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Child Custody: Preference to the Mother

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The husband's administrative duties as "head and master" have many similarities to the duties of a trustee under the Louisiana Trust Code,[44] although there is by no means a direct analogy. The community of gains could be considered similar to a trust for both spouses, with the husband serving as trustee.[45] Certainly the husband has greater freedom of action than a trustee, but the wife is not without substantial protection against acts deliberately to her prejudice, and she need never suffer personal liability because of the husband's acts:

> The wife has an acquired right to sue for a separation of property during the marriage in case of mismanagement, an acquired right to accept or renounce the community upon its dissolution, an acquired right to accept the community with benefit of inventory upon dissolution, an acquired right to sue the husband or his heirs for an alienation made in fraud, and an acquired right to demand an accounting for enrichment of the husband's separate and paraphernal estate from the community of gains.[46]

The Civil Code provides a plan of order between the husband and the wife under which the spouses agree to pool certain of their assets and certain liabilities incurred by the husband in their common interest. Upon dissolution of the community, the wife is given several alternatives whereby she may benefit from their gains during marriage without risking the loss of more than half of the community assets. This benefit she would lose if she either "owned" an interest in the combined assets and liabilities or participated in its management. The *Creech* decision properly defines the wife's and the husband's relationship in the community of gains thereby preserving the matrimonial regime as envisioned in the Civil Code.

Gerald E. Songy

CHILD CUSTODY: PREFERENCE TO THE MOTHER

The granting of custody of minor children pursuant to a judicial separation or divorce is governed by Civil Code articles 146 and 157. In provisional proceedings prior to a judgment of separation or divorce, if custody is contested, article 146 provides that preference will be given the mother.[1] However, according to article 157, once a judg-

44. LA. R.S. 9:2061-2128 (1950).

45. *Id.*; LA. R.S. 9:1781 (1950): "A trustee is a person to whom title to the trust property is transferred to be administered by him as a fiduciary."

46. Creech v. Capitol Mack, Inc., 287 So. 2d 497, 508 (La. 1973).

1. LA. CIV. CODE art. 146: "If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and unde-

ment is rendered, the person who obtains the separation or divorce should be granted custody.[2]

In spite of the express language of article 157, the provisional preference to the mother has been extended to all custody proceedings.[3] The courts have established the presumption that the welfare of the children can best be served by granting custody to the mother.[4]

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cided, it shall be granted to the wife, whether plaintiff or defendant; unless there should be strong reasons to deprive her of it, either in whole or in part, the decision whereof is left to the discretion of the judge." This statutory preference to the wife was created by Act 124 of 1888, amending Civil Code article 146, which had preferred the husband. This preference to the father was based upon the notion of paternal authority which existed during the feudal era. The child, relegated to the status of a paternal chattel, owed his services to the father whose interests were foremost; as compensation for these services, the father was responsbile for supplying the child with his basic necessities and thus was his natural guardian.

Thereafter, the concept evolved that men could not rear children; thus, disposition of custody was inevitably granted to the mother because of the "essential" nature of her maternal role. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYR. L. REV. 55 (1969). This position was recognized by the United States Supreme Court in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872): "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 women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

Only recently has the child's best interests been a major consideration in custody cases. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYR. L. REV. 55 (1969). But, the continued predetermination that the mother is entitled to custody has resulted in awarding her the child in over ninety percent of divorce cases. Of course, many of these awards may have been based upon a genuine belief that the mother is better-suited for rearing the children. Also, often the mother is awarded custody because the father fails to contest it; this may be due to his knowledge of the almost non-rebuttable presumption favoring the mother. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101 (1962).

2. LA. CIV. CODE art. 157: "[T]he children shall be placed under the care of the party who shall have obtained the separation or divorce unless the judge shall, for the greater advantage of the children, order that some or all of them shall be entrusted to the care of the other party."

3. "Notwithstanding LSA-C.C. art. 157 . . . , the mother is preferred in custody proceedings unless she be shown to have forfeited her right to custody." Jones v. Timber, 247 So. 2d 207, 209 (La. App. 1st Cir. 1971).

