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AWARDING CUSTODY OF CHILDREN IN ILLINOIS– REVIEW OF THE FACTORS CONSIDERED BY THE COURTS

RICHARD MARTIN LYON

THE POLE STAR in all custody matters between parents is, what is for the best interest of the child . . ."[1] Custody, of course, refers to "the immediate supervision and control of a child."[2] Awards of child custody made incidental to divorce or separation decrees, therefore, have the primary purpose of "giving"[3] the child to one or the other spouse of the broken marriage, and at times to third parties. Where both parents desire to retain supervision and control of the child after divorce or separation, the courts are faced with a difficult judgment, one which is almost entirely a matter of judicial discretion.

The Illinois statute provides succinctly:

When a divorce shall be decreed, the court may make such order touching the alimony and maintenance of the wife or husband, the care, custody and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just.[4]

[1] Bastian v. Bastian, 81 Ohio L. Abs. 408, 413, 160 N.E.2d 133, 136 (1959).

[2] Sayre, *Awarding Custody of Children,* in ASS'N OF AMERICAN LAW SCHOOLS, SELECTED ESSAYS ON FAMILY LAW, 588 (1950). "By reasonable implication, it usually carries with it various duties to the child by way of care and support, and it may also carry rights to the child's services and other advantages. But these rights and duties may be said to vary with circumstances. . . . [T]hey are not inseparable from the right of custody alone, and they may remain with the parent and be exercised by him in spite of granting custody generally to another." *Supra,* at 590.

[3] Sayre observed that custody "is a slippery word. The courts do not always use it to cover the same things. For instance, is custody co-extensive with the parent's rights in and duties toward the child, so that the parent can 'give' all these rights and duties to another when he gives custody? And again, if the parent did give custody for the whole minority of the child, would this be tantamount to emancipating the child so far as any residuum of rights and duties in the parent was concerned? Although the language of the courts (and worse still, their thought) on these points is highly confusing, it seems fair to say . . . that custody is a term applied to interests less than all the rights and duties of the parent. Even after the parent has given the longest and fullest rights of custody that he possibly could to another, he still has a residuum of rights and duties." Sayre, *supra* at 588.

[4] ILL. REV. STAT. ch. 40 § 19 (1959).

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And further:

> Irrespective if whether the court has or has not in its decree made an order for the payment of alimony or support, it may at any time after the entry of a decree for divorce, upon obtaining jurisdiction of the person of the defendant . . . make such order for alimony and maintenance of the spouse and the care and support of the children as, from the evidence and nature of the case, shall be fit, reasonable and just. . . .[5]

Where the parties are separated the court may likewise "upon the application of either party, make such order concerning the custody and care of the minor child or children of the parties during the pendency of the cause as may be deemed expedient and for the benefit of the child or children, and may award the custody of the minor child or children of the parties to either party as the interests of the child or children may require and may make provision for the education and maintenance of the child or children out of the property of either or both of the parties."[6]

The determination of which parent shall be granted custody of the offspring requires the courts to evaluate and weigh the competing circumstances and opportunities offered by the divorced or separated parents. In carrying out this responsibility, the courts have recognized that they are "clothed with a large discretion."[7] Indeed as was observed by the Illinois Supreme Court over 100 years ago:

> A court of chancery is seldom called upon to exercise a jurisdiction of so embarrassing and important a character as this, or one which requires more serious and anxious consideration.[8]

Justice Spivey of the Appellate Court recently observed that "[I]n all of the duties of a trial judge there is no graver responsibility placed upon him than that of deciding the custody of children in the cases of separated parents. He must call upon all of his background and wisdom not only as a judge but that of his lay experiences."[9]

Such judicial discretion as is exercised by the court is only reviewable where the court has abused its discretion. The reviewing court will not be swayed easily to find an abuse of discretion, but rather

[5] *Ibid.* Pending suit the court may, similarly, "on the application of either party, make such order concerning the custody and care of the minor children of the parties . . . as may be deemed expedient and for the benefit of the children, and may award the custody of the minor child or children of the marriage to either party as the interests of the child or children require. . . ." *Id.* at § 14.

[6] ILL. REV. STAT. ch. 68 § 22 (1959).

[7] Nye v. Nye, 411 Ill. 408, 414, 105 N.E.2d 300, 303 (1952).

[8] Miner v. Miner, 11 Ill. 49 (1849).

[9] Dunning v. Dunning, 14 Ill. App.2d 242, 249, 144 N.E.2d 535, 539 (1957).

will make every reasonable presumption in favor of the correctness of the acts of the trial court.[10]

FACTORS CONSIDERED BY THE COURT IN DETERMINING THE QUESTION OF CUSTODY OF A MINOR CHILD

Various factors are considered by the courts in determining the parent or party who is to be given the custody, control and care of the minor child whose parents are divorced. The primary factor is that of the welfare and needs of the minor. Other factors considered by the courts include the age, sex and health and emotional stability of the child; the preference of the child; race; religion; fault of the parents as determined in the divorce proceedings; the financial ability of the parents and the accommodations available for the child.

