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I. Introduction

This article summarizes the legal considerations that a court takes into account as it strives toward a just determination of the best interests of the child in a contested custody proceeding involving the child's natural parents. As the title suggests, the modern child custody contest usually entails more complex facets than were mentioned in the oft-quoted Old Testament account of King Solomon's award of the custody of an infant to its real mother.[1]

Although these additional considerations are designed to assist the tribunal in arriving at a correct award of custody, they do not lessen the dilemma that faces the court as it carefully weighs each case prior to issuing an order favoring one natural parent over the other. This judge's agony arises because, unlike many types of litigation that can be approached with considerable detachment, the child custody decision confronts the judge with considerations that cannot easily be compiled and coordinated. The judge must make a decision that will have an enormous influence on the impressionable, developing child during his or her formative years and may profoundly affect the lives of the parents.

To properly develop the theme of this article, the discussion of a court's analysis of child custody considerations will be preceded by a short history of the evolution of today's child custody law and followed by a brief projection of the law's future development.

II. Evolution of the Law of Custody

After the advent of Pennsylvania's Equal Rights Amendment, many of the traditional legal presumptions favoring one spouse over the other

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1. 1 Kings 3:23-27 (R.S.V.).

came under serious scrutiny. As a result of the challenges that were brought before our courts, many inequitable presumptions have been discarded and replaced by presumptions that apply uniformly to both spouses in domestic relations cases.[2]

The current enlightened approach toward equality of the sexes has become the law, however, only after a long history of sex related presumptions. During the growth of the Roman empire the private law concept known as *patria potestas* (paternal power) blossomed. This doctrine gave the father an absolute right to control his children.[3] Prior to the flourishing of *patria potestas* in the Roman era, the concept of paternal control of children was embedded in the laws of the Persian, Egyptian, Greek, and Gallic empires.[4]

The father's control over his children continued beyond the demise of the Roman empire and was incorporated into feudal English law. Since the English law during the feudal period was primarily oriented toward assuring an uninterrupted passage of title to property, child custody followed the parent who was entitled to convey or bequeath property. Thus, child custody rested almost exclusively with the male parent property owner without regard for the child's needs.[5]

It was not until 1660 that the English chancery courts inherited child custody jurisdiction from the Court of Wards and Liveries, established during the reign of Henry VIII.[6] Thereupon, the chancery courts began to exercise a power of *parens patriae*, which permitted them, as an arm of the sovereign, to assume a guardianship role over persons under a disability. Notwithstanding their newly found interest in the child as an individual rather than a chattel, the chancery courts' child custody awards continued to favor the father, since he was usually the more financially endowed parent in an age of male dominance over property.

This tendency toward male preference and female exclusion in child custody matters was formally reversed in 1837 when Parliament passed the British Infants' Custody Act.[7] This enactment entitled mothers of legitimate children to periodical visitation with children in the father's custody. The sponsor of the bill, Mr. Serjeant Talfourd, had convinced his fellows that it was inequitable to prevent the mother of a legitimate child from having contact with the child when mothers of illegitimate children were awarded custody by the common law.

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2. Butler v. Butler, 464 Pa. 522, 347 A.2d 477 (1975); Yohe v. Yohe, 466 Pa. 405, 353 A.2d 417 (1976).

3. *See* Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAMILY L.Q. 108, 109 (1971); Shepherd, *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 151, 161 (1974); Wilcox, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917, 920 (1976).

4. *See* Hudak, *The Plight of the Interstate Child in American Courts*, 9 AKRON L. REV. 257, 261 (1975).

5. *See* note 3 *supra*.

6. *See* Hudak, *supra* note 4, at 261.

7. *Id.*

Two years later, Parliament amended the British Infants' Custody Act to permit a mother to petition the court for custody. In addition, the amendment provided that if the subject child was under seven years of age the proper custodial spouse was presumed to be the mother.[8] Delivery of the child to the mother was enforceable by an action for contempt.

The abruptness of this statutory departure from the common law is accentuated by the fact that the statutory preference for the mother could only be defeated by proof that she had been convicted of adultery, either in an action for criminal conversation[9] brought by her husband, or by a similar conviction in an ecclesiastical court.[10] A further amendment in 1873 to the British Infants' Custody Act permitted the mother to retain possession of her children through their age of sixteen years.[11]

As statutorily modified, this concept of *parens patriae* was incorporated into the American law as a natural incident of our colonial ties with England. Its original purpose, the protection of tenurial rights and the exercise of the sovereign's prerogatives, clearly have no current relevance. It was through this *parens patriae* concept, though, that the modern concept of the "best interests" rule evolved.

Although many professional articles credit Justice Cardozo with first articulating the "best interests" rule in the 1925 decision of *Finlay v. Finlay,*[12] courts in several prior cases had employed the "best interests of the child" concept. In 1910, for example, the Colorado Supreme Court adopted language and rationale that referred to the interest and welfare of the child.[13] In 1897, the Supreme Court of Connecticut held, in a proceeding for child custody, that the principal consideration must be the best interests of the child.[14] In 1881, the Supreme Court of Kansas pronounced that the promotion of the child's welfare and interests was of paramount importance.[15] In 1824, a Rhode Island case alluded to the real, permanent interests of the infant.[16] The earliest reference in American case law to the child's best interests appears to be a Supreme Court of Pennsylvania decision by Chief Justice Tilghman in 1813, in which the court focused on the child's healthy environment rather than upon the mother's reputation.[17]

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8. British Infants Custody Act, 1839, 2 & 3 Vict., c. 54; also Hudak, *supra* note 4, at 262.

