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Child Custody Law: Custody Presumptions Favoring One Parent may Impair the Child's Best Interest

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CHILD CUSTODY LAW: CUSTODY PRESUMPTIONS FAVORING ONE PARENT MAY IMPAIR THE CHILD'S BEST INTERESTS

In re The Matter of M.Q. 475 So. 2d 1306 (Fla. 4th D.C.A. 1985)

Under Florida statutes[1] appellant mother qualified as the natural guardian[2] of her illegitimate child.[3] Appellant consented to third party adoption of the child and relinquished all parental rights.[4] When appellant consented, she knew the child would be removed from the country for an unspecified period of time.[5] The putative father[6] objected[7] and filed suit to obtain custody of the child.[8] The trial court awarded appellee custody.[9] On appeal, the Florida Fourth District Court of Appeal affirmed[10] and HELD, the mother's release of parental rights[11] overcame a statutory presumption favoring a mother's right to custody of her illegitimate child.[12]

Early common law precluded fathers from obtaining parental custody of their illegitimate offspring.[13] Natural mothers were granted exclusive custodial rights

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1. *See* FLA. STAT. § 744.301(1) (1985) ("The mother of a child born out of wedlock is the natural guardian of the child."). Section 744.301(1) creates a statutory presumption favoring custody to mothers in disputes concerning out of wedlock children; this presumption may be overcome only by a showing of the mother's unfitness as a parent. Allen v. Childress, 448 So. 2d 1220, 1222 (Fla. 4th D.C.A. 1984).

2. A natural guardian has legal care and management responsibilities of another person who is considered incapable of administering his own affairs. BLACK'S LAW DICTIONARY 635 (5th ed. 1979).

3. *See* 475 So. 2d 1306, 1307 (Fla. 4th D.C.A. 1985). An illegitimate child, also called a bastard, is a child born before the lawful marriage of the parents. BLACK'S LAW DICTIONARY 139 (5th ed. 1979).

4. 475 So. 2d at 1307. The adoption petition was eventually dismissed. *Id.*

5. *Id.* The child was to be taken to Germany. *Id.*

6. 475 So. 2d at 1307. "Putative father" is the alleged or reputed father of an illegitimate child. BLACK'S LAW DICTIONARY 1113 (5th ed. 1979). Hereinafter, "putative father" will refer to the father of an illegitimate child.

7. 475 So. 2d at 1307. Appellee father became a party to the proceedings to contest the adoption.

8. *Id.* The opinion fails to note whether appellee's involvement in the proceedings caused the dismissal of the adoption petition.

9. *Id.* at 1308. Custody was awarded based on the "best interests of the child." *See infra* note 28 and accompanying text.

10. 475 So. 2d at 1308.

11. *See* FLA. STAT. § 63.082(5) (1985) ("Consent [to release of parental rights for adoption] may be withdrawn only when the court finds that the consent was obtained by fraud or duress."); *e.g.*, *In re* Adoption by Cox, 327 So. 2d 776 (Fla. 1976); *In re* Adoption of P.R. McD., 440 So. 2d 57 (Fla. 4th D.C.A. 1983) (supporting the irrevocability of a mother's release of maternal rights unless obtained by fraud or duress).

12. 475 So. 2d at 1308.

13. *See In re* Guardianship of D.A. McW., 429 So. 2d 699, 703 (4th D.C.A. 1983) (surveying common law), *aff'd*, 460 So. 2d 368 (Fla. 1984); Ford v. Loeffler, 363 So. 2d 23, 24 (Fla. 2d D.C.A. 1978) (same). *See generally* Note, *The Putative Father's Parental Rights: A Focus on "Family"*, 58 NEB. L. REV. 610, 610 (1979) (discussing putative fathers' rights at common law).

over their children.[14] Courts deemed fathers of illegitimate children unfit and negligent parents.[15] Putative fathers gained legal rights to their illegitimate children only after marrying the mothers and acknowledging their paternity.[16] Florida courts have established that mothers of illegitimate children have all parental rights,[17] including the legal right to custody, unless expressly provided otherwise by statute.[18] Although rights to custody of illegitimate children were inferior to the rights of mothers, at least one jurisdiction deemed fathers' rights superior to the rights of others.[19]