These factors apply not only when the original custody order is made, but are important considerations in the modification of such order and count heavily in showing to the court that circumstances have so changed as to make a modification essential.

The various factors will now be discussed.

A. *The Welfare of the Minor*

The welfare and "best interests" of the minor are the paramount considerations in all custody awards. The welfare of the minor is pre-eminently the thing to be considered.[11] Innumerable Illinois cases have reiterated the rule as so stated.[12]

B. *Age, Sex and Health of the Child*

In Illinois it is usual "to place small children in the care of their mother, if she is a fit person, since maternal care is especially necessary during early childhood."[13] The court cautiously added: "This is not

[10] Berger v. Berger, 344 Ill. App. 557, 101 N.E.2d 629 (1951). "The function of the appellate court should be to examine the custody order under consideration in light of the evidence before the court with the view of 'penciling in' or correcting here and there the general outline of the plan that the lower court has drawn to govern the future relationship of divorced parents and their children. The whole outline should be erased only when wholly inadequate or inconsistent with the facts." Bronson, *Custody on Appeal*, 10 LAW & CONTEMP. PROB., 737, 746 (1944).

[11] Martinec v. Sharapata, 328 Ill. App. 339, 66 N.E.2d 103 (1946); Peraza v. Tovar, 13 Ill. App.2d 405, 142 N.E.2d 165 (1957); Landrey v. Landrey, 13 Ill. App.2d 202, 141 N.E.2d 405 (1957).

[12] *Cf.* numerous annotations in ILL. ANN. STAT. ch. 40 § 14 (Smith-Hurd 1959), note 115.

[13] Wolfrum v. Wolfrum, 5 Ill. App.2d 471, 475, 126 N.E.2d 34, 36 (1955); Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300 (1952). It "has been the long established policy of

an inflexible rule, however, since the welfare of the child is the prime consideration."[14]

The Illinois Supreme Court appears to have taken judicial notice of the fact that "maternal affection is more active and better adapted to the care of the child."[15] adding that this is especially "true in the case of a minor daughter, where the care and guidance of a mother's hand is doubly important."[16] To deprive her of custody "compelling evidence must be presented, proving the mother to be an unfit person . . . or there must be a positive showing that to deny custody to the mother would be for the best interests of the child."[17]

The rule of law as above stated differs radically from the rule at common law, which prevailed formerly in this state. Under the common law rule the father of the child had the paramount right of custody. This right arose from the obligation imposed on him to provide for the maintenance of the minor children.[18] Under ordinary conditions the right of the mother to the custody of the children would not arise during the life of the father. Significantly, even under the common law rule the right of the father to custody was not absolute. Thus the Supreme Court stated:

Upon the extent of the legal right of the father to the custody and control of his children, many contradictory decisions are to be found; we think it clear, nevertheless, that he does possess that right, *unless he has forfeited, waived or lost it, either by misconduct, misfortune, or some peculiar circumstances, sufficient in the opinion of an enlightened chancellor to deprive him of it.*[19]

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the courts of this state that it is generally to the best interests of children of tender years to entrust the care and custody to the mother if she is fit and proper . . ." Dunning v. Dunning, 14 Ill. App.2d 242, 249, 144 N.E.2d 535, 539 (1957).

[14] Wolfrum v. Wolfrum, 5 Ill. App.2d 471, 475, 126 N.E.2d 34, 36 (1955).

[15] Nye v. Nye, 411 Ill. 408, 414, 105 N.E.2d 300, 303 (1952).

[16] *Ibid.*

[17] *Ibid.;* Israel v. Israel, 8 Ill. App.2d 284, 131 N.E.2d 555 (1955).

[18] Hewitt v. Long, 76 Ill. 399 (1875). "Subject to certain limitations . . . at common law the father was absolutely entitled to the custody of his children until they reached the age of 21. After his death, the mother was entitled to the custody of her infant children for nurture, but even this right was superseded after 1660 if the father appointed a testamentary guardian under the provisions of the Tenures Abolition Act. Common law accorded no other right to the mother as such, and so absolute against her were the father's rights that he could lawfully claim from her the custody even of a child at the breast. But even at common law the father's rights might be lost if to enforce them would lead to the physical or moral harm of the child. Thus apprehension of cruelty would deprive him of the right to custody, as would his immoral or profligate conduct if the child were likely to be contaminated by it." Bromley, FAMILY LAW, 280–81 (1957).

[19] Miner v. Miner, 11 Ill. 43, 49. (Emphasis added.)