9. The Supreme Court of Pennsylvania recently abrogated the common law action of criminal conversation in Fadgen v. Lenkner, —Pa.—, 365 A.2d 147 (1976).

10. Hudak, *supra* note 4, at 262.

11. British Infants Custody Act of 1873, 36 & 37 Vict., c. 12.

12. 240 N.Y. 429, 148 N.E. 624 (1925).

13. Wilson v. Mitchell, 48 Colo. 454, 111 P. 21 (1910).

14. Kelsey v. Green, 69 Conn. 291, 37 A. 679 (1897).

15. Chapsky v. Wood, 26 Kan. 650, 40 Am. R. 321 (1881).

16. United States v. Green, 26 F. Cas. 30 (C.C.D.R.I. 1824).

17. Commonwealth v. Addicks, 5 Binn. 520 (Pa. 1813).

III. Ascertaining the Child's Best Interests

In all disputes between a father and mother contesting which parent, if either, should be entitled to a minor child's custody, subject to a right of visitation in the other, the court's paramount concern should be the best interests and permanent welfare of the child.[18] The child's welfare has been variously identified by appellate courts as the cardinal,[19] overriding,[20] and predominant consideration[21] to which the court must address itself. In comparision, all other factors in a custody proceeding assume a subordinate position.[22]

Incorporated into the "best interests" concept are considerations relating to the child's physical, intellectual, moral, and spiritual well being.[23] These considerations, in turn, require a court to focus upon such circumstances as the stability of the home life offered by those who contend for the child's custody, the companionship of siblings and other children, the attitudes and reasonableness of the contending parents, and, to a degree, the preference of the child and the possibility of the child's removal from the court's jurisdiction. Thus, the court is required to employ a totality of the circumstances test when it adjudicates a child custody matter. The individual ingredients of the totality of the circumstances concept will be discussed seriatim.

A. Parental Competence, Character, and Conduct

In a dispute between a father and a mother for the custody of their child, the court must focus upon the parents' fitness, since this will certainly have a significant impact upon the child's best interests and permanent welfare.[24] Although there is no fixed rule that a parent is entitled to custody merely because he or she is competent and of good moral character,[25] parental fitness serves as a valid and predictable indicator of the child's future environment. Thus, the issue relates primarily to present fitness and not past misconduct, although past be-

18. PA. STAT. ANN. tit. 48, § 91 (1965), as modified by PA. RULE CIV. PROC. 2250(5); Commonwealth *ex rel.* Tucker v. Salinger, — Pa. Super. Ct. —, 366 A.2d 286 (1976).

19. Commonwealth *ex rel.* Rogers v. Daven, 298 Pa. 416, 148 A. 524 (1930).

20. Commonwealth *ex rel.* Cleary v. Weaver, 188 Pa. Super. Ct. 197, 146 A.2d 374 (1958).

21. Commonwealth *ex rel.* Rainford v. Cirillo, 222 Pa. Super. Ct. 591, 296 A.2d 838 (1972).

22. *Id.*; Commonwealth *ex rel.* Carpenter v. Carpenter, 189 Pa. Super. Ct. 297, 150 A.2d 724 (1959); Commonwealth *ex rel.* Shaak v. Shaak, 171 Pa. Super. Ct. 122, 90 A.2d 270 (1952).

23. Commonwealth *ex rel.* Lovell v. Shaw, 202 Pa. Super. Ct. 339, 195 A.2d 878 (1963); Commonwealth *ex rel.* Bordlemay v. Bordlemay, 201 Pa. Super, Ct. 435, 193 A.2d 845 (1963).

24. PA. STAT. ANN. tit. 48, § 92 (1965); Davidyan v. Davidyan, 230 Pa. Super. Ct. 599, 327 A.2d 145 (1974).

25. Commonwealth *ex rel.* Boschert v. Cook, 122 Pa. Super. Ct. 397, 186 A. 229 (1936).

havior may be considered in determining a parent's probable future actions.[26]

Additionally, a determination must be made whether the parent's misconduct affected the welfare of the children.[27] If it did, and if it was persistent and flagrant, the parent's right to custody may be forfeited.[28] Improper conduct detrimental to a child's welfare may even negate the presumptive custodial right in the mother of a child of tender years.[29]

Lapses in moral conduct by a parent, even if they involve adultery,[30] are not necessarily controlling if the parent is not otherwise at fault.[31] Unless it can be shown that the mother's cohabitation with a male friend is detrimental to the welfare of the child, custody will not be refused.[32]

In weighing the parents' comparative competence, character, and conduct, a court occasionally faces a situation in which both parties are equally guilty of misconduct. Just such a case was presented to the Pennsylvania Superior Court, which held that custody would not be taken from a divorced mother who was guilty of acts of fornication, since the father was guilty of similar conduct. The court found the parents *in pari delicto* and refused to recognize a double standard that would have given the father custody.[33] Generally, though, child custody will be determined on other grounds when the record discloses undesirable conduct on the part of both parents.[34]

A mother is not to be deprived of custody of her child of tender years merely because she is compelled to work for a living, provided there is adequate supervision of the child during her absence.[35] Abandonment, though, will constitute grounds for relinquishment of custody rights. To establish abandonment, it must be shown that a parent exhibited a settled intent to relinquish all parental claims to the child. This intent is ordinarily evidenced by words or acts revealing a positive intent to perform no parental duties and exercise no further claim.[36]

