 Pa. Super. Ct. 149, 151-52, 369 A.2d 854, 856 (1977).

150. 246 Pa. Super. Ct. 149, 369 A.2d 854 (1977).

151. *Id.* at 151-52, 369 A.2d at 856.

152. *Id.* at 153-54, 369 A.2d at 857 (Price, J., dissenting), citing *Commonwealth ex rel. Grillo v. Shuster*, 226 Pa. Super. Ct. 229, 312 A.2d 58 (1973). Joining in Judge Price's dissent were Judges Hoffman and Spaeth. Judge Price wrote:

[T]he testimony of these children was taken without the attorneys being present. This procedure was specifically disapproved in *Commonwealth ex rel. Grillo v. Shuster* Further, this error is compounded by the claim, admittedly unsupported by the record, of appellant that a part of this in chambers testimony is missing. It is required that the attorneys be present to safeguard a claim of this type, as well as others.

I would hold the lower court erred in its consideration and procedure relating to the custody award. Accordingly, I would reverse the order of the lower court . . . and remand for a new hearing and determination of custody.

246 Pa. Super. Ct. at 154, 369 A.2d at 857 (Price, J., dissenting).

3. A Suggested Approach for the Practitioner

It is submitted that the course of action which best assures adherence to proper procedure where testimony of children is involved is for counsel to a) be present during an in-chambers examination of a child,¹⁵³ b) insist that a court stenographer transcribe the child's testimony,¹⁵⁴ and c) remind the court of its legal obligation to establish a complete record¹⁵⁵ of the hearing and to file a clear and comprehensive opinion based upon that record.¹⁵⁶ Such a strategy is consistent with recent cases which have followed the rules set forth in *Morales*, *Grillo* and *Gunter* despite any contrary indications from *Cheppa* and *Lewis II*.¹⁵⁷

In *Commonwealth ex rel. Scott v. Rider*,¹⁵⁸ for example, the superior court, in accordance with the dictates of *Morales* and *Grillo*, held that the trial court's failure to transcribe the judge's interview with the children, or to have counsel present, was error and remanded the case for further proceedings.¹⁵⁹ The concern expressed by the *Cheppa* court that the presence of counsel might inhibit the child's ability to testify freely¹⁶⁰ was implicitly rejected by the *Scott* court as a justification for not having counsel present or for not transcribing the interview.¹⁶¹ Although the parties had agreed to the absence of counsel,¹⁶² the *Scott* court added that the presence of counsel is not a personal right of one of the parties which can be waived if not asserted.¹⁶³ Any confidentiality problem, according to the court, could be solved by impounding the record and making it available only to the reviewing court.¹⁶⁴ Thus, *Cheppa* and *Lewis II* are of limited vitality in this context, for counsel and transcription are most likely still required.

C. The Bar's Suggestions for Eliminating the Confusion

The Family Law Section of the Pennsylvania Bar Association has submitted proposed rules governing child custody cases to the

153. See notes 130-34 and accompanying text *supra*.

154. See notes 130-33 & 135-36 and accompanying text *supra*.

155. See notes 130-33 & 135-36 and accompanying text *supra*.

156. See notes 130-33 & 137-38 and accompanying text *supra*.

157. See notes 124-52 and accompanying text *supra*.

158. 248 Pa. Super. Ct. 383, 375 A.2d 149 (1977).

159. *Id.* at 385-87, 375 A.2d at 150-51.

160. See 246 Pa. Super. Ct. at 151-52, 369 A.2d at 856; text accompanying note 139 *supra*.

161. 248 Pa. Super. Ct. at 387, 375 A.2d at 151.

162. *Id.*

163. *Id.* at 385, 375 A.2d at 150.