The landmark Supreme Court case of *Stanley v. Illinois*[20] acknowledged parental rights of putative fathers.[21] Pursuant to Illinois statutes,[22] the father was denied custody of his children following the death of the natural mother.[23] A statute deemed unwed fathers presumptively unfit parents and did not recognize their parental rights.[24] On appeal, the Supreme Court found the Illinois statute contrary to the Equal Protection Clause of the Constitution.[25] The Court in *Stanley* took an important step in recognizing parental rights of fathers by holding fathers constitutionally entitled to hearings involving custody rights.[26]

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14. *See* Comment, *Delineation of the Boundaries of Putative Fathers' Rights: A Psycholigical Parenthood Perspective*, 15 SETON HALL L. REV. 290, 295 (1985).

15. *See* Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 231 (1971); Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1586 (1972).

16. State *ex rel.* Lewis v. Lutheran Social Serv., 47 Wis. 2d 420, 425, 178 N.W. 2d 56, 58 (1970), *vacated*, 405 U.S. 1051 (1972).

17. *E.g., In re* Whetstone, 137 Fla. 712, 188 So. 576 (1939).

18. *See* Act of May 24, 1933, 1933 Fla. Laws, ch. 16103, § 30 (repealed 1974). This statute provided all illegitimate children were heirs of the mother. Thus, it recognized the parentage of illegitimate children in their mother. *See also* Mixon v. Mize, 198 So. 2d 373, 375 (1st D.C.A.) (although the mother was a "mercenary," "materialistic," "calculating," "conniving," and "bewitching" woman interested only in herself, due to the child's illegitimacy, the weight of precedent required that custody be awarded to the mother), *cert. denied*, 204 So. 2d 211 (Fla. 1967).

19. *See In re* Guardianship of Smith 42 Cal. 2d 91, 265 P.2d 888 (1954) (reversing decree appointing daughter guardian of deceased mother's children in preference of natrual father).

20. 405 U.S. 645 (1972).

21. *See* Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries Are Defined*, 19 J. FAM. L. 445, 449 (1980-81).

22. 405 U.S. at 649, 650, *see also* ILL. REV. STAT., ch. 37, §§ 702-1, 702-5 (1967) (a child could become a state ward merely upon showing that he or she had no surviving parents); *id.* §§ 701-714 (defines "parent" as the father or mother of legitimate children or adoptive parents, or "the natural mother of an illegitimate child").

23. 405 U.S. at 646.

24. *Id.* at 650. The presumption that a putative father was an unfit parent may be traced to common law. *See, e.g.*, The Queen v. Brighton, 121 Eng. Rep. 782, 783 (Q.B. 1861) (common law did not recognize father of illegitimate child). This presumption, however, was not always practiced. *See In re* Mark T., 8 Mich. App. 122, 154 N.W.2d 27 (1967) (unanimously affirming circuit court's decision that the putative father was best suited to raise the child). *See generally* Comment, *supra* note 15, at 1586 (discussing statutory presumptions against putative fathers' rights).

25. 405 U.S. at 650.

26. *Id.* at 658. The Supreme Court noted:

> The incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care,

In *Snedaker v. Snedaker*,[27] the Florida First District Court of Appeal employed the "best interests" doctrine to extend the custody rights of putative fathers in Florida.[28] The trial court awarded a mother custody based on a presumption that children of "tender years"[29] are best cared for by their mothers.[30] The appellate court rejected this presumption when evidence failed to support the mother's contention that she could provide for the child's best interests.[31] Recognizing that a child's best interests are the principal concern in custody disputes,[32] the court found the child's interests best served by awarding the father custody.[33] *Snedaker* indicated that a presumption favoring custody to a specific parent may be overcome by showing that the presumption is contrary to the child's best interests.[34]

Florida's guardianship statute[35] favors maternal rights by naming mothers the natural guardians of their illegitimate children. In the custody dispute case of *Allen v. Childress*,[36] the appellant mother received a favorable agency report.[37]

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under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.

Id. at 657 n.9; *see also* Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing* Stanley v. Illinois, 9 FAM. L.Q. 527, 528 (1975) ("a source of much study and of much mystification").

27. 327 So. 2d 72 (Fla. 1st D.C.A. 1976).