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26. Augustine v. Augustine, 228 Pa. Super. Ct. 312, 324 A.2d 477 (1974).
27. Commonwealth *ex rel.* Keer v. Cress, 194 Pa. Super. Ct. 529, 168 A.2d 788 (1961).
28. *Id.*; *In re* Snellgrose, 432 Pa. 158, 247 A.2d 596 (1968).
29. Commonwealth *ex rel.* Rainford v. Cirillo, 222 Pa. Super. Ct. 591, 296 A.2d 838 (1972).
30. Commonwealth *ex rel.* Lovell v. Shaw, 202 Pa. Super. Ct. 339, 195 A.2d 878 (1963); Commonwealth *ex rel.* Wert v. Long, 196 Pa. Super, Ct. 632, 175 A.2d 887 (1961); Commonwealth *ex rel.* Logue v. Logue, 194 Pa. Super. Ct. 210, 166 A.2d 60 (1960); Commonwealth *ex rel.* Mann v. Mann, 181 Pa. Super. Ct. 438, 124 A.2d 432 (1956); Commonwealth *ex rel.* Martocello v. Martocello, 148 Pa. Super. Ct. 562, 25 A.2d 855 (1942).
31. Commonwealth *ex rel.* Logue v. Logue, 194 Pa. Super. Ct. 210, 166 A.2d 60 (1961); Commonwealth *ex rel.* Lovell v. Shaw, 202 Pa. Super. Ct. 339, 195 A.2d 878 (1963).
32. Commonwealth *ex rel.* Myers v. Myers, — Pa. Super. Ct. —, 360 A.2d 587 (1976); Gunter v. Gunter, — Pa. Super. Ct. —, 361 A.2d 307 (1976); Commonwealth *ex rel.* Shipp v. Shipp, 209 Pa. Super. Ct. 58, 223 A.2d 906 (1966).
33. Commonwealth *ex rel.* Ackerman v. Ackerman, 204 Pa. Super. Ct. 403, 205 A.2d 49 (1964).
34. Commonwealth *ex rel.* Spriggs v. Carson, 229 Pa. Super. Ct. 9, 323 A.2d 273 (1974).
35. Commonwealth *ex rel.* Holschuh v. Holland-Moritz, 448 Pa. 437, 292 A.2d 380 (1972).
36. Auman v. Eash, 228 Pa. Super. Ct. 242, 323 A.2d 94 (1974).

Since the present fitness of the parent is the critical focal point, rehabilitation and reform are recognized in custody law. When reformation and departure from past misconduct are proved, a parent may not be deprived of a child's custody on the sole ground of past behavior.[37] Thus, a parent may be awarded custody of a child upon a sufficiently convincing showing that he or she has recovered from a debilitating drug addiction and is currently competent to care for the child.[38] Similarly, recovery from a previous mental disability removes a bar to child custody,[39] particularly in light of a promising prognosis.[40]

B. The Child's Age, Sex, and Preference

A second circumstance that should be considered by a court deciding a child custody case is the age and sex of the child, since this element may bear significantly upon the child's best interest and welfare.[41] This consideration must not be given undue emphasis,[42] however, in view of the totality of the circumstances concept.

Consideration of the child's age, relative to the "tender years" doctrine,[43] is of greater significance to the custody determination than is consideration of the child's sex. A decision respecting an infant's custodial well-being may be reached on the basis of age when the other factual considerations do not dictate a different result.[44] A strong,[45] prima

37. Commonwealth *ex rel.* Grillo v. Shuster, 226 Pa. Super. Ct. 229, 312 A.2d 58 (1973).

38. Commonwealth *ex rel.* Jacobson v. Jacobson, 181 Pa. Super. Ct. 369, 124 A.2d 462 (1956).

39. Commonwealth *ex rel.* Edinger v. Edinger, 374 Pa. 586, 98 A.2d 172 (1953).

40. Commonwealth *ex rel.* Beishline v. Beishline, 176 Pa. Super. Ct. 231, 107 A.2d 580 (1954).

41. *See* Commonwealth *ex rel.* Doberstein v. Doberstein, 201 Pa. Super. Ct. 102, 192 A.2d 154 (1963).

42. Commonwealth *ex rel.* Pruss v. Pruss, 236 Pa. Super. Ct. 247, 344 A.2d 509 (1975); Commonwealth *ex rel.* McLeod v. Seiple, 193 Pa. Super. Ct. 131, 163 A.2d 912 (1960).

43. The Pennsylvania Supreme Court recently rendered a decision in which the "tender years" presumption was severely restricted in scope. The relevant language of the decision is as follows:

> We also question the legitimacy of a doctrine that is predicted upon traditional or stereotypic roles of men and women in a marital union. Whether the tender years doctrine is employed to create a presumption which requires the male parent to overcome its effect by presenting compelling contrary evidence of a particular nature; (citations deleted) or merely as a makeshift where the scales are relatively balanced; (citations deleted) such a view is offensive to the concept of the equality of the sexes which we have embraced as a constitutional principle within this jurisdiction. *See* PA. CONST., art. I, § 28. Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of "presumptions." Instead, we believe that our courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case then before the court.

Commonwealth *ex rel.* Spriggs v. Carson, — Pa. —, —, 368 A.2d 635, 639-40 (1977).

44. Commonwealth *ex rel.* Steuer v. Steuer, — Pa. Super. Ct. —, 368 A.2d 732 (1976); Commonwealth *ex. rel.* Ulmer v. Ulmer, 231 Pa. Super. Ct. 144, 331 A.2d 665 (1974).

