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PATERNAL CUSTODY OF THE YOUNG CHILD UNDER THE KENTUCKY NO-FAULT DIVORCE ACT

INTRODUCTION

And a woman who held a babe against her bosom said, Speak
to us of Children.

And he said:

Your children are not your children.

. . . .

They come through you but not from you,

And though they are with you yet they belong not to
you.¹

In divorce custody proceedings, the courts of this century² have made the father clearly aware that “[y]our children are not your children.” This Comment examines paternal custody in Kentucky since 1972 when the legislature adopted no-fault divorce.³ One question is central to this examination: As between parents, has the no-fault divorce statute affected the possibility of a father receiving custody of his young child?

Today, divorce is a reality for a vast number of people. In 1971 there were 12,052 divorces in Kentucky.⁴ Roughly one-half of all divorces in the United States involve minor children.⁵ For large numbers of parents, custody becomes a word charged with emotion.⁶ One popularly-styled book has noted: “Custody fights bring out all the raw emotions, the neuroses, even the

¹ GIBRAN, *THE PROPHET*, 17-18 (1963).

² See text accompanying notes 8-14 *infra* for a discussion of custody decisions before the 20th century.

³ KY. REV. STAT. § 403.010-.350 (Supp. 1976) [hereinafter cited as KRS and referred to as the No-Fault Divorce Act].

⁴ U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES*, Table number 92 (94th ed. 1973)[hereinafter cited as *STATISTICAL ABSTRACT*].

⁵ While exact figures seem to be unavailable, the one-half estimate is derived from *STATISTICAL ABSTRACT*, *supra* note 4, Table number 56 (44.8% of United States families have no children) and Annot., 4 A.L.R.3d 1396 (1965) (which notes a one-half estimate).

⁶ Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51 (1972)[hereinafter cited as Podell](Judge Podell has been chairman of the Family Law Section of the American Bar Association); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969) (Dr. Watson is both a professor of law and a professor of psychiatry at the University of Michigan).

paranoia of the parties.”⁷ The judge not only senses the tension, but must also make a difficult decision which plays upon the most elemental of human emotions. Ultimately he must decide against one party.

I. A BRIEF HISTORY OF CUSTODY DECISIONS

A. *Custody in the Nineteenth Century*

Prior to the 20th century the chancellor usually awarded custody to the father rather than the mother. The inferior economic position of women, which would have left the mother unable to support the child, and the inherited traditions of the Roman law and English common law, which viewed the child as part of the husband's property, governed these decisions.⁸ Kentucky decisions mentioned this common law rule favoring the father as recently as 1913.⁹ Yet as early as 1864,¹⁰ Kentucky courts were cognizant of emerging maternal rights¹¹ and held that the superior paternal right might be surmounted by the presumption that a child of tender years¹² could best be cared

⁷ F. ATHEARN, *HOW TO DIVORCE YOUR WIFE* 85 (1976).

⁸ Podell, *supra* note 6, at 51; Note, *Paternal Custody of Minor Children*, 5 MEM. ST. L. REV. 223, 223-24 (1975); Annot., 23 A.L.R.3d 6, 15-16 (1969).

⁹ Shehan v. Shehan, 153 S.W. 243 (Ky. 1913).

¹⁰ Adams v. Adams, 62 Ky. (1 Duv.) 168 (1864).

¹¹ In his concurring opinion to *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), Justice Bradley noted:

The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood

. . . .

. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Id. at 141.

Bradwell, of course, was not a custody case. Its language is offered as exemplifying the new emphasis placed on the role of mother in the late nineteenth century, an emphasis that would free women from the presumption in favor of the father in custody questions but, as *Bradwell* so ironically demonstrates, would also tie women tightly to home and children and let them go no further. Ms. *Bradwell* was not permitted to become an attorney.

¹² Although the “tender years” are defined more by intellectual maturity than chronological age, 10 years seems to be the rough standard in Kentucky. *Nicol v. Conlan*, 385 S.W.2d 779 (Ky. 1964); BLACK'S LAW DICTIONARY 302 (4th ed. 1968)(14 years and under); Note, *Child Custody in Kentucky Divorce Cases: 1940-1952*, 41 Ky. L.J. 324, 325 (1953)(10 years and over not tender years).

for by the mother.¹³ For a time, then, in the late 19th century, the law was in a period of transition. During the first quarter of the 20th century, however, the preference for the mother became firmly rooted in Kentucky law.¹⁴

B. *Custody Under Traditional Divorce Laws: The Best Interests Test*

With the decline of the virtually absolute paternal right,¹⁵ the child's best interest has become the paramount concern of the courts in making custody awards.¹⁶ The best interest of the child has become a doctrine, and the courts have evolved a test by which to judge the child's best interest.¹⁷ There are many specific standards against which the potential custodians are to be measured: (1) Financial sufficiency,¹⁸ (2) health,¹⁹ (3) stability of location,²⁰ (4) affection for the child,²¹ (5) preference of the child,²² (6) sex of the child,²³ (7) sense of responsibility,²⁴ (8) physical environment and opportunities for playmates and education,²⁵ (9) present custodian of the child,²⁶ (10) moral character,²⁷ (11) blood relationship to the child,²⁸ and (12) the age of the child.²⁹

¹³ See generally *Riggins v. Riggins*, 287 S.W. 715 (Ky. 1926); *Wills v. Wills*, 181 S.W. 619 (Ky. 1916); *Shallcross v. Shallcross*, 122 S.W. 223 (Ky. 1909).

¹⁴ See notes 35-46 *infra* and accompanying text for a discussion of cases involving the presumption in favor of maternal custody.