The court added:

> In no case do I find this legal right of the father asserted, where a divorce has been granted for his fault or misconduct.[20]

C. *Race*

In a recent case an Illinois court was confronted with the question whether race alone should outweigh all other factors and be decisive of the question of custody.[21] In that case, the father, a Negro, had obtained a divorce from his wife, a Caucasian, alleging desertion. The defendant wife was not represented by counsel, but agreed that plaintiff should have the care, control and supervision of the two minor daughters of this marriage. The defendant sought to regain custody of her children upon remarriage to a Caucasian. The plaintiff in his answer asserted that his daughters have "the outstanding basic racial characteristics of the Negro race . . . and that for racial and religious reasons these children will make a better adjustment to life if allowed to remain identified, reared and educated with the group and basic stock of the plaintiff, their father."[22] The trial court viewed the children in principle, agreed that the condition of either parental home was "over par,"[23] and stated that but for the difference in color the court "would not hesitate for 'a moment in awarding custody to the mother.' "[24]

The defendant appealed on the ground that "the trial court abused its discretion in denying her custody of the children solely on the basis of the race and color of defendant mother and the minor children."[25] Defendant prevailed. The court's opinion is significant:

> In the case before us the competent and experienced trial judge carefully and conscientiously considered the problem before him, having in mind the best interests and welfare of the children, and he concluded that such interest and welfare would be best served by leaving the children to reside with the father's family under the decree of the court previously entered. However, from the record before us it appears that the court came to this conclusion solely because of the racial physical characteristics of the children before him, and that he would have awarded the custody of the children to the mother except that they had the appearance of colored children. In passing upon the question of how the interests and welfare of the children will be best served, the court can and should take into consideration all relevant considerations

[20] *Id.* at 50.

[21] Fountaine v. Fountaine, 9 Ill. App.2d 482, 133 N.E.2d 532 (1956).

[22] *Id.* at 484, 133 N.E.2d 534.

[23] *Id.* at 485, 133 N.E.2d 534.

[24] *Ibid.*

[25] *Ibid.*

which might properly bear upon the problem. However, we do not believe that the question of race alone can overweigh all other considerations and be decisive of the question. . . . If this was the sole and decisive consideration on which the trial court based his decision, and it so appears from the record before us, we feel that his discretion was not properly exercised under the circumstances in the case, even though he went to great lengths to ascertain how the welfare of the children might best be served.[26]

The case was remanded to the trial court. The Appellate Court opinion cited in support *In Re Adoption of a Minor*.[27] In that case, an adoption, the Court of Appeals reversed the Board of Public Welfare of the District of Columbia which had denied the adoption of a white boy by a colored person married to the boy's white mother. The court there stated:

. . . denial of the adoption [cannot] rest on a distinction between the 'social status' of whites and Negroes. There may be reasons why a difference in race, or religion, may have relevance in adoption proceedings. But that factor alone cannot be decisive in determining the child's welfare.[28]

D. *Religion, Religious Training and Education*

The courts of Illinois—and the courts of other jurisdictions—have significantly avoided the consideration of religion and religious training as a factor in the award of child custody. The few cases in this state touching upon the criterion of religion, and the disposition of these cases, reveal a decided reluctance on the part of the courts to choose between religions or to give greater weight to one religion over another. Doing so might involve the courts in serious constitutional dilemmas.[29] Consequently, the courts have adopted an attitude of strict impartiality between religions and will not disqualify any applicant for custody because of his faith.[30]

This is not to say that the religious factor involved in an award may not be considered by the court; it may well have a bearing on the outcome.[31] Admittedly, the religious training of a child is "an element which may be considered among all the circumstances of gradational significance in promoting the general welfare of the

[26] *Id.* at 485-86, 133 N.E.2d 534-35.

[27] 228 F.2d 446 (C.A.D.C. 1955). [28] *Id.* at 448.

[29] "The American courts are constitutionally forbidden to interfere with religious freedom or to take steps preferring one religion or sect to another." 66 A.L.R.2d 1410, 1412 (1959).

[30] Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685 (1910).

[31] *Ibid.*

child."[32] However, in view of the fact that various factors are considered, "it is difficult to isolate the religious factor and assess what weight it has been given as a determinant, or to formulate any helpful general rules in this area."[33]

The rule as stated in *Corpus Juris Secundum* appears to be consonant with Illinois law:

> . . . the question of religion cannot be considered by the court in determining the care, custody, and control of minor children of divorced parents, and with respect to religious conflicts between parties contending for custody, the paramount consideration is the welfare of the child. Accordingly, religious views afford no ground for depriving a parent, who is otherwise qualified, of custody, and religious teachings of one of the parents to the children, regardless of how obnoxious the teachings may be to the court, the other parent, or the general public, should not be considered as the basis of making child custody orders.[34]

The *Annotated Law Reports*, in reviewing the cases from all jurisdictions, conclude that certain general policies appear to be evidenced by the cases:

> First, it seems clear that the courts will not ordinarily make any substantial sacrifice of a child's purely temporal interests in order to insure that it receives training in any particular religion. Second, it would seem that where the child is of an age to have developed a substantial interest in and feeling for a particular religion, the courts will be reluctant to transport him to a home or atmosphere where he will find it difficult to practice the faith to which he has become attached. Third, where the nonreligious considerations are in substantial balance, and the child has not as yet become attached to any particular faith, preference will be given to the religion of his parents, or of his surviving parent, if one parent is dead.[35]

Thus where the dispute over custody is between a minor's natural parents, religious differences are given minimal weight. Emphasis of the child's welfare and best interest criterion takes the courts "off the hook"—constitutionally, and perhaps politically.