45. Commonwealth *ex rel.* Sissel v. Sciulli, 216 Pa. Super. Ct. 429, 268 A.2d 165 (1970); Commonwealth *ex rel.* Hickey v. Hickey, 213 Pa. Super. Ct. 349, 247 A.2d 806 (1968).

facie,[46] albeit rebuttable[47] presumption favors granting the mother of a young child custody if she is fit,[48] even though the child's father may be able to furnish a superior physical environment for the child.[49] Compelling reasons must be evident in the record to overcome the presumption that a child's best interests ordinarily will be served by the mother[50] until the child attains an age of about fourteen years,[51] especially when the child is a girl.[52]

Even though the law presumes that a child of tender years will usually be best served by the mother, this presumption does not rise to the level of a right in the mother. Since the mother's interest is not absolute, it must yield to the paramount consideration of the child's best interests and welfare. Thus, this presumption should not be carried further than the circumstances of a particular case require.[53]

To temper the "tender years" doctrine on a case-by-case basis, a court can consider the expressed preferences of the child. The weight of the child's preference will be determined by the trial judge[54] in light of the child's age, intelligence, and maturity.[55] The younger the child, the greater the preference for the mother's interest under the "tender years" doctrine, the child's express wishes to the contrary notwithstanding. Thus, a four-year-old child's expressed desire to be with the father has been ruled not to be controlling.[56] Similarly, the stated preference of an eight-year-old child for the father, which stemmed from the child's familiarity with the neighborhood and consequent proximity to his friends, was not dispositive.[57]

As the child's age increases, assuming corresponding normal mental development, the child's preference is accorded greater importance. Thus, in *In re Custody of Carlisle*, a trial court was found not to have

46. Commonwealth *ex. rel.* Ackerman v. Ackerman, 204 Pa. Super. Ct. 403, 205 A.2d 49 (1964).

47. Commonwealth *ex rel.* Foster v. Foster, 225 Pa. Super. Ct. 436, 311 A.2d 663 (1973); Commonwealth *ex rel.* Davis v. Davis, 97 Pa. Super. Ct. 442 (1929).

48. Williams v. Williams, 223 Pa. Super. Ct. 29, 296 A.2d 870 (1972).

49. Commonwealth *ex rel.* Holshuh v. Holland-Moritz, 448 Pa. 437, 292 A.2d 380 (1972); Commonwealth *ex rel.* Cooper v. Cooper, 167 Pa. Super. Ct. 492, 75 A.2d 609 (1950).

50. *In re* Russo, 237 Pa. Super. Ct. 80, 346 A.2d 355 (1975); Commonwealth *ex rel.* Parikh v. Parikh, 219 Pa. Super. Ct. 240, 280 A.2d 621 (1971), *rev. on other grounds*, 449 Pa. 105, 296 A.2d 625 (1972).

51. Williams v. Williams, 223 Pa. Super. Ct. 29, 296 A.2d 870 (1972); Commonwealth *ex rel.* Skurat v. Gearhart, 178 Pa. Super. Ct. 245, 115 A.2d 395 (1955).

52. Commonwealth *ex rel.* Shipp v. Shipp, 209 Pa. Super. Ct. 58, 223 A.2d 906 (1966); Commonwealth *ex rel.* Horton v. Burke, 190 Pa. Super. Ct. 392, 154 A.2d 255 (1959).

53. Commonwealth *ex rel.* Buell v. Buell, 186 Pa. Super. Ct. 468, 142 A.2d 338 (1958).

54. Commonwealth *ex rel.* Doberstein v. Doberstein, 201 Pa. Super. Ct. 102, 192 A.2d 154 (1963).

55. *Id.*; Commonwealth *ex rel.* Bender v. Bender, 197 Pa. Super. Ct. 397, 178 A.2d 779 (1962).

56. Commonwealth *ex rel.* Maines v. McCandless, 175 Pa. Super. Ct. 157, 103 A.2d 480 (1954).

57. Commonwealth *ex rel.* Barsden v. DeMarco, 215 Pa. Super. Ct. 38, 257 A.2d 365 (1969).

abused its discretion by deciding a custody proceeding in a father's favor when the children, aged twelve and thirteen years, expressed such a desire. In that case, although the father had remarried and was living in the home occupied by the family prior to separation, the mother had not remarried and had repeatedly threatened to relocate as a means of enforcing discipline.[58]

Although the stated preferences of children aged twelve, thirteen, and fourteen years can outweigh the "tender years" doctrine under proper circumstances,[59] mere age is not the controlling factor. The subject child must also evidence the requisite mental growth and maturity. Thus, a teenager's wishes should not be considered if they are based upon whim or constitute an attempt to avoid parental discipline. Similarly, if a twelve-year-old girl is slow and perhaps retarded, the best interests of the child may require her to be in her mother's custody despite her expression of preference for her father.[60] Again, it is the child's physical, intellectual, spiritual, and emotional well-being upon which the court must focus; all conflicting considerations, including the "tender years" doctrine and child preferences, must be subordinate.[61]

C. Separation of Siblings

In determining the custody of children who have siblings, a court must also address itself to the advisability of separating the children. In this regard, Pennsylvania law provides that it is prima facie desirable to have all the children of the same parents reared together as a family,[62] and that brother and sister should be separated only for good reason.[63]

This policy of keeping siblings together is not a fixed or absolute rule.[64] As is the case with all child custody considerations, this policy must yield to a determination of the best interests of the individual child.[65] Thus, as the older children in a family become sufficiently mature to express legitimate custodial preferences, circumstances may warrant separation from younger siblings. In such a case, the detrimental effects on a child who prefers not to live with a particular parent may outweigh