¹⁵ For a good summary of Kentucky custody cases at mid-century, see Note, *supra* note 12.

¹⁶ *Shallcross v. Shallcross*, 122 S.W. 223 (Ky. 1909).

¹⁷ Dr. Watson asserts that criteria for establishing the child's best interest are "conspicuous by their absence" from statutes, and that the courts show little data to reveal the bases of their decisions. *Watson, supra* note 6, at 56.

¹⁸ *Estridge v. Taylor*, 221 S.W.2d 644 (Ky. 1949).

¹⁹ *West v. West*, 171 S.W.2d 453 (Ky. 1943).

²⁰ *Sanders v. Felzman*, 213 S.W.2d 428 (Ky. 1948).

²¹ *Cruse v. Shepherd*, 240 S.W.2d 548 (Ky. 1951).

²² *Cummins v. Bird*, 19 S.W.2d 959 (Ky. 1929).

²³ *Fugate v. Fugate*, 163 S.W.2d 451 (Ky. 1942).

²⁴ *Haymes v. Haymes*, 269 S.W.2d 237 (Ky. 1954).

²⁵ *Vanover v. Hunley*, 218 S.W.2d 20 (Ky. 1949); *Sanders v. Felzman*, 213 S.W.2d 428 (Ky. 1948).

²⁶ The court prefers not to move a child unless the present custodian is detrimental to the child and the potential custodian is markedly better suited. *Vanover v. Hunley*, 218 S.W.2d 20, 22 (Ky. 1949).

²⁷ *West v. West*, 171 S.W.2d 453 (Ky. 1943).

²⁸ *Johnson v. Cook*, 120 S.W.2d 675 (Ky. 1938).

²⁹ *Fugate v. Fugate*, 163 S.W.2d 451 (Ky. 1942).

The all-encompassing nature of this test suggests it is difficult to apply. How, for example, is one to measure one parent strong in financial sufficiency against the other strong in health? These standards are also liable to subjective misuse, as the trial court might accord unwarranted importance to one factor at the expense of others.³⁰ Of course, as in any adversary proceeding, the data brought forth at trial largely depends on the skill and resourcefulness of the advocates.³¹

However, because of certain presumptions built into the best interests test, it has not been as difficult to apply as it first appears. The presumptions operate to preclude consideration of the other criteria unless the party disfavored by the presumption produces evidence that the favored party is unfit. While the courts have said that the trial court has the power to vest custody in a third party,³² there is a presumption that natural parents have a superior right to custody.³³ A strong showing that the natural parents are unfit is required to overcome this preference.³⁴ As between the natural parents, the mother is preferred.³⁵ This maternal presumption, often called the tender years presumption, is founded on the supposition that the best interests of the child and maternal custody are equivalent, that mothers are "better adapted to the care of the child and best calculated to secure his or her happiness and well-being."³⁶ Only with unequivocal evidence of the mother's unfitness might the father secure custody of his young child.³⁷

³⁰ Comment, *Family Law—Custody of Children*, 59 Ky. L.J. 529, 536 (1970).

³¹ Watson, *supra* note 6, at 57.

³² See, e.g., *Lewis v. Lewis*, 343 S.W.2d 146 (Ky. 1961).

³³ *Wilson v. Wilson*, 255 S.W.2d 49 (Ky. 1953); *Mason v. Williams*, 176 S.W. 1171 (Ky. 1915). *Accord*, KRS § 405.020 (1970).

³⁴ *McKinney v. McKinney*, 266 S.W.2d 327 (Ky. 1954).

³⁵ *McIntosh v. McIntosh*, 464 S.W.2d 627 (Ky. 1971); *Gernert v. Gernert*, 457 S.W.2d 831 (Ky. 1970). See also Comment, *Alimony, Property Settlement and Child Custody under the New Divorce Statutes: No-fault Is Not Enough*, 22 CATH. U. L. REV. 365 (1973).

³⁶ *Byers v. Byers*, 370 S.W.2d 193, 195 (Ky. 1963). *Accord*, *Estes v. Estes*, 299 S.W.2d 785 (Ky. 1957); *Burke v. Burke*, 103 S.W.2d 291 (Ky. 1937).

³⁷ E.g., *Dixon v. Dixon*, 340 S.W.2d 230 (Ky. 1960)(alleged extra-marital sexual relations merely indiscreet); *Wilcox v. Wilcox*, 287 S.W.2d 662 (Ky. 1955)(sexual relations with another man the mother later married did not render the mother promiscuous); *Bowman v. Bowman*, 233 S.W.2d 1020 (Ky. 1950)(mother must be shown to be of unfit character or unable to provide suitable home); *Runge v. Runge*, 212 S.W.2d 275 (Ky. 1948)(wife unfaithful while husband overseas in military, not sufficient to

Such damaging evidence was often introduced in the divorce trial itself because of the fault basis of the old divorce law,³⁸ and the judge readily considered that evidence when awarding custody.³⁹ If the misconduct had been grievous, the tendency of the court was to award custody to the spouse not at fault.⁴⁰ However, the underlying principle was not to punish the guilty spouse but rather to serve the best interests of the child.⁴¹ Faults generally brought to the court's attention which were sufficient to overcome the maternal presumption included immoral behavior,⁴² excessive use of intoxicants,⁴³ neglect of husband and child,⁴⁴ and impaired physical or mental health.⁴⁵ But fault was a two-edged sword, and just as the father could present evidence of fault to cut off the maternal presumption, so the mother could present evidence of equal or greater fault in the father, thereby restoring her presumption.⁴⁶

Thus, prior to the 1972 revision of the divorce laws, the father who sought custody of his young child faced two imposing legal obstacles under Kentucky law: the best interests of the child test and what one commentator has called the

show unfitness). *Contra*, *Parker v. Parker*, 467 S.W.2d 595 (Ky. 1971)(not necessary to show wife unfit); *Hamilton v. Hamilton*, 458 S.W.2d 451 (Ky. 1970); *Watson v. Watson*, 434 S.W.2d 33 (Ky. 1968); *Yelton v. Yelton*, 395 S.W.2d 590 (Ky. 1965). See also text accompanying notes 75-88 *infra* for a discussion of the *Parker* line of cases.