28. The "best interests" doctrine is a standard the courts utilize to determine which home and overall environment will be most beneficial and conducive to the child's needs. The court awards custody based on who could best provide for these needs. The guardian need not be a parent, but may be a relative or other third party. Through use of this doctrine a court aspires to meet the child's best interests. *The Best Interests Doctrine: Its Application in Divorce, Modification and Non-parental Custody Disputes*, 8 J. JUV. L. 184, 184, 190 (1984). The "best interests" doctrine is the primary standard in determining child custody in Florida. *E.g.*, DiGiorgio v. DiGiorgio, 153 Fla. 24, 28, 13 So. 2d 596, 598 (1943); Brock v. Brock, 349 So. 2d 782, 783 (Fla. 1st D.C.A. 1977) (the "emotions," "wishes," and "interests" of disputing parents were subordinate to the welfare and best interests of the child); State *ex rel.* Fox v. Webster, 151 So. 2d 14, 16-17 (Fla. 3d D.C.A. 1963) (foreign judgment abrogated in favor of a Florida judgment based on the child's best interests), *cert. denied*, 379 U.S. 822 (1964); *see also* Dinkel v. Dinkel, 322 So. 2d 22, 23 (Fla. 1975) (welfare of the child is the prime consideration in any child custody proceeding). *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979) (overview of the "best interests" doctrine).

29. 327 So. 2d at 73. The "tender years" presumption suggests that in a custody dispute between the mother and father of a young child, the child should remain with the mother. Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 432 (1976-1977). See *id.* at 432-34 for an extensive listing of "tender years" cases. Florida has rejected the "tender years" presumption as an absolute rule. *See* Marshall v. Marshall, 375 So. 2d 1082 (Fla. 1st D.C.A. 1979) (rejecting "tender years" in favor of child's best interests); *see also Child Custody: Determining the Best Interests of the Child*, 6 J. JUV. L. 82, 83 (1982) (discussing the changing attitudes toward the "tender years" doctrine).

30. 327 So. 2d at 73.

31. *Id.*

32. *Id.*; *see* Dinkel v. Dinkel, 322 So. 2d 22, 23 (Fla. 1975).

33. 327 So. 2d at 73.

34. *Id.*; *see* Murray, *Family Law*, 31 U. MIAMI L. REV. 1011, 1040 (1977).

35. FLA. STAT. ch. 744 (1985); *see supra* notes 1 & 11 and accompanying texts.

36. 448 So. 2d 1220 (Fla. 4th D.C.A. 1984).

37. *Id.* at 1222. The Tennessee Department of Human Services prepared agency reports on the mother and father for custody purposes. *Id.*

Focusing on the child's best interests and the statutory language, the *Allen* court awarded appellant custody.[38] The court recognized that the statutory presumption, rebuttable only by maternal unfitness,[39] favored giving mothers custody rights as the natural guardians.[40] The court found the presumption served the child's best interests.[41]

The instant case afforded the court an opportunity to expand a restricted area of child custody law.[42] The instant court observed that maternal unfitness constituted the only traditionally recognized means to overcome the statutory presumption favoring mothers as natural guardians.[43] Sustaining the trial court's refusal to find the mother unfit,[44] the court then explored other circumstances to override the presumption of maternal guardianship.[45] The court examined the mother's release of her maternal rights[46] and found the release sufficient to overturn the presumption of maternal guardianship.[47] After rejecting the statutory presumption, the instant court affirmed the trial court's award of custody to the father,[48] finding paternal custody would best serve the child's interests.[49] The instant decision expanded the circumstances under which fathers may overcome the statutory presumptions to gain custody of their illegitimate children.

The instant court faced a statutory presumption under *Allen*[50] which conflicted with the "best interests" doctrine, the overriding policy of child custody law.[51] The court reasoned that applying the presumption of maternal guardianship under the instant circumstances would contravene the child's best in-

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38. *Id.*

39. *Id.*; *see, e.g., In re* Guardianship of D.A. McW., 429 So. 2d 699 (4th D.C.A. 1983) (maternal unfitness may overcome statutory presumption favoring mother), *aff'd*, 460 So. 2d 368 (Fla. 1984); Jones v. Smith, 278 So. 2d 339 (Fla. 4th D.C.A. 1973) (same), *cert. denied*, 415 U.S. 958 (1974); *In re* R.L.B., 274 So. 2d 4 (Fla. 4th D.C.A. 1973) (same).