164. *Id.*

Pennsylvania Supreme Court Civil Rules Committee.¹⁶⁵ Included in the proposal is a particular rule concerning the *in camera* interview of the child, under which the court on its own motion, or upon the request of either party, may conduct an oral examination of the child.¹⁶⁶ Additionally, this rule requires that all such examinations be recorded¹⁶⁷ and that they occur only in the presence of counsel, who shall also have the right to examine the child.¹⁶⁸ It is submitted that this proposed rule, which would represent a statutory codification of *Gunter*,¹⁶⁹ will help to clarify the procedural requirements for custody determinations and remedy the continued failure of trial courts and attorneys to follow the procedural mandates set forth by appellate courts for the *in camera* interview of the child.

V. THE PENNSYLVANIA APPROACH TO CHILD CUSTODY CASES

The Pennsylvania Superior Court's progressive approach to substantive child custody law¹⁷⁰ has its roots in that court's procedural insistence on a broad scope of review,¹⁷¹ a comprehensive inquiry,¹⁷² and a decision supported by a complete and clear discussion of all the evidence.¹⁷³ In case after case, the superior court pointed to areas of deficiency in the record below, explained to the lower court where

165. PROPOSED RULES OF COURT, ACTIONS FOR CUSTODY, PARTIAL CUSTODY AND VISITATION (1979) [hereinafter cited as PROPOSED RULES]. The Board of Governors of the Pennsylvania Bar Association unanimously approved these proposed rules prior to their submission to the Pennsylvania Supreme Court Civil Rules Committee. It is submitted that, given the unanimous approval of the Board of Governors, the chances of the Committee adopting the proposed rules are favorable.

166. PROPOSED RULES, Rule 1317(A), *Examination of Child[ren]*. Rule 1317(A) provides:

The Court may, on its motion, or upon the request of either party, conduct oral examination of the child[ren] who are the subject matter of the action. Such examination may or may not be in the presence of the parties, but in all cases, counsel shall be present. All such examinations shall be recorded. Counsel shall also have the right to examine the child[ren].

Id.

167. *Id.*

168. *Id.*

169. See notes 141-44 and accompanying text *supra*.

170. See notes 108-09 and accompanying text *supra*.

171. See, e.g., *Commonwealth ex rel. Morales v. Morales*, 222 Pa. Super. Ct. 373, 375, 294 A.2d 782, 783 (1972); *Commonwealth ex rel. Gifford v. Miller*, 213 Pa. Super. Ct. 269, 273, 248 A.2d 63, 66 (1968). Cf. *Commonwealth ex rel. Holschuh v. Holland-Moritz*, 448 Pa. 437, 443, 292 A.2d 380, 383 (1972) (superior court's scope of review characterized by Pennsylvania Supreme Court as "that of the broadest type").

172. See, e.g., *In re Clause*, 244 Pa. Super. Ct. 396, 400, 368 A.2d 780, 782 (1976); *Gunter v. Gunter*, 240 Pa. Super. Ct. 382, 390, 361 A.2d 307, 311 (1976); *Commonwealth ex rel. Grillo v. Shuster*, 226 Pa. Super. Ct. 229, 235, 312 A.2d 58, 63 (1973).

173. See, e.g., *Commonwealth ex rel. Ulmer v. Ulmer*, 231 Pa. Super. Ct. 144, 147, 331 A.2d 665, 667 (1974); *Commonwealth ex rel. Fox v. Fox*, 216 Pa. Super. Ct. 11, 17, 260 A.2d 470, 472-73 (1969).

the hearing judge was remiss, and emphasized why it was necessary to explore or even reexplore a particular facet of the case.¹⁷⁴

The only blemish on the superior court's record in recent child custody cases may be that a measure of inconsistency exists as a result of the court's attempts to deal with the issue of whether custody litigation is, or should be, a truly adversarial process. The attitude of the court towards this problem can be gleaned from a review of a number of related issues.