Only three cases appear to discuss religion and religious training in the context of child custody in the reported cases in Illinois. At the same time the treatment of the religious issue by the Illinois courts in adoption cases,[36] as well as the disposition of the question of racial

[32] 27 B C.J.S. *Divorce* § 309(a) (1959).

[33] 66 A.L.R.2d 1410, 1412 (1959).

[34] 27 B C.J.S. *Divorce* § 309(a) (1959).

[35] 66 A.L.R.2d 1410, 1413 (1959).

[36] *Cf.* Lutterbeck, *The Law in Illinois Pertaining to the Adoption of Children*, 8 DE PAUL L. REV. 165 (1959).

differences in custody matters, affords ample basis for the conclusion that religious differences carry little weight with the courts.

The Illinois Supreme Court has held that a mother's adherence to the Mazdaznan religion could not support a finding that her boy was a neglected child whose custody should be taken from his mother.[37] It was alleged that the boy also associated with the leader of the Mazdaznan sect and that this man had written a book which might be construed as containing improper doctrines. The Court held that absent any evidence that the religion in question was an immoral one, or that the sect leader was an immoral man, or engaged in immoral practices, the statutory provisions for taking the children from the custody of their parents should not be extended to cases in which there was merely a difference of opinion as to the best course to pursue in rearing a child.

Said the Court:

> She [the mother] may have been misguided in her religious views and mistaken as to the best method of educating and training her boy; but we search the record in vain for evidence that he [the child] lacked food, clothing or shelter or was being reared in immoral or indecent surroundings.[38]

In another decision[39] the court made an oblique reference to admitted neglect in providing religious education by a mother. This factor, however, did not disqualify her from obtaining the custody of her children. Other considerations led the court to deny her custodial rights.

A third case[40] involved a modification in the custody decree sought by the father so that sole custody of the minor be awarded to him because of the mother's alleged breach of agreement that the child should be enrolled in a Catholic school, and for other reasons. The court noted that the minor was only five years old and that the mother on interrogation by the judge had in fact agreed to enroll the child in a parochial school. The child was clearly too young to be enrolled in any school at the time of the controversy.

It is significant also that while the Illinois adoption law states that the "court in entering a decree of adoption shall, whenever possible, give custody through adoption to a petitioner . . . of the same reli-

[37] Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892 (1913).

[38] *Id.* at 339–40, 100 N.E. 896.

[39] Wellcome v. Wilk, 339 Ill. App. 444, 90 N.E.2d 260 (1950).

[40] Smith v. Smith, 340 Ill. App. 636, 92 N.E.2d 358 (1950).

gious belief as that of the child,"[41] the Supreme Court held this to be a directory, not mandatory, provision.

The matter was brought before the court in *Cooper v. Hinrichs.*[42] The lower court had held that a religious difference *per se* barred the adoption by Protestants of a child baptized as a Catholic. The Supreme Court disagreed, stating that the religious protection provision in the Adoption Act did not bar such adoptions. Rather, the Act "indicates a legislative intention to stress the religious factor and to direct the court to give preferences to persons of the same religion as the child to be adopted, where they are otherwise qualified to promote the welfare of the child."[43]

As was noted by one commentator:

> The lower court . . . had taken testimony (from a representative of Catholic Charities, Inc.) concerning the availability of suitable Catholic homes in the area desirous of adopting children, but the supreme court apparently did not consider this sufficient to require that the adoption be refused, thus reinforcing the conclusion that the best interests of the child is to be the controlling factor.[44]

Other commentators agreed that the best interests of the child should be the principal consideration in placing a child in adoption, with the religious aspect to be considered along with others in the sound discretion of the court.[45]

41 ILL. REV. STAT. ch 4, § 4–2 (1959).

42 10 Ill.2d 269, 140 N.E.2d 293 (1957).

43 *Id.* at 276, 140 N.E.2d 297. It may be worth noting that the principal opponent to the adoption was the mother of the children who had a checkered personal history. The twin children were born five months after her divorce from their Lutheran father. "Prior to their birth . . . [she] signed an agreement for their adoption, which she subsequently repudiated. . . . [Later] the mother permitted the twins to be declared dependent in a proceeding brought under the Family Court Act . . . and the county court appointed the probation officer as the legal guardian of the children. He placed the twins in St. Vincent's Home for Children for several weeks, and then . . . placed them with plaintiffs [who were Presbyterians], who have continuously cared for the children." *Supra,* at 271, 140 N.E.2d 294. The children's father consented to the petition for adoption. The children had been baptized in the Catholic faith. The court noted that as to the mother there was conflicting evidence as to whether she was, in fact, a Catholic, and "on the issue of her fitness as a mother. Testimony was presented of her drunkenness, her arrest for disorderly conduct, and her course of illicit relations with men both before and after her divorce from the father of the twins. The evidence . . . is uncontroverted that . . . [the adoptive parents] are of good moral character and are capable of properly caring for and rearing the children." *Supra,* at 272, 140 N.E.2d at 295.