40. 448 So. 2d at 1222; *see supra* note 1 and accompanying text.

41. 448 So. 2d at 1222.

42. A mother's unfitness was the only way to overcome FLA. STAT. § 744.301(1) prior to the instant cases. *See* Allen v. Childress, 448 So. 2d 1220 (Fla. 4th D.C.A. 1984); *e.g., In re* Guardianship of D.A. McW., 429 So. 2d 699 (4th D.C.A. 1983) (maternal unfitness may overcome statutory presumption favoring mother), *aff'd*, 460 So. 2d 368 (Fla. 1984); Jones v. Smith, 278 So. 2d 339 (Fla. 4th D.C.A. 1973) (same), *cert. denied*, 415 U.S. 958 (1974); *In re* R.L.B., 274 So. 2d 4 (Fla. 4th D.C.A. 1973) (same).

43. 475 So. 2d at 1306.

44. *Id.* at 1307. The district court gave no rationale for the deference to the trial court decision.

45. *Id.* at 1308.

46. *Id.*; *see supra* note 11 and accompanying text.

47. 475 So. 2d at 1308.

48. *Id.*

49. *Id.* The court failed to state why paternal custody would better protect the child's best interests. Apparently, the consent for adoption and the appellant's awareness that the child would be moved to Germany were deciding factors. *See supra* note 28 and accompanying text.

50. 448 So. 2d at 1220; *see supra* text accompanying notes 35-41.

51. *See supra* note 28 and accompanying text; *see also The Best Interests of the Child: Custody and Related Problems*, 7 J. Juv. L. 189, 194 (1983) ("The 'best interests of the child' is indisputably the standard by which state courts determine who will have custody of the child.").

terests.[52] The resolution of this conflict required a sacrifice of policy or statute. Although the court failed to clearly articulate a rationale,[53] it rejected the statutory presumption.[54] By overturning this presumption, the court remained free to find that paternal guardianship served the child's best interests.[55]

The "best interests" doctrine, a touchstone of child custody law,[56] serves as Florida's primary judicial standard in settling custody disputes.[57] *Snedaker* firmly established that a child's welfare constituted the prime consideration in settling custody disputes.[58] The instant court's substitution of a "best interests" analysis for a statute is justified by established Florida law.[59] Both *Snedaker* and *Allen* support the instant decision. Although *Allen* employed a strict analysis in recognizing the statutory presumption of maternal guardianship,[60] the decision is cogently reconcilable with the "best interests" doctrine. The factual circumstances favored maternal guardianship as supporting the child's best interests.[61]

Although the instant court invoked policy over statute, statutory presumptions favoring maternal guardianship may more appropriately govern child custody disputes. Statutes are generally more concrete than policy.[62] Statutory presumptions preserve judicial economy by deterring litigants from filing unnecessary and frivolous suits. A more flexible policy[63] may generate manipulation of the law and increase litigation. In addition, child custody litigation adversely affects the emotional state of the respective parties.[64]

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52. 475 So. 2d at 1307-08. The trial court determined the appellee could preserve the child's best interests; however, the presumption favored the appellant. *Id.* at 1307; *see supra* notes 28 & 49 and accompanying texts.

53. The court concluded appellant's release of her parental rights was sufficient to overcome the statutory presumption, but it did not clearly state why the general rule was inapplicable. *See supra* note 11 and accompanying text. The court merely stated that these "unique circumstances" were not applicable to the rule. 475 So. 2d at 1308.

54. *See Snedaker*, 327 So. 2d at 73 (statutory presumptions may be overcome in favor of the child's best interests); *In re* W.D.N., 443 So. 2d 493 (Fla. 2d D.C.A. 1984) (right to integrity of family is a fundamental right, however parents' rights are subject to overriding principle that ultimate welfare or best interests of child must prevail); *see also supra* note 1 and accompanying text.

55. 475 So. 2d at 1308.

56. *See supra* notes 28, 51 & 54 and accompanying text.

57. *See supra* notes 28 & 54 and accompanying text.

58. 327 So. 2d at 72.

59. *See supra* notes 28 & 54 and accompanying text.

60. 448 So. 2d at 1222.

61. *See supra* note 1 and accompanying text.