A. Court-Ordered Counseling

In *Lewis II*,¹⁷⁵ the superior court held that, because the lower court had the authority and the duty to attempt to preserve a family relationship, it had acted properly in ordering a custodial mother and her children to undergo child-centered parental counseling in an effort to reestablish a normal relationship between the noncustodial father and his children.¹⁷⁶ Unfortunately, however, Pennsylvania trial courts have traditionally been reluctant to attempt to restore relationships between parents and children by ordering counseling. It is the authors' hope that the concept of counseling will be employed more often by hearing judges in future custody cases. Since the hearing judge is perhaps the only individual involved in the dispute who objectively understands the conflicting positions of the parties and the feelings of the children, he or she may be in the best position to know when counseling will be beneficial. Court-ordered counseling may not only save the family,¹⁷⁷ but it may also spare the court from future litigation by parties seeking custody modifications, increased visitation privileges, or contempt citations.¹⁷⁸

B. Independent Counsel for Children

There exists three possible approaches to the problem of whether children should have independent counsel in a custody dispute: 1) all

174. For an in-depth review of this case law, see generally Note, *supra* note 1.

175. ___ Pa. Super. Ct. ___, 414 A.2d 375. For further discussion of this case, see notes 112-14 & 145-47 and accompanying text *supra*; notes 214-16 and accompanying text *infra*.

176. ___ Pa. Super. Ct. at ___, 414 A.2d at 377-78.

177. See DIVORCE CODE, *supra* note 92, § 102(a). Section 102(a) of the Code states that "[t]he family is the basic unit in society and the protection and preservation of the family is of paramount concern." *Id.*

178. For a detailed discussion of the advisability of a child having good relationships with both the custodial and noncustodial parents, see Kaslow, *Stages of Divorce: A Psycholegal Perspective, Symposium: Recent Developments in Pennsylvania Family Law*, 25 VILL. L. REV. 718, 730-40 (1980). The harm done by spiteful parents in keeping their children from their ex-spouses is one of the reasons for the adoption of the Uniform Child Custody Jurisdiction Act. See Frank, *supra* note 79, at 784-86, 796-801.

children should have independent counsel in every instance; 2) children should never have independent counsel; and 3) children may have independent counsel at the discretion of the court. Recently, the superior court addressed this issue in *Lewis II*.¹⁷⁹ In *Lewis II*, two children intervened in the custody dispute between their parents and argued through counsel that the failure of the lower court to provide them with independent counsel constituted a denial of due process of law.¹⁸⁰ The intervening children contended that children should be afforded independent counsel to protect their interests and prevent them from becoming mere chattels in the custody dispute.¹⁸¹ In rejecting the intervenors' argument, the superior court took the position that custody proceedings, unlike juvenile delinquency cases, contain "no inherent adversarial process with regard to the children."¹⁸² The court refused to mandate that counsel should be appointed in all custody cases because of the danger of placing the child in an adversary position vis-à-vis his or her parents.¹⁸³ The *Lewis II* court, however, did not disagree totally with the position of the intervenors, for it stated:

Certainly, we agree that in some custody disputes the children do need someone to advance and protect their interests. We think, however, that the trial courts are sufficiently astute to appreciate the situation when it arises and act accordingly. Thus, we will refrain from a ruling which mandates counsel for children in *all* custody cases.¹⁸⁴

It is submitted that the superior court in *Lewis II* adopted the correct viewpoint on the matter of independent counsel for children. While the trial court must exercise its discretion, the thorough appellate review of all facts and issues is sufficient to protect the child's interests because the case will be remanded in the event of any abuse of discretion.¹⁸⁵ It is further submitted that this procedure should be codified to ensure uniform adherence to it. It is for this reason that the proposed rules of the Pennsylvania Bar Association specifically provide for the discretionary appointment of counsel on the court's own motion or at the request of either party.¹⁸⁶

179. ___ Pa. Super. Ct. ___, 414 A.2d 375. For further discussion of this case, see notes 112-14, 145-47 & 175-76 and accompanying text *supra*; notes 214-16 and accompanying text *infra*.

180. ___ Pa. Super. Ct. at ___, 414 A.2d at 378.

181. *Id.*

182. *Id.* See text accompanying note 114 *supra*.

183. ___ Pa. Super. Ct. at ___, 414 A.2d at 379.

184. *Id.* (emphasis in original).

