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Maternal Preference and the Double Burden: Best Interest of Whom?

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this extent, clarification in this area of the law is essential.

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MATERNAL PREFERENCE AND THE DOUBLE BURDEN: BEST INTEREST OF WHOM?

Three years after the plaintiff and the defendant were married, the plaintiff was granted a separation from bed and board based on abandonment. He agreed to an award of custody of his eighteen-month-old daughter to the defendant. After a year and sixty days from the judgment of separation, the defendant was awarded a divorce, but was denied custody of her child after a showing that she had been living with another man in the presence of the child for four months. Three months later, after the defendant married her lover, she brought suit and was granted custody by the trial court. The Third Circuit Court of Appeal affirmed, and *held* that the mother was not required to meet the "double burden" rule and that under the maternal preference rule she was entitled to custody. *Bushnell v. Bushnell*, 348 So. 2d 1315 (La. App. 3d Cir. 1977).

Louisiana Civil Code articles 146 and 157 respectively control child custody awards pending suit for separation or divorce[1] and after suit for separation or divorce.[2] Article 146 dictates that provisional custody

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labeling of the proceeding as civil or criminal. A lynchpin of the *Janis* and *Calandra* decisions of the Burger Court was that the purpose of deterrence for which the exclusionary rule was formulated is not sufficiently enhanced to overcome the need to permit the introduction of otherwise trustworthy evidence where the government's abuse of the seizure power against a defendant would result merely in a civil penalty. On the whole, the view espoused in *One Plymouth Sedan* is far less predictable but exceedingly more just. See note 14, *supra*.

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 undecided, 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.
2. LA. CIV. CODE art. 157 (as it appeared prior to its amendment by Act 48 of 1977):
   In all cases of separation and of divorce the 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

pending suit should be awarded to the mother unless strong reasons exist for not doing so. Before its amendment, article 157 directed judges to grant custody to the party who obtained the separation or divorce unless, for the advantage of the children, custody should be given to the other party. A 1977 amendment to that article eliminated the reference to the party obtaining the separation or divorcé, making clear the paramount importance placed on the child's interest.[3] This amendment simply codified the principle followed by practically all Louisiana courts in child custody cases. However, in some instances, the courts have reached decisions seemingly at odds with the child's best interest by using what is commonly known as the maternal preference rule.

The maternal preference rule has been articulated in many ways,[4] but generally stated the rule is that the best interest and welfare of the child is served by granting custody to the mother. Thus, the maternal preference rule is intended to serve as an aid to courts in determining the best interest and welfare of the child, a factor which Louisiana[5] and other jurisdictions[6] have long recognized as the paramount consideration in awarding child custody.

The rule seems to have originated[7] in the Louisiana jurisprudence

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to the care of the other party. The party under whose care a child or children is placed, or to whose care a child or children has been entrusted, shall of right become natural tutor or tutrix of said child or children to the same extent and with the same effect as if the other party had died.

3. 1977 La. Acts. No. 448. Article 157(A) now reads:

In all cases of separation and divorce, permanent custody of the child or children shall be granted to the husband or the wife, in accordance with the best interest of the child or children. Such custody hearing shall be held in private chambers of the judge. In no event shall the pendente lite custody rights presently existing be affected by this Act. The party under whose care the child or children is placed, or to whose care the child or children has been entrusted, shall of right become natural tutor or tutrix of said child or children to the same extent and with the same effect as if the other party had died.

In passing this amendment, the intent of the legislature may have been to do away with the maternal preference rule because the legislature could have easily written the rule into the Act if it had wished to sanction its use. However, it can also be argued that had the legislature wanted to discard the rule, it could have specifically done so.

4. Welch v. Welch, 307 So. 2d 737 (La. App. 2d Cir. 1975).

5. *E.g.*, Messner v. Messner, 240 La. 252, 122 So. 2d 90 (1960); Drouin v. Hildenbrand, 235 La. 810, 105 So. 2d 532 (1958); Boatner v. Boatner, 235 La. 1, 102 So. 2d 472 (1958).