58. *In re* Custody of Carlisle, 225 Pa. Super. Ct. 181, 310 A.2d 280 (1973).
59. *Id.*; *In re* Custody of Clair, 219 Pa. Super. Ct. 436, 281 A.2d 726 (1971).
60. Commonwealth *ex rel.* Hickey v. Hickey, 213 Pa. Super. Ct. 349, 247 A.2d 806 (1968).
61. *In re* Russo, 237 Pa. Super. Ct. 80, 346 A.2d 355 (1975).
62. Commonwealth *ex rel.* Doberstein v. Doberstein, 201 Pa. Super. Ct. 102, 192 A.2d 154 (1963); Commonwealth *ex rel.* Dinsmore v. Dinsmore, 198 Pa. Super. Ct. 480, 182 A.2d 66 (1962).
63. Commonwealth *ex rel.* Steuer v. Steuer, — Pa. Super. Ct. —, 368 A.2d 732 (1976); Commonwealth *ex rel.* Bowser v. Bowser, 224 Pa. Super. Ct. 1, 302 A.2d 450 (1973); Commonwealth *ex rel.* Sissel v. Sciulli, 216 Pa. Super. Ct. 429, 268 A.2d 165 (1970); Commonwealth *ex rel.* Traeger v. Ritting, 206 Pa. Super. Ct. 446, 213 A.2d 681 (1965); Commonwealth *ex rel.* Martino v. Blough, 201 Pa. Super. Ct. 346, 191 A.2d 918 (1963).
64. *In re* Snellgrose, 432 Pa. 158, 247 A.2d 596 (1968).
65. *In re* Russo, 237 Pa. Super. Ct. 80, 346 A.2d 355 (1975).

the benefits of compelling the child to reside with that parent solely to keep siblings together.[66]

Similarly, the policy of keeping children together, standing alone, would not necessarily overcome the need of a young child for its mother.[67] Thus it is evident that this general policy against separating siblings is closely intertwined with the previously discussed considerations of age, sex, and preference of the children. A tribunal must assess the total circumstances and carefully decide whether to keep siblings together, in an attempt to ascertain each child's best interests.

D. Religious Training and Convictions

The proper religious training of a child is an important matter that should be considered by a court when it decides which parent should be awarded custody.[68] Religion does not determine custody, however, and must be viewed in conjunction with all the other considerations that bear upon a child's best interests.[69] In this regard, it has been held that a court cannot morally condemn sending a four-year-old boy of Jewish parentage to a Methodist Sunday School in the absence of a contractual agreement between the parents that the child would be reared in the Jewish faith. The maintenance of the boy's Jewish faith would not require the taking of custody from his mother merely because she had abandoned Judaism after the divorce.[70]

IV. Ascertaining the Authority to Adjudicate

Prior to receiving testimony in a custody case, the court must focus its attention on matters of jurisdiction and venue. Although the words "venue" and "jurisdiction" are often carelessly interchanged, it is important to note their distinction. Jurisdiction refers to the competence of a court to determine controversies of the general class to which a particular case belongs and to bind the parties to the litigation by its judgment.[71] Venue relates to the place in which a particular action is to be brought and is primarily determined by the convenience of the litigants.[72]

An objection to the lack of subject matter jurisdiction can never be waived and may be raised at any time during the proceedings by the parties or by the court sua sponte.[73] A challenge to venue must be timely

66. *Id.*

67. Commonwealth *ex rel.* Shipp v. Shipp, 209 Pa. Super. Ct. 58, 223 A.2d 906 (1966).

68. Commonwealth *ex rel.* Bordlemay v. Bordlemay, 201 Pa. Super. Ct. 435, 193 A.2d 845 (1963); Commonwealth *ex rel.* Stack v. Stack, 141 Pa. Super. Ct. 147, 15 A.2d 76 (1940).

69. Commonwealth *ex rel.* Trott v. Wilcox, 118 Pa. Super, Ct. 363, 179 A. 808 (1935); Commonwealth *ex rel.* Kelley v. Kelley, 83 Pa. Super. Ct. 17 (1924).

70. Commonwealth *ex rel.* Ackerman v. Ackerman, 204 Pa. Super. Ct. 403, 205 A.2d 49 (1964).

71. County Constr. Co. v. Levengood Constr. Co., 393 Pa. 39, 142 A.2d 9 (1958).

72. *Id.*

73. Commonwealth v. Little, 455 Pa. 163, 314 A.2d 270 (1974); Bloom v. Bloom, 238 Pa. Super. Ct. 246, 362 A.2d 1024 (1976); Commonwealth *ex rel.* Soloff v. Soloff, 215 Pa. Super. Ct. 328, 257 A.2d 314 (1969).

raised by preliminary objection; otherwise it is deemed to have been waived.[74]

Jurisdiction in child custody cases follows either the domicile or the residence of the child.[75] The decisions that have promulgated this rule rely upon section 79 of the *Restatement (Second) of Conflicts of Laws*,[76] which sets forth three areas in which a court may exercise jurisdiction. Accordingly, the court has jurisdiction when the child is (a) domiciled in the state, or (b) present in the state, or (c) neither domiciled nor present in the state, if the controversy is between two or more persons who are personally subject to the jurisdiction of the state.

Pennsylvania courts have held that the mere presence of the child within the court's jurisdiction, regardless of the length of time, is sufficient to confer jurisdiction.[77] That the child has been enticed into the local judicial district by some ruse or in violation of a prior court order is immaterial. Harsh as it may seem, the means of obtaining possession of the child is insignificant in determining jurisdiction.[78] Wrongful conduct would, however, have a bearing upon one's fitness to retain or receive custody.[79]

When there has been a prior adjudication of custody, further custody litigation frequently arises through a habeas corpus proceeding.[80] Before a court in a particular judicial district has power to determine whether a writ of habeas corpus should issue, the child must be confined in that district or be restrained and controlled by an adult within that district.[81] In the latter event, the child need not be physically present within the geographical boundaries of the judicial district.[82]

V. Recent Trends

This portion of the article is intended to focus the reader's thoughts upon several considerations that have not yet become the subject of many court decisions but that deserve the best thoughts of legal practitioners and those who develop legislative policies.