185. See notes 170-74 and accompanying text *supra*.

186. See PROPOSED RULES, *supra* note 165, Rule 1317(B), *Examination of Child[ren]*. Rule

C. *Psychiatric Examination of the Child and Parties*

In *Commonwealth ex rel. Weber v. Weber*,¹⁸⁷ the lower court awarded custody to a mother who testified that, as a result of depression over marital problems, she had spent time in a mental institution before she and her husband had separated.¹⁸⁸ Although the mother stated her belief that her husband had a drinking problem, she did not complain about his care of the children while he had custody of them.¹⁸⁹ The superior court vacated the order and remanded the case because the lower court had failed to provide a comprehensive, reasoned analysis,¹⁹⁰ and because the record itself was incomplete.¹⁹¹ More specifically, the court pointed out that, in light of the mother's contention that the father had a drinking problem and the father's allegation that the mother was mentally unstable and incapable of giving her children proper care, the record, which contained only the opinions of the parties on these two matters, was inadequate for lack of an expert's opinion.¹⁹² In vacating the lower court's order, the superior court declared that "[o]n remand the court should consider any additional evidence which is relevant to the issue of the custody of the three children including, in particular, expert testimony on the psychiatric conditions of both parents."¹⁹³

It seems apparent from the language and circumstances of *Weber* that the court was directing the lower court to order that both parents undergo psychiatric examination. Clearly the mother's mental health was at issue,¹⁹⁴ but, except for the uncorroborated allegation that he had a drinking problem, the father's mental health was never questioned.¹⁹⁵ Furthermore, from the opinion, it does not appear that either party requested a psychiatric examination, so the lower court could not be accused of abusing its discretion in failing to honor such a request. Consequently, it is unclear whether the *Weber* court was announcing a general examination rule—which would require

1317(B) provides that "[t]he Court may, on its motion, or upon the request of either party, appoint independent counsel for the child[ren]." *Id.*

187. ___ Pa. Super. Ct. ___, 414 A.2d at 682.

188. *Id.* at ___, 414 A.2d at 683.

189. *Id.*

190. *Id.* at ___, 414 A.2d at 684-85. For a discussion of the superior court's requirement of a comprehensive and reasoned analysis in custody cases, see notes 170-74 and accompanying text *supra*.

191. ___ Pa. Super. Ct. at ___, 414 A.2d at 684.

192. *Id.*

193. *Id.* at ___ n.2, 414 A.2d at 684 n.2, citing *Wood v. Tucker*, 231 Pa. Super. Ct. 461, 332 A.2d 191 (1974). For a discussion of the requirement that expert opinion must be subject to cross-examination in custody cases, see notes 71-75 and accompanying text *supra*.

194. See note 188 and accompanying text *supra*.

195. See note 189 and accompanying text *supra*.

expert testimony any time a question is raised as to a parent's mental health—or whether the court was merely remanding because, on the facts of the case, the record was so insufficient as to hinder the court in its appellate function.

The superior court in *Rupp v. Rupp*,¹⁹⁶ however, appears to have resolved this issue in favor of establishing a broad rule of law requiring a psychiatric examination of both parents and children. In *Rupp*, neither parent was challenged as being unfit and, indeed, the court agreed that both parents were fit to care for their child.¹⁹⁷ Commenting on the scant record before it, the superior court found that the trial court had failed in its duty to investigate the case thoroughly.¹⁹⁸ Significantly, the court observed that no psychologist or psychiatrist had examined the child or the parents.¹⁹⁹ Thus, although there is no firm holding on this issue, in view of the holdings and circumstances of *Weber* and *Rupp*, it seems that the superior court requires a psychological or psychiatric examination of both the parents and the child, if old enough, in every child custody case in order to produce a complete record.²⁰⁰

It is submitted, however, that an absolute requirement for psychological or psychiatric evaluation in every custody case would be unwise. First, it would constitute a waste of all the parties' time to require such an evaluation involving two clearly fit parents with well-adjusted children. Second, the possibility exists that hearing judges will rely too heavily on the experts, rubber-stamping their opinions and abdicating the responsibility of the court to make the determination.²⁰¹ Finally, the reliability of the psychological or psychiatric examination appears open to question when one considers the necessarily brief contact that the expert will have had with the parents and children.