³⁸ CARROLL'S KENTUCKY STATUTES ch. 66, § 2117 (1922), as amended by 1946 Ky. Acts ch. 14; 1950 Ky. Acts ch. 162; 1956 Ky. Acts ch. 72; and 1962 Ky. Acts ch. 210, § 49 (codified at KRS § 403.020 (1970)(repealed 1972)).

³⁹ *Bowman v. Bowman*, 221 S.W.2d 71 (1949).

⁴⁰ *Meadors v. Meadors*, 281 S.W. 180 (Ky. 1926).

⁴¹ See *Renfro v. Renfro*, 291 S.W.2d 46 (Ky. 1956).

⁴² *Wilkey v. Glisson*, 303 S.W.2d 266 (Ky. 1957); *Renfro v. Renfro*, 291 S.W.2d 46 (Ky. 1956); *Brumley v. Brumley*, 247 S.W.2d 987 (Ky. 1952); *Owen v. Owen*, 240 S.W.2d 46 (Ky. 1951). *But see* *Dixon v. Dixon*, 340 S.W.2d 230 (Ky. 1960)(alleged extra-marital sexual relations merely indiscreet).

⁴³ *Turner v. Turner*, 336 S.W.2d 586 (Ky. 1960). *But cf.* *Estes v. Estes*, 299 S.W.2d 785 (Ky. 1957)(mother's averment that she no longer used intoxicants sufficient to support motion to modify custody).

⁴⁴ *Donoho v. Donoho*, 357 S.W.2d 665 (Ky. 1962); *Singleton v. Singleton*, 302 S.W.2d 121 (Ky. 1957).

⁴⁵ *Day v. Day*, 347 S.W.2d 549 (Ky. 1961); *Snider v. Snider*, 302 S.W.2d 621 (Ky. 1957); *Dayton v. Dayton*, 161 S.W.2d 618 (Ky. 1942).

⁴⁶ *Sevier v. Sevier*, 280 S.W.2d 526 (Ky. 1955)(mother accused of adultery and father tried to kill her, mother awarded custody). *Compare Sevier with* *Mandelstam v. Mandelstam*, 458 S.W.2d 786 (Ky. 1970), in which the Court denied custody to both parents because of the "weird, abnormal, bizarre atmosphere" of the home. *Id.* at 788.

"unfitness test,"⁴⁷ the obverse of the maternal presumption. To pass the first the father had to be an exemplary parent; to pass the second he had to be a faultless husband *and* find grievous-faults in his former spouse.

Perhaps the greatest obstacle faced by the would-be paternal custodian is the disfavor of society generally. The courts reflect this disfavor in viewing the father as an "unnatural" custodian.⁴⁸ Lawyers condone this disfavor by dissuading fathers from seeking custody⁴⁹ and generally taking a cynical view of the father's motives.⁵⁰ The effect has been to create a maternal sanctuary few fathers dare attempt to violate.⁵¹

II. THE NO-FAULT DIVORCE ACT

The 1972 Kentucky Act Relating to Marriage and Divorce⁵² (the No-Fault Divorce Act) and the custody provisions embodied therein⁵³ have done nothing to improve the father's position vis-à-vis the mother in a custody dispute. On the contrary, if the underlying spirit of the No-Fault Divorce Act is adhered to, it may well diminish the father's opportunities for custody of his young child.

The No-Fault Divorce Act⁵⁴ is patterned after the Uniform

⁴⁷ Comment, *The Father's Right to Child Custody in Interparental Disputes*, 49 TUL. L. REV. 189 (1974).

⁴⁸ *Donoho v. Donoho*, 357 S.W.2d 665 (Ky. 1962), expressed this view although the Court reluctantly granted custody to the father.

⁴⁹ The annotator of 23 A.L.R.3d 6, 20-21 (1969) suggests the attorney "dissuade" a father from seeking custody "by reminding him that whatever may be the difficulties between him and his wife, his wife is a good mother and better able to care for the children than he is." Similar advice is found in J. BRAUN, *SURVIVING DIVORCE* 69 (1975): "From a practical viewpoint, mothers may be better equipped physically, mentally, and emotionally to serve the best interests of the child, particularly at a tender age."

⁵⁰ J. BRAUN, *supra* note 49, at 70, 77-78. The author suggests that fathers find post-divorce finances so difficult that they seek custody in order to avoid support payments. Similarly, ATHEARN, *supra* note 7, at 85 states: "Sometimes a father will make custody an issue simply to upset the mother or for leverage in bargaining for a lesser alimony award In these cases the father does not really want custody. He probably wouldn't know what to do with the children if he got them."

⁵¹ BRAUN, *supra* note 49, at 70 states: "Usually a departing father does not challenge custody in the mother" See Note, *Child Custody: Preference to the Mother*, 34 LA. L. REV. 881, 882 (1974)[hereinafter cited as *Child Custody*]. The author of Note, *supra* note 8, at 23 finds discrimination against fathers.

⁵² KRS § 403 (Supp. 1976).

⁵³ KRS § 403.260-.350 (Supp. 1976).