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74. PA. R. CIV. P. 1006(e).

75. Commonwealth *ex rel.* Graham v. Graham, 367 Pa. 553, 80 A.2d 829 (1951); Commonwealth *ex rel.* Hickey v. Hickey, 216 Pa. Super. Ct. 332, 264 A.2d 420 (1970); Swigart v. Swigart, 193 Pa. Super. Ct. 174, 163 A.2d 716 (1960); Commonwealth *ex rel.* Camp v. Camp, 150 Pa. Super. Ct. 649, 29 A.2d 363 (1942).

76. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1970).

77. Commonwealth *ex rel.* Graham v. Graham, 367 Pa. 553, 80 A.2d 829 (1951).

78. Reilly v. Reilly, 219 Pa. Super. Ct. 85, 280 A.2d 639 (1971); *In re* Custody of Irizarry, 195 Pa. Super. Ct. 104, 169 A.2d 307 (1961).

79. Commonwealth *ex rel.* Rogers v. Daven, 298 Pa. 416, 148 A. 524 (1930); Commonwealth *ex rel.* Schofield v. Schofield, 173 Pa. Super. Ct. 631, 98 A.2d 437 (1953).

80. *See* PA. STAT. ANN. tit. 12, § 1901 (1967).

81. Commonwealth *ex rel.* Mees v. Mathieu, 107 Pa. Super. Ct. 261, 163 A. 109 (1932); Reilly v. Reilly, 219 Pa. Super. Ct. 85, 280 A.2d 639 (1971).

82. Commonwealth *ex. rel.* Hickey v. Hickey, 216 Pa. Super. Ct. 332, 264 A.2d 420 (1970). For a thorough dissertation on the matter of jurisdiction in child custody cases, see Commonwealth *ex rel.* Blank v. Rutledge, 234 Pa. Super. Ct. 339, 339 A.2d 71 (1975).

A. *Legal Representation for the Child*

One of the most widespread movements in the developing law of child custody is the advocacy of legal representation for the child in contested custody cases. Often the impetus for developments in the law derives from a case in which tragedy suggests that precautions be adopted to avert similar future recurrences. Just such a case arose recently in New Jersey in which drug addicted parents gave birth to an addicted child. The state removed the child from their custody, and the parents made progress toward overcoming their addiction. Subsequently the parents petitioned to have their child returned, and the court consented. Tragically, the child was dead within one month of its return.[83]

Although this case is not unique, it fortunately does not represent the majority of child custody cases. Nevertheless, it is this type of case in which tragedy was not thwarted that prompts serious questions: Could the presence of counsel for the child have previously identified the potential for disaster and prevented tradgedy? Could counsel for the child have independently adduced critical information about the character of the contesting parents and thereby blocked the parents from convincing the tribunal that their custody would serve the best interests of the child? If we move one logical step further more fundamental questions are raised: Are there significant numbers of contested custody cases that entail otherwise undisclosed, potentially damaging tendencies by a parent that should preclude custody? Is it advisable to establish a policy whereby the subject children of contested custody cases would automatically have appointed counsel?

As previously indicated, such questions do not lend themselves to quick, uncomplicated answers. Those jurisdictions that have addressed the subject have generally taken the view that it is necessary to recognize the minor child as an indispensable rather than a nominal party in a contested custody proceeding. The tribunal may either appoint an attorney to represent the child[84] or notify the state's prosecuting attorney to become the child's advocate.[85] Other jurisdictions have granted the courts discretionary, as opposed to mandatory, power to appoint counsel for the child.[86]

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83. *See* Comment, *A Child's Right to Independent Counsel in Custody Proceedings: Providing Effective "Best Interests" Determiniation Through the Use of a Legal Advocate*, 6 SETON HALL L. REV. 303 (1975).

84. *Id.*; Skubas v. Skubas, 31 Conn. 340, 330 A.2d 105 (1974); Ford v. Ford, 191 Neb. 548, 216 N.W.2d 176 (1974); State *ex rel.* Juvenile Dep't of Multnomah County v. Wade, 527 P.2d 753 (Or. App. 1974); Edwards v. Edwards, 270 Wis. 48, 71 N.W.2d 366 (1955).

85. MICH. STAT. ANN. § 25.121 (1974).

86. Barth v. Barth, 12 Ohio Misc. 141, 225 N.E.2d 866 (1967); Zunni v. Zunni, 103 R.I. 417, 238 A.2d 373 (1968); ARIZ. REV. STAT. ANN. § 25-321 (1976); COLO. REV. STAT. ANN. § 14-10-116 (1973); IOWA CODE ANN. § 598.12 (Supp. 1976); UTAH CODE ANN. § 30-3-11.2 (Supp. 1975); VT. STAT. ANN. tit. 15, § 594 (1974).