A better solution, and one left open by the lack of a firm holding in *Rupp*, is contained in rule 1316(A) of the Pennsylvania Bar Association's proposed rules.²⁰² This provision would permit a psychological

196. ___ Pa. Super. Ct. ___, 408 A.2d 883 (1979).

197. *Id.* at ___, 408 A.2d at 884.

198. *Id.*

199. *Id.* at ___, 408 A.2d at 885.

200. See also *Gunter v. Gunter*, 240 Pa. Super. Ct. at 402, 361 A.2d at 318. The court in *Rupp* used language very similar to that employed in *Gunter*. Compare *id.* with *Rupp v. Rupp*, ___ Pa. Super. Ct. ___, 408 A.2d at 885. In view of the similarity of expression, it would appear that the development is not recent.

201. Cf. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (thorough analysis and evaluation of expert testimony of psychiatrist and psychologist conducted by the court).

202. PROPOSED RULES, *supra* note 165, Rule 1316(A), *Physical and Mental Examination*. Rule 1316(A) provides:

[W]here the physical or mental condition of a party is in controversy in the action, the

or psychiatric examination only when the mental condition of a party or child is at issue, and—in the case where a party is to be examined—only when the party gives his or her express consent.²⁰³ It is hoped that this rule will avoid the dangers mentioned above which would be inherent in a blanket rule prescribing a mental examination in every instance.

D. *Determining the Best Interests of the Child—Adversary or Nonadversary Proceedings?*

In striving for open and full custody proceedings to determine the best interests of the child, the superior court has had occasion to consider the question of whether custody cases are adversary proceedings. Several statements by the court, however, reveal an inconsistent approach to this issue.

Illustrative of the superior court's ambiguous pronouncements regarding the adversarial nature of custody cases are the *Kessler*²⁰⁴ and *Sipe v. Shaffer*²⁰⁵ decisions. Regarding the admissibility of reports into evidence without the author of the report being subjected to oath, examination, and cross-examination, the *Kessler* court held, without exception, that a report which is received into evidence must be substantiated in court by the person who made it, irrespective of whether an objection is raised.²⁰⁶ This decision is clearly based upon the court's view that all factors need to be explored.²⁰⁷

On the other hand, in *Sipe*, the superior court upheld the admissibility of a report of a probation officer who, although present in court, did not testify.²⁰⁸ The report was admitted despite the court's seemingly absolute duty, under *Kessler*, to put the probation officer on the stand.²⁰⁹ The superior court apparently justified the admission of the report on the ground that the parties had jointly agreed to

Court, upon *consent* of the party to be examined, shall direct an examination by a qualified and impartial physician or psychologist. Where the physical, mental or emotional condition of the child[ren] is in issue, the Court may order such examination upon motion of any party.

Id. (emphasis added).

203. *Id.*

204. ___ Pa. Super. Ct. ___, 412 A.2d 605 (1979). See notes 71-75 and accompanying text *supra*.

205. ___ Pa. Super. Ct. ___, 396 A.2d 1359 (1979).

206. ___ Pa. Super. Ct. at ___, 412 A.2d at 607. See notes 71-75 and accompanying text *supra*.

207. ___ Pa. Super. Ct. at ___, 412 A.2d at 607.

208. ___ Pa. Super. Ct. at ___, 396 A.2d at 1364.

209. See notes 71-75 and accompanying text *supra*.

its admission,²¹⁰ a holding difficult to reconcile with *Kessler*. What is especially significant about this inconsistency is the language which the court used to create it. Such phrases as "joint exhibit" and "no objection was made"²¹¹ indicate that the court still regarded the proceedings as somewhat adversarial in nature.