⁵⁴ For a summary of the Act, see Note, *Kentucky's New Dissolution of Marriage Law*, 61 KY. L.J. 980 (1973).

Marriage and Divorce Act (the Uniform Act).⁵⁵ The intent of both is to eliminate the bitterness and hostility attendant to divorce actions under the fault system. Divorce, it is reasoned, should not be a remedy granted to an innocent spouse for misconduct by the other spouse; it should be analogous to the dissolution of a partnership. The No-Fault Divorce Act seeks to "redirect the law's attention from an unproductive assignment of blame to a search for the realities of the marital situation."⁵⁶ The Act focuses on whether there has been an irretrievable breakdown, not on the faults of the parties.

The No-Fault Divorce Act and the Uniform Act apply the no-fault concept to child custody determinations as well.⁵⁷ The rationale is that a proceeding based on the old fault concepts would "redound inevitably to the future, and perhaps permanent, disadvantage, of the child."⁵⁸ With both parties blaming each other and creating additional tension and animosity, post-divorce cooperation, so vital to the welfare of the child, would be precluded. Ironically, the welfare of the child would itself become secondary in such a proceeding as the parents exposed each other's faults in order to win custody. Therefore, under the No-Fault Divorce Act marital misconduct is considered irrelevant unless it directly affects the child.⁵⁹ The parents are encouraged to put aside their animosities, to be concerned with the child they presumably love, and to arrange custody without litigation. The court is not, however, bound by such arrangements and will view them only as suggestions when considering the best interests of the child.⁶⁰

⁵⁵ Compare NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM MARRIAGE AND DIVORCE ACT (1970) [hereinafter cited and referred to as the UNIFORM ACT] with KRS § 403 (Supp. 1976). See Note, *supra* note 54, for such a comparison. For present purposes, the minor differences within the custody provisions are of no concern.

⁵⁶ UNIFORM ACT, Commissioners' Prefatory Note.

⁵⁷ *Id.* "Fault notions . . . were deliberately and expressly excised."

⁵⁸ Watson, *supra* note 6, at 58.

⁵⁹ Callow, *Custody of the Child and Uniform Marriage and Divorce Act*, 18 S. DAK. L. REV. 551, 553-55 (1973); Watson, *supra* note 6, at 58, 65. *But cf.* Comment, *Oregon's No-Fault Divorce Law: Effect on Custody, Property Division, and Support*, 55 ORE. L. REV. 267, 269-70, 275-76 (1976) (both parties and judges consider misconduct relevant).

⁶⁰ KRS § 403.180(1) (Supp. 1976); UNIFORM ACT §§ 303(b)(5), 306(a). *But cf.* Comment, *supra* note 59, at 269 n.15 (discourages out-of-court settlement because "guilty" party need not fear judicial reproof or chastisement and will therefore litigate to get what he can).

The best interests of the child test is the heart of the custody provisions of the No-Fault Divorce Act.⁶¹ In determining the effect of the Act on paternal custody, a crucial question is: Is the old maternal presumption still a relevant factor? The question becomes more important in light of Section 2 of the Act, which injects the no-fault concept into the custody determination: "(2) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."⁶² If the maternal presumption, and its obverse, the unfitness test, are *not* relevant factors, the new statute has placed both father and mother on an equal plane.⁶³ If the maternal presumption remains a relevant factor, Section 2 has the potential of partially stripping the father of his ability to meet the unfitness test and to negate the maternal presumption by showing the mother at fault and therefore unfit. Much depends on the final caveat in the statute, "that does not affect [her] relationship to the child,"⁶⁴ and how it will be interpreted by the courts.

III. INTERPRETING THE NO-FAULT DIVORCE ACT

Four broad questions must be examined and answered in light of the court decisions interpreting the Act: (1) Is the trial court limited to consideration of the factors enumerated in the statute? (2) If the trial court is not so limited, is the maternal presumption one of the relevant factors upon which the trial court may rest its decision? (3) If the maternal presumption is

⁶¹ KRS § 403.270 (Supp. 1976) provides:

Custody—Best interest of the child shall determine.—

(1) The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:

- (a) The wishes of the child's parent or parents as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community; and
- (e) The mental and physical health of all individuals involved.

⁶² KRS § 403.270(2)(Supp. 1976).

⁶³ Note, *supra* note 8, suggests that the Act does indeed equalize the status of mothers and fathers: "Thus the Act would require courts to employ egalitarian standards between fathers and mothers of minor children." *Id.* at 231.

⁶⁴ KRS § 403.270(2)(Supp. 1976).

still vital, how does the no-fault provision of Section 2 affect the father in view of the unfitness test, the necessity to find fault in the mother's conduct? (4) What misconduct does or does not affect the potential custodian's relationship to the child?

A. *Scope of the Trial Court's Inquiry*

The plain meaning of the statutory words, "The court shall consider *all* relevant factors *including* . . .,"⁶⁵ leaves little doubt that the enumerated factors are only some of the factors the trial court should consider. The comments to the Uniform Act⁶⁶ favor a thorough judicial inquiry, noting that the court can order an investigation in the face of joint opposition by the parents when custody is contested. Less reliance is placed on use of the adversary process to obtain information. Additionally, it is widely recognized that the trial court has wide discretion in custodial adjudications.⁶⁷

This interpretation of the Act is in complete accord with prior case law, which left the inquiry to the trial court's broad discretion. In *Dudgeon v. Dudgeon*, the Court noted: "[T]he trial judge's discretion in determining the best interest and welfare of the children when making a custody award is indeed broad. . . . [T]his court has continually refused to establish rigid guidelines which a trial court should follow when determining questions of child custody."⁶⁸ In addition to the broad scope of the trial court's inquiry, "a very clear and substantial showing of manifest error . . . [was] required before an appellate court should undertake to substitute its judgment. . . ."⁶⁹

Predictably, since the adoption of the No-Fault Divorce Act the case law has generally reaffirmed the broad discretion of the trial court. In *Eviston v. Eviston*, the Court was quite explicit: "In reviewing the decision, the test is not whether we

⁶⁵ KRS § 403.270(1)(Supp. 1976)(emphasis added).