44 Polston, *Religion as a Factor in Proceedings for Adoption and Custody of Children,* 1957 U. ILL. L. F. 114, 117.

45 Lutterbeck, *supra* note 35, at 169.

While the jurisdictions are not unanimous,[46] ample support may be found outside Illinois for the rule which appears to underlie the few reported Illinois decisions.

A mother's interest in Rosicrucianism did not disqualify her as custodian in Kansas.[47] Evidence that the father of an eight-year old girl was an active adherent of the Megiddo sect and was raising the child in that belief, which involved a way of dress and behavior very different from that ordinarily followed by American children, did not disqualify the father as custodian. The sole criterion is the child's welfare.[48] In another case involving the same parties, this time a habeas corpus proceeding, the court stated:

> The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental, and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act.[49]

In *Ex parte Kananack*,[50] the court held that in a dispute relating to custody, religious views afforded no grounds for depriving an otherwise qualified parent of custody. In yet another case the courts reversed a custody order where it appeared that in changing the custody order from the divorced mother to the father, the court had considered and given some weight to the circumstances that the mother was a Jehovah's Witness and that the children were being given instruction which might lead them to refuse to salute the flag, perform military service, or celebrate Christmas in the customary manner.[51]

In a fairly recent case, the Supreme Court of Alabama specifically

[46] New York and Massachusetts appear to give controlling weight to the natural parents' right to determine the child's religion. In re Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1951); Petition of Goldman, 331 Mass. 647, 121 N.E.2d 843 (1954).

[47] Mothershead v. Mothershead, 161 S.W.2d 669 (Kansas 1942).

[48] In Re Sisson, 152 Misc. 806, 274 N.Y.S. 857 (1934); People ex. rel. Sisson v. Sisson, 271 N.Y. 285, 2 N.E.2d 660 (1936).

[49] People ex rel. Sisson v. Sisson, 271 N.Y. 285, 287–88, 2 N.E.2d 660, 661 (1936).

[50] 272 App. Div. 783, 69 N.Y.S.2d 889 (1947).

[51] Commonwealth ex rel. Derr v. Derr, 148 Pa. Super. 511, 25 A.2d 769, *cert. denied*, 317 U.S. 631 (1942); Commonwealth ex rel. Kaufmann v. Kaufmann, 69 Montg. Co. L.R. 292 (Pa. 1953); Reynolds v. Rayborn, 116 S.W.2d 836 (Tex. Civ. App. 1938); Salvaggio v. Barnett, 248 S.W.2d 244 (Tex. Civ. App. 1952); Stone v. Stone, 16 Wash.2d 315, 133 P.2d 526 (1943).

rejected the contention that the divorced wife's subsequent marriage to one of Jewish faith rendered her unfit or unsuitable for the custody of her three-year old child. The court said that such marriages were not forbidden by statute or violative of social morality, and that while the second husband's character was a pertinent factor, he was admitted to be "a man of exemplary habits and splendid character."[52]

In two Pennsylvania cases, illustrative of the principles noted above, religion became a factor in the dispute over the custody between a parent and a relative. The courts again placed little weight on the matter of religion. Noting that the father had not been concerned with his son's religious faith until proceedings for support were brought, the court held that it was error for the trial court to require that the boy (who had been baptized a Catholic) be removed from the custody of his Protestant aunt. He had been placed in the aunt's custody by his mother six years earlier. The court stated that the welfare of the child was the binding consideration.[53]

More recently in *Sabath v. Mendelson,*[54] the court refused to confirm custody to the minor girl's maternal uncle to whom she had been entrusted by the deceased mother, who had originally been awarded custody in the divorce decree. The uncle asserted that the child had developed deep roots in the maternal family and the Jewish religion which it practiced. The child's father had remarried a Protestant. The court noted that the father was of the Jewish faith and would give the child adequate opportunity to practise her religion and the Protestant stepmother agreed to cooperate.

Where it can be shown, of course, that the religious doctrines of the party seeking to obtain custody do, in fact, seriously threaten the health or physical well-being of the minor, or would lead the custodian to neglect the minor, the court may prefer to award custody to the other party.[55]

E. *Preference of the Child*

The preference of the child, while an overall factor in determining custody, is secondary to the paramount consideration of what is for

[52] Goldman v. Hicks, 241 Ala. 80, 1 So.2d 18 (1941).

[53] Commonwealth ex rel. Weber v. Miller, 84 Pa. Super. 409 (1925).

[54] 187 Pa. Super. 73, 143 A.2d 665 (1958).