6. "In all matters where children are involved courts have said with tedious regularity that the welfare of the child is the supreme goal to be obtained. No principle is more untiringly recited." Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101, 103 (1962).

7. Comment, *The Father's Right To Child Custody in Interparental Disputes*, 49 TUL. L. REV. 189, 192 (1974).

with the cases of *Black v. Black*[8] and *White v. Broussard*[9] and since then has become firmly established in Louisiana law.[10] The cases reveal that the maternal preference rule is so strong that the mother will not lose its advantage even if she is guilty of adultery.[11] However, the courts have carefully marked the point beyond which the mother may not go and still enjoy the benefits of the rule. For example, the father has been awarded custody when the mother has adopted a highly emotional and irrational method of disciplining the children,[12] or when the mother has frequently entertained her paramour at home in the children's presence.[13] Thus, as a general rule, the father will be awarded custody when the mother is guilty of open and public indiscretions in defiance of generally accepted moral principles and in disregard of the embarrassment and injuries which might be sustained by the children.[14] Nevertheless, in some cases, Louisiana courts often seem to give more consideration to the maternal preference rule than to the child's environmental stability.[15]

Despite its strong judicial acceptance, the maternal preference rule recently has been the object of severe criticism.[16] One of the strongest criticisms levelled against the rule is that although its premise may have been valid at one time, it is simply no longer supportable in light of the changing roles of married couples.[17] In the past, few mothers were re-

8. 205 La. 861, 18 So. 2d 321 (1944).

9. 206 La. 25, 18 So. 2d 641 (1944).

10. *E.g.*, Tiffee v. Tiffee, 254 La. 381, 223 So. 2d 840 (1969); Sharp v. Sharp, 228 La. 126, 81 So. 2d 833 (1955); Morrow v. Morrow, 218 So. 2d 393 (La. App. 2d Cir. 1969).

11. *E.g.*, Estopinal v. Estopinal, 223 La. 485, 66 So. 2d 311 (1953); LeGrand v. LeGrand, 295 So. 2d 55 (La. App. 4th Cir. 1974); Brown v. Brown, 180 So. 2d 106 (La. App. 2d Cir. 1965).

12. Nethken v. Nethken, 307 So. 2d 563 (La. 1975).

13. Tuggle v. Tuggle, 235 So. 2d 166 (La. App. 2d Cir. 1970); Morris v. Morris, 152 So. 2d 291 (La. App. 1st Cir. 1963).

14. Parker v. Parker, 304 So. 2d 681 (La. App. 3d Cir. 1974).

15. *See* Estes v. Estes, 261 La. 20, 258 So. 2d 857 (1972); Nieto v. Nieto, 276 So. 2d 362 (La. App. 4th Cir. 1973); Tullier v. Tullier, 140 So. 2d 916 (La. App. 4th Cir. 1962).

16. "The assumption that, other things being equal, maternal custody was best, has been justly criticized as incongruous with the best interest of the child theory and out of touch with contemporary thought." Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 52 (1972).

17. "If equal consideration were given to these emerging roles of the modern wife and mother in our society, it might be discovered that the mother in a custody matter may no longer be confined to traditional household and child rearing duties consistent with the notion of motherhood." Walker, *Measuring the Child's Best Interest—A Study of Incomplete Considerations*, 44 DEN. L.J. 132, 139 (1976). "However, the urban family today is a different unit, economically and sociologically, from its rural counterpart of one hundred years ago. It can no longer be stated that a woman's sole occupation is to care for children." Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAM.

quired to work in order to meet the needs of their family, and thus were able to spend more time at home with their children. The child, having spent more time with its mother, would naturally develop a preference for her. Generally, on divorce or separation, the interest and welfare of the child were best served by granting custody to the mother. However, in a society where more and more young mothers find it necessary or useful to work to supplement the husband's income, the mother may have no more time to spend with the child than the father.[18] Applying the maternal preference rule under these circumstances deprives the father of his right to custody without serving the ostensible purpose of the rule. In addition, many writers today agree that the rule was always based more on traditional prejudices[19] than on scientific evidence.[20] If these criticisms are valid, the maternal preference rule does not protect the best interest of the child.