The underlying premise of those who advocate counsel for the child is that the child's "best interests" are difficult to discern from the biased evidence that is produced by contesting parents as they attempt to discredit each other before the court in a highly volatile and emotional proceeding. Thus, counsel for the child would assist the court in preventing the custody contest from deteriorating to a legal war between the parents, in which the child becomes a prize for the victor in the struggle for self-justification or revenge. Child counsel advocates also assert that it is unrealistic to think that the parents' attorneys can or will effectively advocate the child's interests. Particular emphasis is placed upon those instances in which a parent's attorney is faced with the realization that his client's desires and the child's "best interests" are not compatible. In such circumstances, the presence of counsel for the child is necessary to enable the parents' counsel to fully comply with the ABA Code of Professional Responsiblity, DR 5-101A and DR 5-105(c).[87]

Separate representation of children in contested custody matters could provide the child with the same rights to discovery, presentation of evidence, cross-examination, and appellate review that the adult possesses. The interests of the child that could be assured by separate counsel include: (1) having the case progress through the procedural stages of litigation rapidly to expedite a final decision; (2) preventing frivolous appeals; (3) marshalling supportive facts and articulating the child's desires effectively; (4) classifying monies as support rather than alimony, thereby limiting the custodial parent's discretion regarding its usage; (5) protecting support monies in the event of remarriage; (6) bringing actions to compel medical treatment or to reject the same if nonessential; (7) preventing a parent from successfully seeking custody of an antipathetic child in order to exert influence over the parent seeking visitation arrangements; (8) preventing a spouse from successfully seeking custody as a bargaining tool to reduce child support or alimony demands; and (9) preventing a parent from seeking custody as vindication of his or her innocence in the breakup of the marriage.

Although the foregoing considerations in favor of counsel for the child are enticing, there are persuasive countervailing considerations. One argument against the automatic appointment of counsel for the child is that additional expense will flow to the adult litigants. This expense consideration might also be compounded by the potential protraction of litigation because of the presence of a third counsel. The second argument recognizes that rather than assure rapid resolution of the controversy, as contended by supporters of counsel for the child, additional counsel may prolong litigation.

87. *See* Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565 (1976).

A third point advanced by those who oppose counsel is the allegedly inherent limitation of the effectiveness of counsel because of the characteristics of the children. Since children view the world through immature, inexperienced eyes, their preferences may lack perception of their own "best interests." The younger the child, the more accentuated will be his or her inability to assist counsel in developing a viable perspective that a court could accept.

Finally, the opponents of counsel argue that a potential conflict of interest between the adult's objectives in the litigation and the child's "best interests" is not a sufficiently significant consideration to warrant automatic child counsel. They contend that if a hint of conflict appears in a case, counsel could identify and disclose this possibility to the parent and to the child and carefully determine whether the child understands the problem and voluntarily consents to dual representation. If an actual conflict were to arise, counsel for the adult should request the appointment of counsel for the child.

Similarly, counsel could be requested in cases in which a child has distinct personal interests in the preservation of the court's decision that transcend the interests perceived by the adult litigant. Just such a situation recently confronted this author in a case contesting paternity. When an appeal was taken from the jury's determination of paternity, counsel for the mother moved that independent counsel for the child be appointed for the appellate phases of the case. The mother had a significant interest in the preservation of the jury verdict because of her demand for support payments for the child. The court nevertheless entered an order appointing counsel for the child in view of the child's interest in preserving the decision to protect his entitlement for welfare, social security, and support payments and his standing for wrongful death, workmen's compensation, and inheritance claims.[88]

B. Full Faith and Credit

Both counsel and the court exert considerable effort to acheive an adjudication that will serve the "best interests" of a child. Attention must also be directed toward minimizing the "seize-run-sue" syndrome that frequently prompts unsuccessful litigants to flee with a child to another forum to seek a more favorable custody adjudication. Since the "best interests" of a child are generally served by a stable environment, such practices contribute little to the proper development of the child.

Previous court efforts to limit the "seize-run-sue" syndrome have included: (1) absolute denials of visitation out-of-state, since travel expenses between two points are the same whether the visitor comes into the

88. Matthews v. Cuff, Court of Common Pleas, Allegheny County, Pa., Family Division, No. 120 of 1975 (per Brosky, J.) (currently on appeal to Superior Court of Pennsylvania at 149 April Term, 1977).

jurisdiction or the child travels to the non-custodial, out-of-state parent; (2) the posting of compliance bonds to assure the child's return; and (3) employment of the clean hands doctrine, under which a tribunal can refuse to entertain an action if the child has been brought into the forum in violation of the decree of a sister state. Nevertheless, all of these efforts, even though well-intentioned, are weak in comparison to the syndrome which they seek to remedy.

An absolute denial of out-of-state visitation is vulnerable to several arguments. First, a child needs the love, affection, and companionship of both parents. Second, it is not always as economically feasible for a parent to travel to a jurisdiction as it is for a child to visit with the noncustodial parent, since travel fares for adults generally exceed children's fares. Furthermore, parents must often incur additional costs by leaving their place of employment or business establishment to undertake the visitation. The noncustodial parents may also be unable to temporarily forego responsibilities to others who are now dependent upon them.

Compliance bonds have not proved to be the solution either. Their principal defect is that they must be set so high that they exceed the economic reach of the noncustodial parent. Were they within the reach of the noncustodial parent, then they would prove insufficient to satisfy detective and attorneys' fees if the child were not returned.