⁶⁶ UNIFORM ACT, Commissioners' Note to § 404.

⁶⁷ Bradbrook, *An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario Regarding the Working of the Present Child Custody Adjudication Laws*, 49 CAN. B. REV. 557 (1971). The author's remark may be fairly interpreted as applying to both Canadian and United States courts.

⁶⁸ 458 S.W.2d 159, 160 (Ky. 1970).

⁶⁹ *Id.* at 161. *Accord*, *Grider v. Grider*, 254 S.W.2d 714 (Ky. 1953).

would have decided differently but whether the findings of the trial judge were clearly erroneous or he abused his discretion."⁷⁰ The Court has also ruled that the use of reports by social workers was within judicial discretion,⁷¹ as was interviewing only one of the three children involved in a custody proceeding.⁷²

The trial judge's discretion remains broad. He is not limited to consideration of the factors statutorily enumerated; he may range beyond those to all relevant factors.

B. *The Maternal Presumption*

The maternal presumption remains a vital doctrine. The commentary to the Uniform Act explicitly recognizes it and urges its application:

Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interests of the child, and this section enjoins judges to decide custody cases according to that general standard.⁷³

In *Casale v. Casale*, the Kentucky Supreme Court pointedly took note of that commentary and held it to be inherent in the custody provisions of the No-Fault Divorce Act, with the result that "the natural preference for the mother should prevail."⁷⁴

Because the maternal presumption remains strong, it is important to examine the unfitness test and the effect of the no-fault custody provision. However, it is first necessary to consider the *Parker* line of cases decided prior to the No-Fault Divorce Act.

⁷⁰ 507 S.W.2d at 153 (Ky. 1974). *Accord*, *Calhoun v. Calhoun*, No. 76-481 (Ky. Sup. Ct. Jan. 14, 1977); *Wilhoit v. Wilhoit*, 521 S.W.2d 512 (Ky. 1975).

⁷¹ *Lewis v. Lewis* 534 S.W.2d 800 (Ky. 1976).

⁷² *Brown v. Brown* 510 S.W.2d 14 (Ky. 1974).

⁷³ UNIFORM ACT, § 402, Commissioners' Note.

⁷⁴ *Casale v. Casale*, No. 76-273, slip op. at 4 (Ky. Sup. Ct. Jan. 14, 1977). *Accord*, *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). *See Sharp v. Sharp*, 491 S.W.2d 639 (Ky. 1973) (on appeal from reconsideration directed by the Ky. Court of Appeals (predecessor court to the Ky. Supreme Court), the Court affirmed the lower court ruling, 516 S.W.2d 875 (Ky. 1974)).

C. *The Unfitness Test Discarded: Parker v. Parker*

*Parker v. Parker*⁷⁵ was decided in 1971. It seemed to redress the imbalance between mother and father by discarding the unfitness test, explicitly affirming a legal equality of the parents, and more formally establishing criteria by which the best interests of the child must be measured. This case warrants particular attention because it represents a departure from prior case law. Despite a later judicial pronouncement to the contrary,⁷⁶ *Parker* is at odds with the No-Fault Divorce Act and subsequent cases.

The facts of the *Parker* case are significant. Lena and James Parker became estranged when Lena "left her home and family and spent one or more nights in a motel room with another man."⁷⁷ Following a brief reconciliation and subsequent absences of his wife from their home, James Parker filed for divorce in 1966. James and Lena agreed that James should have custody of their children, ages 10, 9, and 5 years, and the agreement was made part of the judgment. James and the children continued to live with Lena's parents until he remarried. James then left the children in the home of their maternal grandparents, established his own home nearby, visited the children frequently, and provided support. The reason James made this arrangement is not explained in the opinion. Lena, who also had remarried, later sought a modification of the custody award. Her motion was denied and she appealed.⁷⁸

Lena's contention was that "being the mother of young children she is entitled to their custody under previous rulings of this court and the mere fact that she is guilty of an 'indiscretion' will not deprive her of that right."⁷⁹ This represents the classic statement of the maternal presumption/unfitness test: A mother cannot be denied her children unless found unfit.

⁷⁵ 467 S.W.2d 595 (Ky. 1971).

⁷⁶ The Court stated in *Casale*: "Our holding here is not, in our opinion, inconsistent with *Parker* . . ." *Casale v. Casale*, No. 76-273, slip op. at 4 (Ky. Sup. Ct. Jan. 14, 1977).

⁷⁷ 467 S.W.2d at 595.

⁷⁸ *Id.* at 595-96.

⁷⁹ *Id.* at 596. The Court accepted Lena's appellation of her conduct as an indiscretion "[e]ven though that label may be wanting in some respects . . . because of its brevity." *Id.* at 595.

In affirming the lower court, the Court of Appeals rejected unfitness as a test: "We do not believe it is indispensable that a trial court find that a mother is morally unfit to have custody of children as a prerequisite of awarding custody to the father."⁸⁰ As parents, "they have equal rights."⁸¹ The Court then went on to reduce motherhood from its status as a presumption to "more a practical consideration than a rule of law."⁸² The Court outlined the factors which a trial court should consider in an excellent summary of the best interests test as it is scattered throughout the earlier cases.