One of the most recent and perhaps most serious criticisms of the rule is that it may be unconstitutional.[21] In *Reed v. Reed*,[22] the United States Supreme Court held that a provision of Iowa's probate statutes was unconstitutional because it gave men preference over women as estate administrators. According to the Court, such a preference violated the fourteenth amendment equal protection clause by providing dissimi-

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L. 21, 26 (1965). "Yet, when we investigate the reasons for the presumption in favor of motherhood, we see that in today's society, it loses some of its validity." Behles & Behles, *Equal Rights In Divorce and Separation*, 3 N.M. L. REV. 118, 132 (1973). *See also* Estes v. Estes, 261 La. 20, 34, 258 So. 2d 857, 862 (1972) (Barham, J., dissenting).

18. Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 28 (1965).

19. For example, it has been asserted that motherly love is a dominant trait in all women which surpasses the paternal affection for the common offspring and that in general, a child needs a mother's care even more than the father's. Freeland v. Freeland, 92 Wash. 482, 159 P. 698 (1916); *see also* Roth, *The Tender Years Presumption In Child Custody Cases*, 15 J. FAM. L. 423, 436 (1977).

20. "The assumption that the mother is a better custodian was and is wrong from an historical, economic, sociological, and philosophical point of view." Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 53 (1972). "To define best interest in terms of maternal custody not only forecloses further inquiry into a consideration of which parent will best protect the child's welfare, but it also ignores the empirical data demonstrating that 'mothering' is a function independent of the sex of the individual performing it." Comment, *The Tender Years Presumption: Do The Children Bear the Burden?*, 21 S.D. L. REV. 332, 334 (1976). "A considerable amount of research supports the proposition that what a child needs during the 'tender' years is a certain quality of affectionate relationship with someone *in loco parentis* and this can be provided by the father as well as the mother." Roth, *The Tender Years Presumption In Child Custody Cases*, 15 J. FAM. L. 423, 449 (1977).

21. Comment, *The Tender Years Presumption: Do The Children Bear The Burden?*, 21 S.D.L. REV. 332 (1976).

22. 404 U.S. 71 (1971).

lar treatment for men and women similarly situated.[23] The approach taken by the Court in *Reed* implied that some special sensitivity to sex as a classifying factor entered into the analysis.[24] In *Frontiero v. Richardson*,[25] a plurality of the Court concluded that "classifications based on sex, like classifications based on race, alienage, or national origin are inherently suspect and must therefore be subjected to strict judicial scrutiny."[26]

Recent decisions of the Supreme Court, however, indicate that its members disagree over the extent to which, if at all, sex is a suspect classification. Justice Douglas, who joined the plurality in *Frontiero*, altered his position on the subject in *Kahn v. Shevin*[27] and seemed to imply that where the classification based on sex is "benign"—*i.e.*, discriminates in favor of a class that has been and remains subject to discrimination—such classification will not be subject to strict judicial scrutiny.[28] In dissenting opinions, Justices Brennan and Marshall argued that the Court should stand by the language in *Frontiero* without reservation. However, in *Weinberger v. Wiesenfeld*,[29] a case factually similar to *Frontiero*, Justice Brennan's *sub rosa* strict scrutiny approach was criticized by concurring opinions.[30]

The clearest statement of the test to be used concerning gender based classifications was given in *Craig v. Boren*.[31] There, Justice Brennan, writing for the majority, said that to withstand constitutional challenge, classifications based on gender "must serve important governmental objectives and must be substantially related to achieve-

23. *Id.* at 74.

24. Gunther, *Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972).

25. 411 U.S. 677 (1973).

26. *Id.* at 682.

27. 416 U.S. 351 (1974).

28. In *Kahn*, the Court upheld a Florida statute which allowed widows a $500 property tax exemption but provided no analogous exemption for widowers. *Cf.* Schlesinger v. Ballard, 419 U.S. 498 (1975), where the Court held that a statute requiring dismissal of male naval officers who had not been promoted after nine years of active duty and of female officers after thirteen years of active duty was not a denial of equal protection to male officers. The Court noted that women officers did not have the same opportunities for promotion as did their male counterparts.