4. In Louisiana, the "paramount consideration in determining to whom custody should be granted is always the welfare of the children." Estes v. Estes, 261 La. 20, 24-25, 258 So. 2d 857, 859 (1972). *See also* Fulco v. Fulco, 259 La. 1122, 1127, 254 So. 2d 603, 605 (1971); Drouin v. Hildenbrand, 235 La. 810, 105 So.2d 532 (1958). But the welfare of the children is automatically presumed better served by awarding custody to the mother. Abreo v. Abreo, 281 So. 2d 695 (La. 1973); Estes v. Estes, 261 La. 20, 258 So. 2d 857 (1972); Fulco v. Fulco, 259 La. 1122, 254 So. 2d 603 (1971). The purpose behind such a presumption may be administrative convenience or a genuine belief that the mother will be the better parent.

Furthermore, the father will be awarded custody only where the mother is determined "morally unfit or otherwise unsuitable."[5] These situations have been limited to those in which the mother was guilty of an "adulterous relationship which was calculated, open and public . . . [which] continued over a substantial period of time, in total disregard of basic moral principles of our society."[6]

Even this narrow category has been severely limited in *Fulco v. Fulco*.[7] In that case, the trial court found that the wife's adulterous conduct was calculated, continuous and public, but because she and the children had moved in with her mother after the custody rule was filed, the trial judge allowed the custody to remain with the mother.[8] The supreme court upheld the trial court although the wife's misconduct had definitely constituted unsuitability sufficient to require a custody award to the father. However, as a result of the presumption that the mother has the paramount right to custody,[9] the supreme court, as criticized by Justice Sanders,

> endow[ed] a temporary adjustment made after the custody-changing machinery [had] already begun to operate with the power to wipe out all past misconduct of the custodian. Such a rule is unsound and inconsistent with the judicial goal of promoting the welfare of children.[10]

Furthermore, the supreme court seems to favor the mother without regard to the child's environmental stability.[11] In *Estes v. Estes*[12] a mother sought to obtain the custody of her children from the fa-

5. Abreo v. Abreo, 281 So. 2d 695 (La. 1973); Estes v. Estes. 261 La. 20, 258 So. 2d 857 (1972); Fulco v. Fulco, 259 La. 1122, 254 So. 2d 603 (1971); Nieto v. Nieto, 276 So. 2d 362 (La. App. 4th Cir. 1973); Gustin v. Tregle, 275 So. 2d 825 (La. App. 4th Cir. 1973).

6. Strother v. Strother, 248 So. 2d 867, 871 (La. App. 3d Cir. 1971).

7. 259 La. 1122, 254 So. 2d 603 (1971). *Fulco* is continuously cited as the leading authority in today's custody determinations. Abreo v. Abreo, 281 So. 2d 695 (La. 1973); Estes v. Estes, 261 La. 20, 258 So.2d 857 (1972); Nieto v. Nieto, 276 So. 2d 362 (La. App. 4th Cir. 1973); Gustin v. Tregle, 275 So. 2d 825 (La. App. 4th Cir. 1973).

8. The judge declared this move was "the only thing that has saved Mrs. Fulco, Jr. from losing her children." Fulco v. Fulco, no. 190,158, at 3, 6-7 (1st La. Jud. Dist. 1971). The appellate court reversed the trial court decision because it determined that Mrs. Fulco's move, rather than remedying the conditions which were detrimental to the interests and welfare of her children, made it possible for her to continue her misconduct. Fulco v. Fulco, 245 So. 2d 461 (La. App. 2d Cir. 1971).

9. Fulco v. Fulco, 259 La. 1122, 1128, 254 So. 2d 603, 605 (1971).

10. *Id.* at 1131, 254 So. 2d at 606-07 (dissenting opinion).

11. Estes v. Estes, 261 La. 20, 258 So. 2d 857 (1972) (dissenting opinion).

12. 261 La. 20, 258 So. 2d 857 (1972).

ther.[13] Even though the trial court did not determine that such a change would serve the better interests of the children, the supreme court granted her custody because she, as a mother, had a greater "right" to the children.[14]

Such a preference to the mother may be constitutionally attacked as violative of the father's and child's interests.[15] If the rationale behind a preference to the mother is based upon the idea that the mother, because she is a woman, is better suited for rearing children, this denies the father's interest in his children and places a great burden upon him to assert this interest by rebutting the presumption. In *Stanley v. Illinois*,[16] the United States Supreme Court held that an unwed father's interest in the "children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[17] By analogy to *Stanley*, in a custody dispute the father's interests in the child should receive the same protection as the mother's.[18]