In *Parker*, the Court relied on *Yelton v. Yelton*⁸³ and *Watson v. Watson*.⁸⁴ In the *Yelton* case, Mary Ann, the mother, originally had been awarded custody of the two children, then 9 and 5 years old. The father later won a modification decree giving him custody of the children even though the trial judge had not found Mary Ann to be unfit. Mary Ann appealed. In affirming, the Court of Appeals reviewed the following facts. After her divorce, Mary Ann married Foster Haley. Not long after the marriage, Haley was convicted of dealing in illegal liquor and imprisoned. Mary Ann took the children with her when visiting Haley. With Haley still imprisoned, Mary Ann first moved to Washington state, then back to Kentucky, then to California, and back to Kentucky again, all within approximately 8 months. Haley was released and again convicted of illegal dealing in alcoholic beverages. Mary Ann again visited Haley with the children. With Haley back in prison, Mary Ann subsisted on public assistance and support payments from Phillip.⁸⁵

The *Watson* case involved an attempt by the mother to modify an award of custody to the father. Although the Court of Appeals did not explicitly find her morally unfit, the trial court's decree was affirmed. The Court stated that appellant's

⁸⁰ *Id.* at 596.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 395 S.W.2d 590 (Ky. 1965).

⁸⁴ 434 S.W.2d 33 (Ky. 1968).

⁸⁵ 395 S.W.2d at 590. The Court also notes: "There is some indication that [Mary Ann] proclaimed that she and Haley had been married at a time earlier than the actual wedding date." *Id.* at 591. This comment has little significance to the case unless the court offered it as a euphemism for fornication.

relationship with another man during her marriage evinced "an imprudence and lack of good judgment that would justify some doubt as to her fitness . . . ,” and noted that the mother had allegedly been “guilty of lewd and lascivious conduct.”⁸⁶

The weakness of the decision in *Parker*,⁸⁷ and in the *Yelton* and *Watson* cases upon which *Parker* is based, follows from the factual situations involved.⁸⁸ While this line of cases ostensibly renounces the unfitness test, it does so in factual situations which cast doubt on the Court’s sincerity. The Court does not explicitly find the mother unfit, yet implicitly does so by recounting factual circumstances which suggest immoral behavior or behavior which could be classified as detrimental to the children. Any subsequent case involving a mother with discretion and prudence could easily be distinguished from *Parker* on the facts. The issue then becomes: Would the Court award custody to the father purely on a showing he could best meet the interests of the child and require no showing that the mother was unfit? The Court’s sincerity in abrogating the unfitness test could only be tested in a situation where the mother did not have glaring faults. Still, following the decision in *Parker* the unfitness test was theoretically laid to rest—for a time.

D. *The Unfitness Test Revived: Casale v. Casale*

Six years later, the unfitness test was resurrected. *Casale v. Casale*⁸⁹ presented a factual situation involving a discreet and prudent mother. After extensive findings of fact, the trial court awarded custody to the father. The mother appealed. The record revealed that both parents loved and wanted the child, that both cared for the child on a daily basis, and that neither was unfit to have custody. Without acknowledging the

⁸⁶ 434 S.W.2d at 34.

⁸⁷ While not cited in the *Parker* decision, *Hamilton v. Hamilton*, 458 S.W.2d 451 (Ky. 1970) is in accord: “We do not believe that a finding of unfitness is any longer necessary.” *Id.* at 45. The facts revealed “Mrs. Hamilton’s attachment to a man other than her husband.” *Id.*

⁸⁸ It is also disturbing that after *Yelton*, though prior to *Hamilton*, *Watson*, and *Parker*, the Court was able to say that “[i]n the absence of proof to the contrary the mother is considered best fitted to care for the needs of young children.” *Knight v. Knight* 419 S.W.2d 159 (Ky. 1967)(emphasis added).

⁸⁹ No. 76-273 (Ky. Sup. Ct. Jan. 14, 1977).

wide discretion accorded the trial court as a matter of law, the Supreme Court reversed:

While we could agree that the testimony taken as a whole could be evaluated to indicate a marginal preference for the father as the most suitable person to have custody of the child, the test is the best interest of the child, and it is in this respect that we believe the trial court erred in awarding custody to the father.⁹⁰

The error lay in failing to consider properly the maternal presumption now inherent in Kentucky's statutory law by virtue of the commentary to the Uniform Act.⁹¹ The Court reasoned that despite the lower court finding that the mother in this case was not better suited to have custody,⁹² the relative strengths of the mother and father were equal "[f]or all practical purposes"⁹³ Therefore "the *preference* that the mother should have custody of a young child has not been overcome"⁹⁴ In the very same paragraph the Court explicitly states that *Parker* discarded the unfitness test and later states that the *Casale* opinion is consistent with *Parker*.⁹⁵

On the one hand, the two opinions can be rationalized to a degree because they involve different facts. Furthermore, both opinions insist that the father need only show he is clearly better suited to be custodian. He can make that showing by establishing his own superior, positive parental attributes or by proving his own positive attributes and proving the mother unfit. It could be said then that *Casale* and *Parker* are only holding that *as a matter of law* the mother need not be shown unfit—there is no *required* unfitness test and any such showing is purely voluntary.

On the other hand, the spirit of parental equality underlying the *Parker* decision is contradicted in "the preference . . . has not been overcome" language of the *Casale* opinion, and any attempt to rationalize the two cases is strained. How supe-

⁹⁰ *Id.*, Slip op. at 2-3.

⁹¹ The commentary is reprinted in text accompanying note 73.

⁹² The mother was not better suited to have custody because she was "very self-centered." No. 76-273, slip op. at 2.