29. 420 U.S. 636 (1975).

30. *Id.* at 654, 655. In *Weinberger*, the Court struck down a Social Security provision which conferred payments based on the earnings of a deceased husband and father upon his widow and minor children but which conferred payments based on the earnings of a deceased wife and mother only upon her minor children since it was based on the assumption that the earnings of male workers were vital while those of female workers were not.

31. 429 U.S. 190 (1976).

ment of those objectives."[32] Although this standard does not represent a strict scrutiny approach, it does represent an intermediate test[33] which is more critical than the "minimum rationality" test used by the Court to examine social welfare or economic legislation where the issue of disfavored classifications is not involved.[34]

Recent cases indicate how the Supreme Court will apply the *Boren* test. The statutes presented for review in *Califano v. Goldfarb*[35] and in *Califano v. Webster*[36] were similar in many ways.[37] In *Goldfarb*, the Court was faced with a Social Security Act provision whereby survivor's benefits were payable to a widower only if he had been receiving at least half of his support from his deceased wife, while such benefits based on the earnings of a deceased husband were payable to his widow regardless of dependency. The statute at issue in *Webster* was also a Social Security provision which contained a federal formula for computation of monthly old-age benefits. Application of the formula resulted in uniformly higher benefits for retired female wage earners than for males similarly situated.

However, the Court upheld the *Webster* statute and struck down the statute in *Goldfarb*. Apparently, the difference was that the *Webster* statute served the permissible governmental objective of redressing society's longstanding disparate treatment of women[38] while the *Goldfarb* statute was based on "archaic and overbroad generalizations" because of the assumption that wives are usually dependent.[39] Thus, according to one writer, the differential treatment of men and women is constitutional only when it is demonstrable that the difference is not the accidental consequence of a tradition-bound way of thinking about males and females, but is intentionally and reasonably designed to effect a needed

32. *Id.* at 197.

33. *Id.* at 210-228. Justice Powell concurred in the decision because he felt that under the test of *Reed v. Reed*, the statute in *Boren* did not bear a fair and substantial relation to the object of the legislation. Justice Stewart also concurred, apparently on the basis of *Reed*. In dissenting opinions, Justices Burger and Rehnquist criticized the majority opinion for applying an intermediate constitutional test to gender based classifications without a constitutional basis for doing so.

34. A similar intermediate level of scrutiny has been used by the Court concerning the rights of illegitimates. *See* Trimble v. Gordon, 430 U.S. 762 (1977); Matthews v. Lucas, 427 U.S. 495 (1976).

35. 430 U.S. 199 (1977).

36. 430 U.S. 313 (1977).

37. *Id.* at 319.

38. *Id.*

39. Califano v. Goldfarb, 430 U.S. at 211.

remedy.[40]

Application of this standard to the maternal preference rule results in the conclusion that the rule is an unconstitutional differentiation between males and females.[41] It is doubtful that one could successfully argue that the rule is not the result of a tradition-bound way of thinking about males and females but is instead a method of effecting a needed remedy in favor of women. Thus, under the *Boren* test, although serving the best interest of the child is without a doubt an important governmental objective, socio-economic changes in the institution of the family, as well as scientific evidence on the function of "mothering," point to the conclusion that the maternal preference rule does not serve this objective.

Like the maternal preference rule, the double burden rule was formed in an effort to protect the interest of the child in a custody dispute.[42] The rule was first enunciated in the case of *Decker v. Landry*[43] and provides that the party seeking the modification of an initial custody decree must prove that the conditions under which the child is living are detrimental to his interests and that the petitioning party can and will provide a good home and a better environment if he or she is given custody.[44]

The double burden rule is supported by important policy considerations, not the least of which is the preservation of stability in the child's environment.[45] Such stability has long been recognized as necessary to

40. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1070 (1978).