Regardless of the constitutionality of the preference to the

13. The mother had originally been awarded custody of the children in an uncontested divorce. Later, she voluntarily surrendered custody to the father and they jointly obtained a consent judgment by which the original decree was amended to award temporary custody to the father until such time as the mother could provide a "proper home" for the children. After the mother was able to provide a proper home, she waited two more years before attempting to regain custody. Estes v. Estes, 261 La. 20, 258 So. 2d 857 (1972).

14. Justice Barham in his dissent criticizes the court for deciding "that because the mother is *woman*, some superior right rides with her." *Id.* at 33, 258 So. 2d at 862.

15. Furthermore, there is an increasing interest in children's rights in custody cases, especially in the due process area. The application of the standard—the best interest of the child—without allowing the child counsel to advocate these interests produces inadequate results and may be a violation of due process by analogy to *In re Gault*, 387 U.S. 1 (1967), which established the juvenile's right to counsel and due process in criminal proceedings. *See* Inker, *A Child's Right to Counsel in Custody Cases*, 55 MASS. L.Q. 229 (1970).

16. 405 U.S. 645 (1972).

17. *Id.* at 651. The Supreme Court declared unconstitutional a statute which, upon the death of the mother, presumed the unwed father to be an unfit parent and made the children dependents of the state. The court emphasized a parent's interest in the "companionship, care, custody, and management of his or her children . . . ."

18. Futhermore, *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), indicate that because this presumption is based upon sex, it would be unconstitutionally discriminatory against the male. In *Reed*, a statutory provision which gave the father preference over the mother for an appointment as administrator of their child's estate was held unconstitutionally discriminatory as "providing dissimilar treatment for men and women who are . . . similarly situated" in violation of the equal protection clause. Reed v. Reed, 404 U.S. 71, 77 (1971). In *Frontiero*, the court held that different federal statutory treatment between servicemen and servicewomen was unconstitutional as a violation of the due process clause. In fact, four out of the

mother, since one out of every four American children today must endure his parents' divorce,[19] more important reasons demand an evaluation of the procedures in custody cases. Although this presumption in favor of the mother gives the judge a convenient tool to award custody, it prevents a thorough examination of the facts of each case. The failure of this presumption to achieve the best interests of the children, and its discouraging effect on fathers who would otherwise assert their custodial rights,[20] has resulted in increasing dissatisfaction with the present child custody procedures.[21] Also, the physiological and sociological foundation upon which this preference to the mother was originally based is no longer valid.[22] Continuing the

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eight justices who concurred in the decision expressed the view that sex is a suspect classification and thus, any presumptions based upon sex are subject to close judicial scrutiny.

However, it may be argued that there are legitimate state purposes for such a preference to the female in custody proceedings. One argument, administrative convenience as a justification for the presumption, is not valid. As *Stanley* indicates, the Court will no longer accept convenience as a reason to deny the father and the child due process and equal protection.

Also as stated in *Reed*, "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ." Reed v. Reed, 404 U.S. 71, 76 (1971).

Yet, other reasons for the presumption may be upheld. The courts could find the mother, as the central family figure, entitled to a preference. In *Hoyt v. Florida*, 368 U.S. 57 (1961), the court upheld a statute which required women to volunteer before being called for jury duty. The Court's decision was based upon the reasoning that a "woman is still regarded as the center of home and family life." *Id.* at 62. It must be pointed out, however, that this is an older case which is the product of traditional notions of womanhood. Recently, a three-judge federal district court did not follow *Hoyt* when it declared unconstitutional a similar Louisiana provision. Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973).

Of course, the presumption may be upheld because the courts will conclude that the bonds between a mother and her child are stronger than those between the father and child, and thus, the child's welfare demands a presumption. Stanley v. Illinois, 405 U.S. 645, 665 (1972) (Chief Justice Burger's dissenting opinion).

Although *Reed, Frontiero,* and *Stanley* involve statutory discrimination, their holdings indicate that the presumptive preference to the mother in child custody cases, whether statutory or jurisprudential, is unconstitutional.

19. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101 (1962).

20. Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC. REV. 167 (1969).

21. *Id.*

22. Physiologically, fewer mothers are nursing their infants, and after this period, for those who do, there is no reason why a mother is better suited to rear a child. Sociologically, with the employment of more than forty percent of all married women, *Frontiero v. Richardson*, 411 U.S. 677, 689 n.23 (1973), and the increasing number of

preference in order to maintain the traditional notion of the woman's role as "homemaker and child-tender" is not a legitimate reason for failing to thoroughly investigate both parents' ability to meet the needs of the child.[23]

One solution to the inequities in child custody awards would be to literally adhere to the provisions of article 157, granting custody to the party who obtained the divorce.[24] However, at the time this article was first enacted "no fault" divorces did not exist; the custody determination was to reward the party not at fault and to presume that this party would be a better parent. As a result of the availability of "no fault" divorce,[25] the applicability of article 157 in this manner would be precluded. Nevertheless, by analogy to article 160, which takes into consideration such divorces,[26] article 157 could be restricted to awarding custody to the spouse who obtained the divorce only if that spouse were not at fault. However, this approach would use child custody awards to punish the guilty spouse rather than meet the needs of the child. It is not inconceivable that the spouse judicially at fault would actually be the more capable party to rear the children. Furthermore, there are more realistic grounds than fault upon which to decide questions of custody and support.[27]

Child custody should be awarded according to the individual parent's capabilities and situation in relation to how these will affect the child's needs and desires. Articles 146 and 157 should be repealed and replaced with provisions which would guide the judge in the child custody determinations. Of course, in the child custody area, strict rules can easily lead to inequities. Child-oriented criteria established as guidelines should be based upon the rights of children to economic and educational security and emotional stability,[28] and would require an extensive fact-finding process by the court.[29]

Economic security would include the parent's ability to provide the children with necessities, cultural development and entertain-

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men who are experiencing domestic duties, an automatic preference to the mother eliminates recognition of the fact that the child's welfare may be best served by awarding custody to the father.

23. Estes v. Estes, 261 La. 20, 28, 258 So. 2d 857, 860 (1972) (dissenting opinion).

24. LA. CIV. CODE art. 157.

25. LA. R.S. 9:301 (1950). For example, living separate and apart for two years.

26. Civil Code article 160 deals with alimony to the wife after divorce. The former article stated the wife who obtained the divorce was entitled to alimony; the new article allows the wife to obtain alimony regardless of who obtained the divorce if the wife can prove she is not at fault. By analogy, article 157 can be extended to allow the non-faultor (regardless of who obtained the separation or divorce judgment) to be granted child custody.

27. Couch, *Toward a More Realistic Divorce Law*, 43 TUL. L. REV. 243 (1969).

28. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101 (1962).

29. The judge could appoint an investigator or counsel to advocate the child's interests. Inker, *A Child's Right to Counsel in Custody Cases*, 55 MASS. L.Q. 229 (1970). Wisconsin adopts this approach by providing a court-appointed guardian *ad*

ment.[30] For educational security, the court could determine which schools the children would be attending if they lived with either parent, the quality of the education at these schools, and the learning environment which would prevail at home.

The fact-finding process which would enable the court to determine which parental environment could provide the most emotional stability for the child is more complex. This would include a determination of the child's age; his preference if old enough to make an intelligent judgment; the religious preference of the child and each parent;[31] the moral fitness of the parent and its effect upon the child; each parent's emotional stability; the failure or success of the parent to provide adequate care or guidance during the periods in which the child had been in his or her control;[32] the effect a change in actual custody would have; and where and with whom the child would spend most of his time.

Several recently enacted and proposed statutes in other jurisdictions have utilized these factors in creating procedures to govern child custody cases.[33] Colorado's procedure in contested child custody cases could be a model for any revision in Louisiana law. It states that no party because of sex shall be presumed to be better able than another to serve the interests of the child.[34] Colorado requires an investigation by the court's probation office or the local welfare department into the ability of each party to fulfill the needs of the child.[35] The investigators make findings of fact and file a report with the court, but do not make recommendations as to which party should be awarded custody.[36] The court, however, uses this report as an aid in its decision.[37]

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litem to represent the children if the court has reason for special concern for their future welfare. The guardian's fee shall be paid by either or both parties or the county as directed by the court. *See* WIS. STAT. ANN. § 247.045 (1971).