[55] See People ex rel. Trafford v. Trafford, 12 N.Y.S. 43 (1890); Battaglia v. Battaglia, 9 Misc.2d 1067, 172 N.Y.S.2d 361 (1958).

the best interest of the child. The general rule has been stated as follows:

> The wishes of a child who is sufficiently mature to be able to formulate a rational opinion and desire as to its custody may be considered by the court, but the child's desire is not conclusive.[56]

Where the child has arrived at an age to choose for himself, the court will not take him from one parent and give him to another against his wishes.[57]

Only in doubtful cases will the wishes of immature children be given consideration in awarding custody.[58] A slight preference of the child for one parent is not taken into consideration at all.[59] In this case, involving a thirteen-year old boy, the Illinois Supreme Court remarked:

> In a very doubtful case the wish of the child is to be considered and given weight, but we do not think that the wish of the child in this case should have any great weight in determining custody. The testimony of the child is that he may be equally satisfied to remain with his father after he goes with him, and that he does not have any serious objection to going with his father and will not be seriously grieved by being separated from his aunt.[60]

On the other hand, a strong attachment by a sickly seven-year old boy to his mother, combined with what the court labelled a "decided disinclination" to go to his father, led the court to decide in one case that the best interest of the child would be served by continuing the boy in the custody of his mother.[61]

In *Wellcome v. Wilk*,[62] the strong preference of a twelve-year old girl for her father and stepmother, both of whom she loved, was a factor in continuing her custody in the father. This evidence and the further evidence that when the natural mother gave up the custody of the child five years earlier, the child had expressed the desire to live with her father and had refused to attend school or obey her mother explain the Appellate Court holding that custody was to be continued with the father.

It is evident that the child's preference is not a very compelling

[56] 17A Am. Jur. *Divorce & Separation* § 818 (1957).

[57] Hewitt v. Long, 76 Ill. 399 (1875).

[58] Gresser v. Guynn, 331 Ill. App. 610, 73 N.E.2d 671 (1947).

[59] Stafford v. Stafford, 299 Ill. 438, 132 N.E. 452 (1921).

[60] *Id.* at 450–51, 132 N.E. 457 (1921).

[61] Umlauf v. Umlauf, 128 Ill. 378, 21 N.E. 600 (1889).

[62] 339 Ill. App. 444, 90 N.E.2d 260 (1950).

ground for the award of custody, viewed alone, although the child may be consulted when it is practical to do so.[63]

F. *Financial Status of Parent or Ability to Provide*

Another factor considered by the court in granting or modifying the custody decree would relate to the ability of a parent, financial and otherwise, to support the child, house it, and educate it.

Illinois courts are not impressed with disproportionate financial resources of the parents and will grant custody to the less well-off parent should the interest and welfare of the child require it.

In *Williams v. Williams*,[64] in seeking to have the original custody decree changed in his favor, the father placed much emphasis on the fact that the minor then in the mother's custody might be deprived of a remainder interest in a trust valued at 125,000 dollars unless the child's custody be transferred to the father. The court noted that the trust deed so providing cannot have any effect on the issue of who is entitled to the custody of the five-year old boy. The court added:

> As far as Charles is concerned, this court is well aware of the financial advantages that would accrue to this boy if the terms of the deed were complied with. On the other hand, financial considerations, after a certain point, are entitled to little consideration in the determination of the welfare of a child in a case of this type, especially where it appears that the father is contributing amply to his support.[65]

Similarly in *Kent v. Kent*,[66] the court held that the fact that the minor, who had been placed in the custody of his maternal grandmother upon the divorce of his parents, was living with strangers who could do more for him in a financial way than could his father did not preclude the court from subsequently awarding custody of the child to the father who had remarried. Said the court of the financial argument:

> We have never known of any Court adopting this line of reasoning and we decline to do so.[67]

In *Horn v. Horn*[68] the court was asked to decide between the relative financial ability of the minor's mother and the paternal grandparents

[63] *Cf.* Buehler v. Buehler, 373 Ill. 626, 27 N.E.2d 466 (1940).

[64] 320 Ill. App. 354, 51 N.E.2d 284 (1943).

[65] *Id.* at 356, 51 N.E.2d 285.

[66] 315 Ill. App. 284, 42 N.E.2d 958 (1942).

[67] *Id.* at 290, 42 N.E.2d 961.

[68] 5 Ill. App.2d 346, 125 N.E.2d 539 (1955).

(noting that the child's father had not asked for the custody of the child). The court said:

> The mother, having remarried, now desires the custody of the child, and an investigation of her financial responsibility and the home in which she lives has been so satisfactory that the court felt justified in changing the order and giving the child to her. It is the opinion of this court that however financially responsible the paternal grandfather may be, and however suitable he may be to rear this child, that any rights he may have must necessarily be subordinate to those of the mother.[69]

Where the divorced wife did not have sufficient housing to accommodate her three boys, the court did not abuse its discretion where it awarded custody of the six-year old boy to the husband, and the two- and three-year old boys to the wife.[70]

Where the mother had remarried and lived in her second husband's home, the court modified the prior decree awarding custody of an eleven-year old girl to the husband, it appearing that the husband did not offer adequate accommodations for the girl so that she had to live with the husband's father and step-mother out-of-State.[71]

G. *Present Surroundings of the Home into which the Child is to be Brought.*

In *Tosh v. Jones*,[72] the decree was modified to transfer custody to the father, subject to the mother's rights of reasonable visitation, where the mother was not maintaining a home in which the child could be reared in the security of a family relationship. The mother had remarried, yet was not living with her second husband. Until the return home of this second husband, the mother was obliged to seek work outside the home and would thus be forced to leave the care of the child to others.