⁹³ *Id.* at 4.

⁹⁴ *Id.* (emphasis added).

⁹⁵ *Id.*

rior must the father's parental attributes be? If the mother is x good, must the father be $x + 1$, or $x + 10$? While *Casale* holds the father must be more than marginally better suited, the Court was "not prepared to define precisely the quantum of proof necessary to overcome the preference that the mother should be the custodian of children of tender years."⁹⁶ But if the father was found marginally better suited to be custodian, why is the mother awarded custody? The compelling answer is the father's failure to meet the unfitness test by introducing evidence of fault against the mother.

Except in the unusual case where the mother is merely a good parent and the father is a clearly superior parent, the father must prove the mother unfit to be custodian as a practical matter, if not as a matter of law. As long as motherhood but not fatherhood is considered equivalent to the best interest of the child the father must diminish the esteem with which the court presumptively views the mother.

E. *The No-Fault Divorce Act and Application of the Unfitness Test*

The spirit of the No-Fault Divorce Act certainly militates against the consideration of prior misconduct. But the custody provision is at least one avenue to the admission of such evidence⁹⁷ because the trial judge may hear testimony concerning misconduct that affects the child. The type of misconduct which affects the child is largely a matter of judicial discretion. Some judges believe that only misconduct which the child can hear or see or otherwise know about would be admissible. Others view habitual bad conduct as indicative of a bad character which will inevitably have at least an indirect impact on the child.⁹⁸

Of the faults that have been sufficient to overcome the maternal presumption in the past,⁹⁹ three clearly affect the child and would undoubtedly be admissible in a custody

⁹⁶ *Id.* at 1-2.

⁹⁷ Note, *supra* note 54, at 1002.

⁹⁸ *Id.* at 996; Note, *Kentucky's No Fault Divorce: Theory and The Practical Experience*, 13 J. FAM. L. 567, 580-81 (1973-74).

⁹⁹ See text accompanying notes 42-45 *supra* for a listing of such faults.

adjudication: (1) Mental or physical impairment,¹⁰⁰ either of which could not fairly be called misconduct and would not even be subject to the misconduct test; (2) neglect of the child,¹⁰¹ and (3) excessive use of intoxicants.¹⁰² Neglect of the husband and immoral behavior—generally a euphemism for adultery or conduct approaching adultery—fall within the discretionary twilight zone. As any survey of the cases will reveal, adultery was one of the faults commonly introduced under the old custody provisions. In two recent cases the Kentucky Court has admitted such evidence,¹⁰³ and no Kentucky court has yet found such conduct irrelevant as a matter of law, a finding which would exclude it from the trial court's examination. There are few indications as to how judges will measure the proscription on irrelevant misconduct and whether evidence of adultery is proscribed or relevant. Under the old fault system, judges occasionally took a permissive view of adulterous behavior and labeled it mere indiscretion.¹⁰⁴

F. *The Effect of the No-Fault Divorce Act on Paternal Custody*

At the very best, the No-Fault Divorce Act has done nothing to improve the opportunities for paternal custody. By possibly limiting the father's opportunity to use the mother's transgressions against her in the custody proceeding—and the extent of such limitation remains to be seen—the No-Fault Divorce Act may have weakened the father's position. To the extent that the *Parker* line of cases briefly offered equal rights to the father by explicitly stating such equality and by minimizing the maternal presumption, the No-Fault Divorce Act,

¹⁰⁰ Such evidence was admitted in *Calhoun v. Calhoun*, No. 76-481 (Ky. Sup. Ct. Jan. 14, 1977) and *Bond v. Shepherd*, 509 S.W.2d 528 (Ky. 1974).

¹⁰¹ Admitted as evidence in *Cox v. Bramblet*, 492 S.W.2d 188 (Ky. 1973).

¹⁰² Admitted as evidence in *Bond v. Shepherd*, 509 S.W.2d 528 (Ky. 1973).

¹⁰³ *Bond v. Shepherd*, 509 S.W.2d 528 (Ky. 1973) and *Dowell v. Dowell*, 490 S.W.2d 478 (Ky. 1973). One commentator, in reviewing the No-Fault Divorce Act, hypothesized that evidence of a discreet sexual liaison during the separation period should not be admitted. Note, *supra* note 54, at 996 n.91. Another commentator studying judicial attitudes found that many judges would exercise their discretion based on "the use of common sense on an individual case basis" in considering the admissibility of such evidence. Note, *supra* note 98, at 580.

¹⁰⁴ *Wilcox v. Wilcox*, 287 S.W.2d 622 (Ky. 1955); *Hager v. Hager*, 219 S.W.2d 10 (Ky. 1949).

as interpreted in *Casale*, has set the paternal cause back again by revitalizing the maternal presumption and reinstating the unfitness test as a practical matter if not as a rule of law.¹⁰⁵

Until the Court answers the very question it raised in *Casale* by ruling on "the quantum of proof necessary to overcome the preference that the mother should be the custodian . . .,"¹⁰⁶ the mother who passes the best interests test will prevail over the father even if he also passes the test. As the Court has applied the test, the mother and father are not compared against each other: the test measures each individually. If both pass, the maternal preference gives the mother custody unless the father meets the unfitness test by introducing evidence of fault against the mother.

The weakness in the *Parker* decision, which supposedly abrogated the unfitness test, is the failure to realize that the maternal presumption and the unfitness test are really different sides of the same coin. One cannot discard one side and retain the other—the *Casale* decision makes that quite evident. Disregarding the wide discretion traditionally afforded the trial judge, the Court discounted the finding of fact that the father was better suited to be custodian, and on the strength of a presumption, the maternal presumption, the Court awarded custody to the mother.