In comparison, the *Lewis II*²¹² and *Weber*²¹³ rulings represent a nonadversarial approach to custody law. In *Lewis II*, the court opined that "most custody cases reflect a genuine parental love for the children."²¹⁴ As evidence of its belief that there is no adversarial element with respect to children involved in a custody suit, the court held that the provision of independent counsel for children was not mandatory.²¹⁵ The apparent rationale for this holding was that the superior court's broad standard of review would ensure that trial courts would take every possible measure to obtain and consider *all* relevant evidence, thus making an adversary proceeding unnecessary to test the veracity of a witness or an author of a report.²¹⁶

Similarly, in *Weber*, the court discarded all pretense of an adversary custody proceeding when, *sua sponte*, it remanded the case to the hearing judge with a directive that both parents undergo psychiatric examinations and that the psychiatrist be present in court for purposes of examination and cross-examination.²¹⁷ It is suggested that, in keeping with the nonadversarial approach of *Lewis II* and *Weber*, waivers of required procedures by counsel, such as the superior court accepted in *Sipe*,²¹⁸ should not be tolerated as a justification for the court's failure to develop a complete trial record.²¹⁹

210. ___ Pa. Super. Ct. at ___, 396 A.2d at 1364. The court stated:

In the present case, however, the probation officer's report was introduced at the hearing with both parties and both counsel present; the probation officer was present; and no one objected to the admission of the report which was made part of the record as a "Joint Exhibit." The hearing judge therefore did not err in admitting and considering the report.

Id. In a footnote, the court continued, remarking that

[o]ur reference to the presence of counsel and the fact that no objection was made pertains only to the conclusion that the probation officer's report was made part of the record and thus that its admission was not violative of *Wood v. Tucker*. . . . This reference in no way involves the issue of waiver and does not therefore undercut the rule that waiver does not obtain in a child custody dispute.

Id. at ___ n.8, 396 A.2d at 1364 n.8, citing *Gunter v. Gunter*, 240 Pa. Super. Ct. 382, 361 A.2d 307 (1976); 231 Pa. Super. Ct. 461, 332 A.2d 191 (1974).

211. See note 210 *supra*.

212. See notes 112-14, 145-47, & 179-85 and accompanying text *supra*.

213. See notes 187-95 and accompanying text *supra*.

214. ___ Pa. Super. Ct. at ___, 414 A.2d at 379.

215. *Id.*

216. See *id.*; notes 170-74 and accompanying text *supra*.

217. ___ Pa. Super. Ct. at ___, 414 A.2d at 684.

218. See notes 208-11 and accompanying text *supra*.

219. See also *Gunter v. Gunter*, 240 Pa. Super. Ct. 382, 390, 361 A.2d 307, 311 (1976). In

In addition to *Lewis II* and *Weber*, other cases likewise demonstrate that the superior court is desirous of removing adversarial barriers to a full and complete hearing in determining what is the child's best interests.²²⁰ For example, the decisions in *Commonwealth ex rel. Cox v. Cox*²²¹ and *Lewis v. Lewis (Lewis I)*²²² indicate that trial courts must assist counsel in developing all pertinent aspects of the case to ensure that the superior court will have a complete record if an appeal is taken.²²³ In *Cox*, the court remanded for an independent evaluation of the conditions of the parties' homes, even though there was already testimony on this question from neighbors and from the parties themselves.²²⁴ In *Lewis I*, the superior court affixed an affirmative duty on the trial court "if necessary to develop the record itself."²²⁵ It is submitted that these cases, along with *Weber* and *Lewis II*, are more indicative of the trend in the superior court than is *Sipe*, which should be limited to its facts.

From this discussion, it is apparent that the superior court is demanding that custody cases receive extremely careful attention in the courts below. The court has recognized that its goal of placing a child with the party who will serve his or her best interests can be better achieved by the adoption and promotion of a nonadversarial atmosphere during the proceeding. By making relevant evidence more accessible without the strictures found in adversary proceedings, the court can amass sufficient information upon which to base a sound custody decision.