The court here was undoubtedly influenced by the "distinct contrast" between the home of the father and the complete lack of similar facilities on the part of the mother, in addition to which she had to work away from the home.

Where, of course, mother and father have equally adequate homes, the court will have to decide on the proper custody order by taking other matters into consideration.[73]

[69] *Id.* at 354, 125 N.E.2d 539.

[70] Malczyk v. Malczyk, 12 Ill. App. 95, 138 N.E.2d 690 (1956).

[71] Lucado v. Lucado, 1 Ill. App.2d 548, 118 N.E.2d 40 (1954).

[72] 1 Ill. App.2d 215, 117 N.E.2d 307 (1954).

[73] *Cf.* Bates v. Bates, 166 Ill. 448, 46 N.E. 1078 (1897).

H. *Past Misconduct or Fault of Parent as Established in the Divorce Proceedings*

Past misconduct of a parent does not necessarily disqualify such parent for purposes of custody if other factors make it desirable that the parent be given custody. Even present misconduct may have that effect.

There are several early decisions in this state in which the husband was disqualified from obtaining custody because of extreme and repeated cruelty to the wife,[74] or because of desertion by the husband.[75]

But in *Hogsett v. Hogsett*,[76] the court held that the fact that the divorce was granted to the wife on grounds of extreme and repeated cruelty did not forfeit the father's rights to custody of the children at a later time upon proper petition for modification.

It will be recalled that the principle that the mother is entitled to the custody of children of tender years will not be invoked where compelling evidence shows that she is not a fit and proper person for custody.[77] In this connection the *Nye* case[78] is of interest. The original divorce decree established the mother's fitness for custody of the minor. It was not known at the time that the mother had a relationship with a man other than her husband. Even so, the lower Appellate Court held that it could not assume that the divorce court would have disapproved the original custody award had the testimony concerning the mother's pre-divorce conduct been offered.

Said the court:

> Where the mother is able to care for her minor daughter and is not shown to lack the proper attributes of good motherhood, past misconduct, where the evidence indicates no probable future misconduct, should not be the basis for denying custody to the mother.[79]

[74] Becker v. Becker, 79 Ill. 532 (1875).

[75] Hewitt v. Long, 76 Ill. 399 (1875).

[76] 11 Ill. App.2d 332, 137 N.E.2d 99 (1956).

[77] Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300 (1952).

[78] *Ibid.*

[79] *Id.* at 417, 105 N.E.2d 303. The bristling dissent of Bristow, J. cannot be easily overlooked: "I am disposed to dissent to the majority opinion in this case because it disregards one of the cardinal rules in judicial review, namely, that the findings of a trial court on issues of fact will not be disturbed unless they appear to be against the manifest weight of the evidence. . . . The prevailing opinion rejects the determination of the trial court that the divorce decree pertaining to the custody question should be modified because of changed conditions. This language was employed in connection therewith: 'Assuming defendant's allegations are true, there is no showing here of a

On the other hand, in the *Wolfrum case*[80] in which the mother was shown to have adequate physical care and to have affection for the children, the evidence disclosed "a shocking course of adulterous conduct by . . . [the mother] with a man who himself is married and the father of a family."[81] The court noted that assuming her prior conduct condoned, there was still no assurance that it would improve in the future. The ruling in the *Nye* case[82] was held inapplicable; while the mother in that case had committed adultery, she later married her paramour and her previous indiscretions were considered to have come to an end.

Obvious immorality by a mother who was remarried to an operator of a gambling house led to denial of custody. The court reasoned:

> Parental example has great influence in the development of young children, and due regard should be had to the character and conduct of the parties in awarding children.[83]

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change in conditions warranting a modification of the custody decree.' In other words, Bruckner and Constance were recognized adulterers, at the time of the divorce decree. Therefore, the court adopts the unique position that since they simply continued their clandestine relationship there was no change in conditions." *Id.* at 417, 419, 105 N.E.2d at 305–06.

[80] Wolfrum v. Wolfrum, 5 Ill. App.2d 471, 126 N.E.2d 34 (1955).

[81] *Id.* at 476, 126 N.E.2d 36.