CONCLUSION

In the best interest of the child, the theory underlying the maternal presumption should be re-examined. The maternal

¹⁰⁵ The *Casale* Court, in rationalizing the decision in *Parker*, also notes that the *Parker* holding was reached in a case involving a request for modification, implying that the strong reluctance of the Court to alter custody overcame the maternal presumption with the result that the father retained custody. But the slate is not so clean. *Yelton*, upon which *Parker* relies, also involved a modification of custody, and in *Yelton* the Court took custody from the mother and awarded custody to the father. Thus the Court in *Yelton* viewed the best interest of the child as superior to the preference for the present custodian, reduced the maternal presumption to a mere consideration, and did not require a showing of the mother's unfitness. *Casale v. Casale*, No. 75-756, slip op. at 4-5 (Ky. Sup. Ct. Jan. 14, 1977); *Yelton v. Yelton*, 395 S.W.2d 590 (Ky. 1965).

Clearly the *Parker* line of cases was moving the Court away from the maternal presumption/unfitness test despite the vulnerability of the cases because of their factual circumstances.

¹⁰⁶ No. 76-481, slip op. at 4.

presumption may well be invalid in law and in fact. At least one court¹⁰⁷ and several commentators¹⁰⁸ have challenged the presumption's constitutionality. Others have also questioned its factual basis.¹⁰⁹

Nurturing is essentially learned behavior¹¹⁰ and as such can be learned by either parent. When the female exclusively occupied the role of nurturer, directly tending the child, and the male occupied the role of provider, necessary but distant from the child, there was a certain logic that the mother should have custody of young children. The traditional divorce only continued the traditional roles—the mother continued to tend the immediate needs of the child, and the father, more distant now, provided support payments. That judges often view the situation in this stereotypical fashion is borne out in Bradbrook's study of judicial attitudes. Several of the judges in his sample noted that their preference for the mother would disappear were she to take a full-time job in the post-divorce situation.¹¹¹

More and more, post-divorce reality forces the mother into fulltime employment;¹¹² she becomes the head of a household, and she assumes a traditional father role in addition to her traditional mother role. Fewer women than men remarry after divorce.¹¹³ Under the maternal preference rule, more children are necessarily raised in single parent situations¹¹⁴ where the woman must assume both roles. Indeed, the pre-divorce situation finds more women assuming part of the traditional father

¹⁰⁷ *Watts v. Watts*, 350 N.Y.S.2d 285 (Fam. Ct. 1973), cited in Comment, *supra* note 47, at 201-02.

¹⁰⁸ *Id.*; *Child Custody*, *supra* note 51; Comment, *Male Parent versus Female Parent: Separate and Unequal Rights*, 43 UMKC L. REV. 392 (1975).

¹⁰⁹ Bradbrook, *supra* note 67, at 565; Podell, *supra* note 6, at 51-53. See Batt, *Child Custody Disputes: A Developmental-Psychological Approach to Proof and Decisionmaking*, 12 WILLAMETTE L.J. 491 (1976).

¹¹⁰ Watson, *supra* note 6, at 72.

¹¹¹ Bradbrook, *supra* note 67, at 565.

¹¹² Podell, *supra* note 6, at 53.

¹¹³ There are 1,781,000 divorced men and 3,052,000 divorced women. The longer life expectancy of women cannot account for the disparity of these figures; a significant number of men who obtain divorces remarry. STATISTICAL ABSTRACT, *supra* note 4, Table number 46.

¹¹⁴ There are 214,000 divorced men with children and 1,487,000 divorced women with children. *Id.*, Table number 43.

role by being employed outside the home.¹¹⁵ Conversely, men can be, and more are, involved in the nurturing role.¹¹⁶ As one commentator put it: "When a 'woman's place was in the home,' the maternal preference rule may have had some marginal value as a consideration in awarding custody; today it is an invalid consideration: after all . . . a man can hire a baby sitter as well as a woman."¹¹⁷ But the point is: If both potential custodians would be assuming dual roles in the post-divorce situation, what justification exists to apply a sex-based presumption?

The *Casale* decision demonstrates how arbitrary the application can be. The trial judge found that "both parents participated in the day-to-day care of the child"¹¹⁸ and that the father was better suited to be custodian; yet the Supreme Court applied the maternal presumption, reversed the trial court, and awarded custody to the mother.¹¹⁹ The trial judge had applied the spirit underlying the maternal presumption by awarding custody to the parent who had played a nurturing role, the father. The Supreme Court let words distort meaning by focusing on the gender term "maternal" rather than the intent of the presumption. Because of the change in societal roles, the Supreme Court of Kentucky should fully reevaluate the maternal presumption, not to give fatherhood greater rights than motherhood, but to equalize the rights of fathers and mothers. The equality of right between parents is a clearly emerging social, economic, and psychological reality. That equality cannot be ignored if the best interests test is to function properly.¹²⁰ Equality should be recognized in the law and the real spirit of *Parker* should be given legal and actual vitality. Yet, as *Parker* implies, the equality of right is only the background. The reevaluation of the maternal presumption is necessary because in the foreground stands the child, and the best interest of the child is too important to be left to presumptions.

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¹¹⁵ *Id.*, Table number 353; Comment, *supra* note 47.

¹¹⁶ Comment, *supra* note 47, at 199-200.

¹¹⁷ *Id.*

¹¹⁸ No. 76-273, slip op. at 2 (Ky. Sup. Ct. Jan. 14, 1977).

¹¹⁹ *Id.* at 1-2.

¹²⁰ Podell, *supra* note 6, at 51-52; Note, *supra* note 8, at 233-34. See Batt, *supra* note 109.