VI. CONCLUSION

With the abolition of the tender years presumption,²²⁶ the path was cleared for courts to develop more fully the best interests of the child standard.²²⁷ Although some presumptions persist, they are gradually losing force.²²⁸ Those presumptions which do remain do

Gunter, the court refused to accept the father's waiver argument, stating that the child "had a right to expect that the hearing judge would follow prescribed procedures. That right was not one that the hearing judge could ignore, or that either parent could waive." *Id.* (citation omitted).

220. See notes 221-25 and accompanying text *infra*.

221. 255 Pa. Super. Ct. 508, 388 A.2d 1082 (1978).

222. ___ Pa. Super. Ct. ___, 406 A.2d 781 (1979).

223. See *id.* at ___, 406 A.2d at 783-84; 255 Pa. Super. Ct. at 510-12, 388 A.2d at 1083-84.

224. 225 Pa. Super. Ct. at 511, 388 A.2d at 1083.

225. ___ Pa. Super. Ct. at ___, 406 A.2d at 784.

226. See notes 6-29 and accompanying text *supra*.

227. See notes 65-225 and accompanying text *supra*.

228. See notes 30-64 and accompanying text *supra*.

not carry the strength and weight of the tender years presumption and can be overcome relatively easily.²²⁹

Evidentiary rules are changing to accommodate the best interests standard. The burden of proof in custody cases is now shared by both contesting parents.²³⁰ Most evidentiary reports, such as those by doctors concerning the mental or physical condition of the parties, or those of social workers regarding the suitability of a parent's home, are inadmissible unless the authors are produced for cross-examination.²³¹ The strict application of *res judicata* has been limited in custody cases.²³² It is difficult to assert privilege effectively, and the constitutional right to privacy, although prevailing in juvenile delinquency proceedings, arguably does not carry the same weight in private custody disputes.²³³ Finally, the fact that one parent is engaged in a meretricious relationship is not, of itself, a sufficient ground for denial of custody or visitation rights, absent a showing of detrimental effect on the child.²³⁴

Although the requirements with respect to the in-court examination of a child are often unclear,²³⁵ a practitioner will have complied with proper procedure if he or she 1) insists upon being present during in-chambers conferences, 2) demands a transcription of the child's testimony, and 3) reminds the court that reversible error is a possibility absent a comprehensive record and court opinion.²³⁶

The considerations enumerated above are component parts of the Commonwealth's serious and thorough approach to child custody cases.²³⁷ Appellate courts, exercising a scope of review of the broadest type,²³⁸ have created an approach to custody law which requires a full and unfettered investigation by all parties involved, including the court, in order to determine how the child's best interests will be served.²³⁹ Under this approach, courts have the discretion to order counseling,²⁴⁰ independent counsel for children,²⁴¹ or psychiatric examinations of the child and the parties.²⁴²

229. See notes 30-64 and accompanying text *supra*.

230. See text accompanying notes 69-70 *supra*.

231. See notes 71-75 and accompanying text *supra*.

232. See notes 76-88 and accompanying text *supra*.

233. See notes 89-116 and accompanying text *supra*.

234. See notes 117-22 and accompanying text *supra*.

235. See notes 141-52 and accompanying text *supra*.

236. See notes 124-39 & 153-64 and accompanying text *supra*.

237. See notes 171-225 and accompanying text *supra*.

238. See notes 144 & 171 and accompanying text *supra*.

239. See notes 108-10 & 171-74 and accompanying text *supra*.

240. See notes 175-76 and accompanying text *supra*.

241. See notes 179-86 and accompanying text *supra*.

242. See notes 187-203 and accompanying text *supra*.

In summary, the best interests standard now mandates full and open custody hearings which are less adversarial in nature than other types of legal proceedings.²⁴³ As a result, custody law in Pennsylvania is truly an area of law in transition—a transition which appropriately marks the recognition of the court, not as a battleground for custody-seeking parties, but rather as a forum in which the child's interests are paramount.

243. See notes 204-25 and accompanying text *supra*.