41. An obstacle in the way of declaring the rule unconstitutional is that the rule is not a product of legislative action but is instead a judicially created presumption. This, however, has not prevented at least one court from declaring the rule unconstitutional. *See* State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973). It should be noted that a Louisiana court has recently held that the maternal preference rule as applied under article 157 before its amendment does not violate article I, section 3 of the Louisiana Constitution of 1974. *See* Broussard v. Broussard, 320 So. 2d 236 (La. App. 3d Cir. 1975). Also, three Pennsylvania justices have called the rule offensive to the concept of equality of the sexes which that state has adopted as a constitutional principle through the equal rights amendment. *See* Commonwealth *ex rel.* Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977).

42. Decker v. Landry, 227 La. 603, 80 So. 2d 91 (1955).

43. *Id.*

44. *Id.* at 604, 80 So. 2d at 92.

45. "Any psychiatrist or psychologist, experienced parent, grandparent, or teacher will state that when there has already been one upheaval in the child's life due to divorce or some other misfortune, the first and foremost requirement for the child's health and proper growth is stability, security, and continuity." Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1208 (1969).

the ordinary development of the child.[46] Even if custody is initially awarded to the less suitable parent, it may be better for the child to remain there than to be transferred from one parent to another.[47] The double burden rule also serves to prevent needless or extensive litigation and continued bickering which can have damaging effects on both the custodial parent and the child.[48] Stability of the child's environment and finality of the decree are so important that many writers suggest that a time limit be set before the decree can be challenged,[49] and then only

46. "A growing child's need for stability of environment and constancy of affection, especially when subjected to the trauma of a disintegrated home seems today a well-accepted fact, verifying old truths gathered from long experiences of mankind." *Id.* at 1209. "Ordinarily, the best psychological interests of the child require continuity and consistency in the parent-child relationship." Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFF. L. REV. 1, 12 (1972). "The most serious effect of these vacillating and dilatory tactics is the effect they have on the children. As will be noted, one of the critical aspects of a child's development is the need for stability in order to develop a sense of identity. When a child is kept suspended, never quite knowing what will happen to him next, he must likewise suspend the shaping of his personality. This is a devastating result and probably represents one of the greatest risks which current procedures pose for children." Watson, *Children of Armageddon: Problems of Child Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 64 (1969). "In the view of most child psychiatrists, stability of the environment is far more crucial than its precise nature and content. The one thing with which children have most difficulty coping is unpredictable variation, and this is especially critical between the ages of two and adolescence." *Id.* at 71.

47. "If he is continuously being transferred from one parent to another by conflicting court decrees, he may be a great deal worse off than if left with one parent, even though as an original proposition some better provision could have been made for him." Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1209 (1969). "There is some evidence that continuity of parental care may be more important to the child than the individual attributes of the parent who provides care . . . ." Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC. REV. 167, 208 (1969). "Barring neglect, a wrong but permanent decision probably serves the best interest of a child better than a decision subject to continuous review, scrutiny, and a continuation of battles between the litigant parents." Greenbaum, *In the Best Interest of the Child*, 50 FLA. B.J. 532, 533 (1976).

48. "Another characteristic of current dispositional procedures which may be criticized is the fact that any custodial disposition may be freely challenged and disrupted. This has serious and detrimental effects on the custodian who must remain ever alert to defend against such legal onslaughts. Parents lose spontaneity with their children when they feel they must constantly anticipate the court's reaction to their activities with their children. Since spontaneity in relationships between parents and children is highly important, the end result of this situation is detrimental to the children. Of course there is also a high economic cost to these ongoing defensive maneuvers." Watson, *Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 63 (1969).

49. "Generally, post-decretal changes should be discouraged. The optimal situation would be that there would not be post-decretal changes. Since this is unreal, there should

under compelling circumstances.[50] However, one disadvantage of the double burden rule is that it may force the non-custodial parent to attack the custodial parent personally in court in order to prove that the child's environment is deleterious to his welfare.