[82] 411 Ill. 408, 105 N.E.2d 300 (1952). In Frank v. Frank, 26 Ill. App.2d 16, 167 N.E.2d 577 (1960), the Appellate Court relied on Nye v. Nye, *supra,* in transferring custody of a boy from his father to the mother who during her marriage to the boy's father had become pregnant by another man. Both parents were of the Catholic faith, although the mother was excommunicated after obtaining a divorce and marrying her Protestant paramour. See 1 J. FAMILY LAW 139 (1961). She subsequently attended her second husband's church. The mother had another child, the product of her second marriage. She lived in a small house and was able and willing to care for the boy who was living in crowded quarters in his father's apartment, although he had his own bedroom. The mother further agreed to raise the boy in the Catholic faith, although her family attended a Protestant church. The Appellate Court upheld the trial court's finding that the mother was a fit and proper person to obtain custody. "No other finding is made, but implicit in the modification order changing custody from the father to the mother, is a finding that there were changed conditions since the divorce decree, and that in the light of the changed conditions, the best interests of the child were being served in entering the order. It was not necessary to find that the father be found unfit in order that the modification of the order be justified." *Id.* at 19, 167 N.E.2d at 579. The dissenting judge considered it wrong to change custody from the father to the adulterous mother. The dissent emphasized the fact that the boy's half-sister and both parents practiced the Protestant religion. The judge also observed that it was not "just or reasonable to further injure and humiliate the innocent party to a marriage who had lost his wife through the criminal intimacies of the erring spouse . . ." and added: "The boy may later resent being brought up by a step-father who was the cause of breaking up his home." *Id.* at 22, 167 N.E.2d at 581.

[83] Cohn v. Scott, 231 Ill. 556, 558, 83 N.E. 191, 192 (1907).

RECONSIDERATION OF THE ORIGINAL CUSTODY DECREE

It may be well to note at this point that where the court is called upon to modify the prior decree for custody, a clear showing is required that new and subsequent facts require such change. The decree awarding custody being res judicata as to rights of the parties, the original decree is binding upon the parties "under the same facts and so long as the same conditions exist as did at the time of the hearing and order."[84] Any other rule would permit the same or some succeeding judge "to review, and to reverse, alter, or modify a decree, upon the facts existing at the time of its entry."[85]

The change of circumstances doctrine is subject to an important qualification. Changed circumstances alone do not necessarily move the court to modify the existing decree. The court may leave custody unchanged, even though circumstances did change, where the best interest of the child so requires it. In *Maupin v. Maupin* the court declared:

> It should be plain . . . that the mere fact that there has been a change in conditions is not sufficient in itself to modify a decree, unless those changed conditions affect the *welfare of the child.* As stated by another chancery court: "But the changing circumstances must be, obviously, those that affect the children—not those that concern the parents."[86]

Indeed, "it must positively appear that it is to the best interest of children affected by the proposed change that . . . [a change] can be made, as otherwise it must be denied."[87] The new conditions must have arisen subsequent to the prior decree giving custody, or must have existed at the time of the decree, but were not brought to the attention of the court. Thus where the court was aware at the time it granted the custody of the child to the mother that the mother could not support it unless she worked, the same court could not base

[84] 211 Ill. 519, 525, 71 N.E. 1077, 1079 (1904). The court which granted the divorce or separation order has continuing and exclusive powers to make orders with regard to the custody and maintenance of the child and a petition to modify the prior decree must be made in the court where the decree was rendered. *Cf.* ILL. REV. STAT. ch. 40, § 19 (1959). Stafford v. Stafford, 299 Ill. 438, 132 N.E. 452 (1921); Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300 (1952).

[85] Maupin v. Maupin, 339 Ill. App. 484, 489, 90 N.E.2d, 236 (1950).

[86] *Id.* at 489, 90 N.E.2d 236.

[87] Wick v. Wick, 341 Ill. App. 478, 94 N.E.2d 602 (1950).

transfer of custody of the child to the father on the fact that the mother was working.[88]

The burden of proving a material change in circumstances since the divorce or separation decree awarding custody of the minor child is upon the person seeking a change.[89] The change, furthermore, must be permanent, for changes in custody "should not be subject to spasmodic variation merely to follow fluctuations in the employment or resident status of one of the parents, who does not have custody . . . in absence of proof that welfare of [the] child requires such modification."[90]

CONCLUSION

The pole star in all custody matters between parents is what is for the best interest of the child.[91]

[88] Callan v. Callan, 5 Ill. App.2d 480, 125 N.E.2d 854 (1955); Harms v. Harms, 323 Ill. App. 154, 55 N.E.2d 301 (1944).

[89] Israel v. Israel, 8 Ill. App.2d 284, 131 N.E.2d 555 (1955); Martinec v. Sharapata, 328 Ill. App. 339, 66 N.E.2d 103 (1946); Erickson v. Erickson, 344 Ill. App. 550, 101 N.E.2d 619 (1951).

[90] Israel v. Israel, *supra.*

[91] With apologies to Dean Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960), conclusion, at 1148. Weinman, *The Trial Judge Awards Custody*, 10 LAW & CONTEMP. PROB. 721, 735 (1940), wisely notes that in the end "social factors usually outweigh legal factors, when one analyzes the responsibility of judges today in deciding these challenging custody problems."

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