30. Although financial resources of the parent is a factor, child support provisions would diminish the importance of such a finding.

31. In many families, the child may be affiliated with one religion while one of the parents prefers another or none at all. If religion is important to the child's development and personal happiness, the separation from the parent who encourages his religious participation may lead to the emotional distress of the child.

32. Comment, 7 DUQUESNE L. REV. 262, 265 (1968-69).

33. COL. R.S. 46-1-24 (1971); ME. R.S.A. 19:751 (1967); Proposed Statute, Proceedings of the Family Law Section of the American Bar Association 38 (1963). *See* Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC. REV. 167 (1969-70); Leavell, *Custody Disputes and the Proposed Model Act*, 2 GA. L. REV. 162 (1968).

34. COL. REV. STAT. ANN. § 46-1-5(7) (1967).

35. *Id.*

36. *Id.*

37. *Id.* Similarly, Louisiana judges could utilitize their juvenile officers as independent investigators who would file a report which would include hearsay (*e.g.*, from neighbors) as well as facts regarding the home conditions of the parties and child's school attendance and records. The report could be subject to rebuttal and could be placed in the record.

In the interests of environmental stability,[38] any law which is enacted in Louisiana should continue to provide for a mandatory determination of custody by the judge at the time of judicial separation or divorce and should discourage further litigation.[39] Actually, if a more child-oriented custody scheme is enacted and used to determine who shall initially be granted custody, much less litigation on that issue would follow. Furthermore, the presumption that the original custodian should be continued is one preference which is valid and has its basis in the welfare of the children.[40]

The present statutory and jurisprudential scheme which gives preference to the mother in child custody cases is not in the best interest of the children. This presumption furthers the traditional philosophy that only a woman can appropriately rear children and is a judicial tool to conveniently administer these cases. The grant of

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38. This is desirable because evidence reveals that continuity of parental care and environmental stability are more important to the child than the individual attributes of the parent and his particular desires. Furthermore, subsequent litigation is often traumatic for the child. Justice Barham's dissent in *Estes* expresses his concern over this issue: "Children should not be uprooted and removed from a loving and secure environment afforded by one parent unless there are exceptional and substantial reasons advantageous to the welfare of the children for making the change. In deciding what are the good and substantial reasons for change of child custody, if there is any legal advantage with either parent it is with the one in whose custody the children have been for some time." Estes v. Estes, 261 La. 20, 21, 258 So. 2d 857, 861 (1972) (dissenting opinion).

39. Civil Code article 157 presently provides that the person awarded custody is the tutor, and that the judge "shall" make a custody determination regardless of whether it is contested. Thus, any subsequent attempt at a change in custody should actually be a divestiture of tutorship proceedings which requires especially close scrutiny by the court. Removal of a tutor is based upon his disqualification under Code of Civil Procedure articles 4231 or 4234 which include such reasons as mental incompetency, physical incapacity, bad moral character, abandonment of the child, failure or incapacity to discharge the duties of a tutor, mismanagement of the minor's property, or failure to perform any duty imposed by the court or by law. Furthermore, the burden is on the tutor to show why he should not be removed from office.

Presently, there is a debate between Justice Barham of the Louisiana supreme court (*see* Griffith v. Roy, 263 La. 712, 269 So. 2d 217 (1972)) and Professor Robert Pascal (*see* 16 LA. B.J. 267 (1968)) on the issue of whether a natural tutor must be appointed prior to assuming his position. Professor Pascal asserts article 157 of the Civil Code to argue that the natural tutor assumes his position, without appointment as such, upon being granted child custody; thus, any subsequent proceedings concerning custody are more properly considered tutorship proceedings and require application of the appropriate tutorial provisions in the Code of Civil Procedure. Justice Barham contends that the natural tutor must be appointed; thus, custody and natural tutorship are separate and the jurisprudential "change in custody" procedures will govern custody determinations after the original award.

40. Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC. REV. 167 (1969).

custody to one parent or the other could very well be the most important decision in a child's life. Due to the present system's failure in such a crucial determination to meet the needs of the child, reevaluation and revision of child custody procedures is in order by both the courts and the legislature.

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