After *Decker*, it seemed as if most of the circuits would follow the double burden rule.[51] However, members of the Third Circuit were not completely satisfied with the rule. The dissenting opinion of Judge Hood in *Gary v. Gary*[52] stated that the double burden rule should not be used to prevent a mother from gaining custody of her children from their father merely because the mother, at the time of the initial award, was financially unable to care for the children. Apparently the dissent would have allowed the mother to benefit from the maternal preference rule and gain custody of the children even after the children had lived with the father continuously for three years. A similar criticism was voiced in a concurring opinion in *Wells v. Wells*.[53] Judge Tate found fault with the rule because it made it almost impossible for the mother to regain custody of her children if a default judgment was rendered against her because she was unable to afford a lawyer.[54]

Judge Tate reiterated this criticism in his concurrence in *Craft v. Craft*.[55] Its basis was simply that the double burden rule was a rigid and inflexible rule which prevented the mother from exercising her maternal preference in certain situations. This criticism, however, is no longer valid in light of the recent cases restricting the rule's application

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be a specific minimal period of time before the court allows any question as to change of custody. Three years seems to be a reasonable period of time barring emergencies." Greenbaum, *In the Best Interest of the Child*, 50 FLA. B.J. 532, 535 (1976).

50. "A uniform act, therefore, should include a provision that specifically prohibits modification petitions for a given period (one or two years at the least) following the initial decree in the absence of a showing (by affidavit only) of extraordinary circumstances—e.g., that the child's physical health is seriously and immediately endangered by his present circumstances." Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC. REV. 167, 209 (1969).

51. Wells v. Wells, 180 So. 2d 580 (La. App. 3d Cir. 1965); Poitevent v. Poitevent, 152 So. 2d 256 (La. App. 4th Cir. 1963); Gary v. Gary, 143 So. 2d 411 (La. App. 3d Cir. 1962); Hanks v. Hanks, 138 So. 2d 19 (La. App. 1st Cir. 1962); Gentry v. Gentry, 136 So. 2d 418 (La. App. 1st Cir. 1961).

52. 143 So. 2d 411 (La. App. 3d Cir. 1962).

53. 180 So. 2d 580 (La. App. 3d Cir. 1965).

54. *Id.* at 583 (Tate, J., concurring). Judge Tate's opinion did not rest entirely upon the maternal preference rule. An equal if not stronger basis for the decision was fairness to the mother. Judge Tate could have been using the maternal preference rule in an attempt to give the mother her day in court.

55. 184 So. 2d 758, 760 (La. App. 3d Cir. 1966) (Tate, J., concurring).

to situations where the original judgment was a considered decree.[56]

Judge Tate later received another opportunity to write about the rule, speaking this time for a majority of the Louisiana Supreme Court. In *Fulco v. Fulco*,[57] he attempted to clarify Louisiana custody law by listing four of its major tenets.[58] Instead of clarifying the law, however, the ambiguous language of the decision has only led to conflicting opinions over whether the court intended to discard the double burden rule.[59] Cases from the Third Circuit in which the double burden issue has arisen

56. Lemons v. Lemons, 325 So. 2d 734 (La. App. 1st Cir. 1976); Southern v. Southern, 308 So. 2d 424 (La. App. 3d Cir. 1975); Swann v. Young, 311 So. 2d 617 (La. App. 3d Cir. 1975). A considered decree is a trial of the issue and a decision thereon applying pertinent principles of law to the facts adduced. Gulino v. Gulino, 303 So. 2d 299 (La. App. 1st Cir. 1974). It seems that the essential ingredient of the considered decree is a proceeding at which evidence is taken in regard to the parties' fitness to have the care, custody, and control of the child or children. Stevens v. Stevens, 340 So. 2d 584 (La. App. 1st Cir. 1976); Partin v. Partin, 339 So. 2d 450 (La. App. 1st Cir. 1976). Some courts have held that the double burden rule does not apply when the award of custody is made to one party based on the supervision of the child by third parties where both the mother and father have abandoned their parental responsibility. DeCelle v. DeCelle, 313 So. 2d 634 (La. App. 2d Cir. 1975).

57. 259 La. 1122, 254 So. 2d 603 (1971).