Nor can a court, without identifying a legitimate state interest, condition an award of child custody on a requirement that the custodial parent not leave the jurisdiction with the child. Although the United States Constitution does not expressly guarantee a right to travel, a prohibition on travel would violate the implied constitutional right to travel that the Supreme Court has long recognized as emanating from the privilege and immunities clause of the fourteenth amendment, the privilege and immunities clause of article IV, the commerce clause of article I, and the due process clause of the fifth amendment.[89]

Even the Supreme Court has artfully evaded the issue of limiting the "seize-run-sue" syndrome. In each of the four child custody cases it has entertained,[90] the Court has declined to meet this problem squarely. Thus, contesting parents are still able to capitalize on the federal character of our nation as they vie for control of their child. They are aided by the inapplicability of *res judicata* in awards of child custody[91] and the fact

89. *See* Shapero v. Thompson, 394 U.S. 618 (1969); *cf.* Dunn v. Blumstein, 405 U.S. 330 (1972); United States v. Guest, 383 U.S. 745 (1966); Aptheker v. Sec. of State, 378 U.S. 500 (1964); Dayton v. Dulles, 357 U.S. 144 (1958); Kent v. Dulles, 357 U.S. 116 (1958); Edwards v. California, 314 U.S. 160 (1941); Williams v. Fears, 179 U.S. 270 (1900); Crandall v. Nevada, 6 Wall. 35 (1868); Passenger Cases, 7 How. 283 (1849). For a comprehensive review of these cases see Hoffman, *Restrictions on a Parents' Right to Travel in Child Custody Cases: Possible Constitutional Questions*, 6 U.C.D. L. REV. 181 (1973).

90. Ford v. Ford, 371 U.S. 187 (1962); Kovacs v. Brewer, 356 U.S. 604 (1958); May v. Anderson, 345 U.S. 528 (1953); New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

91. New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

that, under full faith and credit, a sister state is required to give an adjudication no more effect than it would be given by the rendering forum.

In an effort to deal with this problem, the National Conference of Commissioners on Uniform State Laws adopted and the ABA approved the Uniform Child Custody Jurisdiction Act in 1968.[92] This Act is designed to alleviate the plight of children who are the subjects of multi-jurisdictional custody cases. The basic purposes of the Act include the discouragement of continued controversies over child custody to establish a stable environment for the child, the deterrence of child abductions and similar practices, and the promotion of interstate judicial cooperation in child custody cases.

The Act achieves these objectives by providing that one court of a single state shall assume responsibility for the custody of a particular child. The properly chosen court will have access to as much relevant information about the child and family as possible. Thus, jurisdiction attaches if:

(a) the court is located in the "home state" of the child (as defined); or,
(b) it is in the best interests of the child that the court assume jurisdiction, because the child and at least one contestant have significant contact with the state and substantial evidence of the child's future prospects is available in the state; or,
(c) the state had been the child's "home state" within six months before the commencement of the proceeding, and the child is absent from the state because of his/her removal or retention by a person claiming his/her custody, and the parent continues to live in the state.[93]

Once the proper forum is identified, the Act states that other essential evidence that may be located out-of-state shall be channeled into the chosen court to aid in its adjudication. Thus, the court that hears the case is authorized to obtain any essential evidence by ordering testimony and records from courts in other jurisdictions.

The courts of other states must honor the decision of the custody court and enforce it within their territory. If the state that originally heard the case ceases to be a proper forum because the child has become established in a new jurisdiction, a new court has the right to take jurisdiction for purposes of modifications. All previously developed information and records will be channeled from the prior to the subsequent court. So long as jurisdictional requirements are satisfied, the power to modify a decree remains in the court that rendered the prior decree.

Although the Uniform Child Custody Jurisdiction Act codifies, to a degree, the concepts of *res judicata* and full faith and credit developed by

92. 9 U.L.A. 103 (1973).
93. *See id.* at 106 (1973).

case law, its emphasis upon encouraging the universal recognition of sister states' decrees constitutes a major advancement. The tendency of state courts, in contrast, has been to permit contestants to sue in their home state, to freely modify custody decrees of other states, and thereby to compete with other jurisdictions.[94] Thus, the Act deserves careful consideration by the legislatures of all the states that have not yet enacted it.[95]

VI. Conclusion

Today, the public is focusing even more on domestic relations law and is finding it a very complex realm that is less easily integrated than other areas of the law. Although most custody determinations upon divorce are consensual and incidental to the resolution of the marital conflict, there are many contested custody cases that require the court's attention. Those circumstances upon which the courts focus in reaching a child custody determination have been long in the making and their evolution is not yet complete. The now recognized "best interests of the child" standard has required the law to relinquish the old sex-related presumptions favoring one spouse and to replace them with legal concepts designed to place both parents on equal legal footing.

Just as time and experience have given us the "best interests of the child" concept with all of its intricately balanced considerations, time and experience will provide a polish to the current considerations of child representation by counsel and development of a uniform system of custody jurisdiction statutes.

The courts must remain receptive to new and creative concepts and constantly seek out the merits of new arguments. Similarly, it is incumbent upon attorneys to continually search for new approaches to traditional problems and apply them to appropriate cases. With such perceptiveness and creativity, the legal community can hone from Solomon's Sword a sharp, precisely balanced scalpel, which, when properly utilized, can separate the relevant from the irrelevant, section out the biases, and disclose, on a case-by-case basis, the true "best interests" of the subject child.[96]

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94. *See* Uniform Child Custody Jurisdiction Act, 16 Family Law Newsletter, no. 4, at 6 (Spring, 1976).

95. The Act has been enacted into law in California, Colorado, Hawaii, Oregon, Wyoming, North Dakota, Maryland and Michigan.

96. Although this article has restricted its coverage to cases in which natural parents vie for custody, it is noteworthy that in cases involving both natural and foster parents selected by the Child Welfare Agency and the Juvenile Court under the theory that the child is deprived as defined by the Juvenile Court Act, Act of December 6, 1972, P.L. 1464, No. 333, 11 PA. CONS. STAT. § 50-101 et seq., the "best interests" concept requires that the child not be taken from the parents except upon proof of "clear necessity." "Best interest" is a general welfare standard and is by definition a much less exacting standard than "clear necessity." *See* In the Interest of James and John LaRue, — Pa. Super. Ct. —, 366 A.2d 1271 (1976).