58. In this regard, we believe the following legal principles are applicable:

(1) The paramount consideration in determining to whom custody should be granted is always the welfare of the children. . . .

(2) The general rule is that it is in the best interest of the children of the marriage to grant custody to the mother, especially when they are of tender years. Such paramount right of the mother to custody should not be denied unless she is morally unfit or otherwise unsuitable, and it is only in exceptional cases that the better interest of the children is served by changing their custody from the mother to the father. . . .

(3) When the trial court has made a considered decree of permanent custody in the light of the above principles, even though such custody is subject to modification at any time when a change of conditions demands it, the party seeking the change bears a heavy burden of proving that the continuation of the present custody is so deleterious to the children as to justify removing them from the environment to which they are accustomed. . . .

(4) Upon appellate review, the determination of the trial judge in child custody matters is entitled to great weight. . . . His discretion on the issue will not be disturbed on review in the absence of a clear showing of abuse thereof.

259 La. at 1127-29, 254 So. 2d at 605.

59. Although the *Fulco* decision neither specifically adopts nor discards the double burden rule, the most reasonable interpretation of the decision seems to be that the first and second principles are to apply only to initial custody proceedings and the third principle is to apply to custody modification proceedings. Under the third principle, the person seeking modification must prove that the child's environment is so detrimental that removal from that environment to which the child may have become accustomed is justified. This is the position taken by the dissent in *Bushnell*. 348 So. 2d at 1321 (Domengeaux, J., dissenting).

since *Fulco* show that the judges are split in their opinions of *Fulco's* effect on the rule.[60] The latest cases[61] from the Third Circuit, of which the instant case is one, take the position that *Fulco* discarded the double burden rule.

The decision in the instant case, just as other recent decisions, criticized the double burden rule for its rigidity and inflexibility. The *Bushnell* court took the position that the double burden rule had been discarded by *Fulco* and allowed the mother who had once been determined unfit to use the maternal preference rule to gain custody of her child from the father. The court found that the child's environment with the father was in no way detrimental. However, the *Bushnell* court reasoned that, based on the maternal preference rule, the mere separation of the child from its mother was a sufficiently detrimental factor to justify placing the child in her custody.

In light of prior jurisprudence, the court cannot be faulted for relying so heavily on the maternal preference rule. As mentioned previously, it is one of the strongest presumptions in Louisiana law. Furthermore, the determination of whether the rule is to apply in custody modification proceedings depends on one's interpretation of the *Fulco* decision. However, the *Bushnell* court completely disregarded the recent criticisms of the maternal preference rule; indeed, the court's reliance on the rule, in light of the facts of the case, could very well result in the bouncing back and forth of a child between parents "like a tennis ball," in the words of Judge Domengeaux's dissenting opinion.[62] If the courts are allowed to use the maternal preference rule without the limitations placed on it by the double burden rule, situations similar to the one in *Bushnell* are likely to become more and more common. Mothers, encouraged by the formidable power of the maternal preference rule, will not hesitate to sue for a change of custody when the risk of losing has been minimized. This would be unfortunate, not only because the stability of the child's environment is of paramount concern, but also because the courts are already flooded with such litigation.

The conclusion by the *Bushnell* court that *Fulco* discarded the double burden rule may not be entirely correct. According to *Fulco*, the party seeking to change custody must bear a "heavy burden" of proving "that the continuation of present custody is so deleterious to the child as to justify removing him from the environment to which he has become

60. Grimes v. Johnson, 323 So. 2d 150 (La. App. 3d Cir. 1975); Hebert v. Mestayer, 251 So. 2d 66 (La. App. 3d Cir. 1971); King v. King, 245 So. 2d 560 (La. App. 3d Cir. 1971).

61. *See* Bourque v. Leger, 322 So. 2d 784 (La. App. 3d Cir. 1975).

62. 348 So. 2d at 1321 (Domengeaux, J., dissenting).

accustomed." This "heavy burden" looks very much like the first step of the double burden, and it can be assumed that the courts will refuse to change custody unless the petitioning party can also provide a better environment. Therefore, it can reasonably be said that to this extent, *Fulco* did not discard the double burden rule.[63]

Bushnell serves to illustrate the danger involved when the courts attempt to decide important issues with the use of unfounded presumptions and rigidly applied rules. We should recognize from the jurisprudence that there are no short cuts in child custody cases. The best interest of the child cannot be consistently obtained through the strict application of rules. The double burden rule and the maternal preference rule should be discarded[64] in favor of specifically worded guidelines which would enable the courts to weigh and balance those factors which most often affect the determination of child custody cases.[65] These guidelines could be incorporated into legislation, or the supreme court, as it attempted to in *Fulco*, could list these guidelines to be followed by the courts.

Such guidelines could be used in provisional custody proceedings, permanent custody proceedings, and in proceedings to modify custody. These guidelines would also allow a party to predict within reason whether his case is strong enough to obtain custody. Furthermore, if such guidelines include consideration of the amount of time the child has lived in a stable environment, then the parties will be reluctant to enter useless proceedings when one party has had custody for a prolonged period of time.[66]

63. The court in the instant case seems to have ignored the language in *Fulco* which seemed to specify what the "heavy burden" was.

64. FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1977): "The court shall award custody and visitation rights of minor children of the parties as a part of proceeding for dissolution of marriage in accordance with the best interests of the child and in accordance with the Uniform Child Custody Jurisdiction Act. Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody." *See also* WIS. STAT. ANN. § 247.24(3) (West Supp. 1978): "In determining the parent with whom a child shall remain, the court shall consider all facts in the best interest of the child and shall not prefer one parent over the other solely on the basis of the sex of the parent."

65. FLA. STAT. ANN. § 61.13 (West Supp. 1977); MICH. STAT. ANN. § 25.312(3) (Supp. 1974); *See also* UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1970).

66. "It has been asserted that a third of all divorces involving children are followed by further litigation regarding them, and if such is the case, obviously the law with regard to modification is largely responsible." Freed & Foster, *The Shuffled Child and Divorce Court*, 10 TRIAL 26, 34 (1974); *See also* Freed & Foster, *Child Custody Part II*, 39 N.Y.U.L. REV. 615 (1964).

Another advantage of a precisely worded set of guidelines would be that they would take the focus of the courts away from the fitness of the parties and place it where it should be, on the best interest of the child. This would also prevent the petitioning parent from being forced to prove the other's unfitness. Louisiana courts should also follow the lead taken by other courts in further employing the services of experts in the field of human behavior in order to determine more realistically what is in fact the child's best interest.[67]

Furthermore, the guidelines would resolve the bickering[68] between the circuits involving the application of the maternal preference and the double burden rules. Although the conflict may simply be a matter of semantics, as one judge has suggested,[69] its final determination would permit the courts to deal more completely with each individual child's best interest, with no need to take sides in a controversy over jurisprudential interpretation.

Decisions concerning child custody are perhaps the most difficult that a judge must make.[70] However, the job should not be made easier by mechanically applied formulas which sacrifice the best interest of the child to judicial economy. With so much at stake, the courts can ill afford to make decisions based on out-of-date presumptions and inflexible rules.

Samuel N. Poole, Jr.

HOME RULE AND LOCAL ORDINANCES DEFINING GAMBLING

Defendant was convicted in Shreveport city court of violating a mu-

67. "[I]t seems clear that the trend particularly among the more enlightened courts is to ignore the rigid absolutes and legalisms of the past and adhere with increasing frequency to the trend toward reliance on the social scientists and expert testimony of psychologists, psychiatrists, social investigators and other experts in the field of human behavior." Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 68 (1972).

68. There are no signs that the circuits are coming closer to an agreement concerning the use of the double burden rule. In fact, the very opposite seems to be the state of affairs at this time. *See* Languirand v. Languirand, 350 So. 2d 973 (La. App. 2d Cir. 1977).

69. Bushnell v. Bushnell, 348 So. 2d at 1322 (Domengeaux, J., dissenting).

70. "[A] judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders." B. BOTEIN, TRIAL JUDGE 273 (1952).