62. *See* Caminetti v. United States, 242 U.S. 470, 485-86 (1917) ("Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them").

63. *See* BLACK'S LAW DICTIONARY 1041 (5th ed. 1979) (policy defined as "the general prinicples by which a government is guided in its management of public affairs, or the legislature in its measures").

64. *See* Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 3 (1984) ("For parents, a custody fight is probably the most stressful time in their lives. For children it is a time of uncertainty, disruption, and conflicting loyalty."). *See generally* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP (1980) (discussing how parent and child cope with divorce).

Statutory presumptions should not be sacrosanct when contrary to underlying policies.[65] The *Snedaker* court implied that presumptions favoring one sex over another are not absolute[66] and concluded that such presumptions should be overcome when contrary to a child's best interests.[67] Statutes are law, but policies generate law.[68] Absent other considerations, statutes should be read in light of applicable policy.[69] The instant court legitimately overturned the statutory presumption in favor of underlying legal policy. Subsequent courts, however, should recognize the potential chilling effect of adoption consents. An illegitimate child's mother must more seriously consider the ramifications of such agreements, even when executed in the child's best interests. The instant case clearly demonstrates that a mother's parental rights become no better than the putative father's when she consents to the adoption of her illegitimate child.[70] Thus, if contested by the putative father, evidence that paternal custody is in the child's best interests will defeat the mother's presumptive right to guardianship and perhaps, as in the instant case, her decision to place the child with adoptive parents.

Elevating the child's interests in custody disputes strengthens the position of unwed fathers. The Supreme Court's holding in *Stanley* supports this proposition. By recognizing the right of unwed fathers to establish custodial rights over their illegitimate children,[71] the Court established more parity between the parties. This parity, set forth in *Stanley* and reaffirmed by the instant court, is especially advantageous in contemporary society. Couples now marry less frequently for the sake of their illegitimate children because of the reduced social or legal stigma attendant to illegitimacy.[72] Parental parity in custody disputes allows courts to clearly establish which guardian will further a child's best interests.

With litigants in parity, courts focus primarily on the child's welfare. The underlying premise of the statutory presumption favoring maternal guardianship was that it indeed advanced the child's interests.[73] This premise is not irre-

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65. *Snedaker*, 327 So. 2d at 73.

66. *Id.*; *see also* Marshall v. Marshall, 375 So. 2d 1082, 1083 ("The tender years of the child is one of the relevant factors to be considered but does not override the basic determination which must in each instance be the welfare and best interests of the child.").

67. 327 So. 2d at 73.

68. *See* Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1857). In *Brown*, Chief Justice Taney concluded:

> [I]n interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature . . . .

Id.

69. *Snedaker*, 327 So. 2d at 73.

70. *See* 475 So. 2d at 1308 (mother's consent to adoption sufficient to place parties in parity).

71. *Stanley*, 405 U.S. at 645.

72. *See* W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION 601 (1983).

73. UNIFORM MARRIAGE AND DIVORCE ACT § 402 commissioner's note (1973) ("The preference for the mother as custodian of young children when all things are equal, for example, is simply

futable.[74] The common law rules presuming mothers uniquely equipped to care for their young[75] and fathers unfit[76] can impede a child's best interests. Courts should overcome inherently sex-biased presumptions. Instead, courts should introduce parity into the judicial setting and return the focus to where it belongs — on the child.

By overturning the statutory presumption of maternal guardianship, the instant court introduced parity into the custody proceedings. Greater parity between litigants in custody disputes provides more freedom to award custody based on a child's best interests. The "best interests" doctrine represents the driving force of custody law.[77] Courts have traditionally recognized the importance of the "best interests" doctrine as a judicial standard[78] and have overturned contrary legal presumptions.[79] Statutory presumptions should only apply to further a child's welfare. Invoking custody presumptions favoring one sex over another fails to properly advance the goal of best serving a child's interest.

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a shorthand method of expressing the best interests of the children..."); *see* S. YUSSEN & J. SANTROCK, CHILD DEVELOPMENT 422 (2d ed. 1982).

74. *See, e.g.*, Mixon v. Mize, 198 So. 2d 373, 374 (1st D.C.A.), *cert. denied*, 204 So. 2d 211 (Fla. 1967).

75. *See generally* S. YUSSEN & J. SANTROCK, *supra* note 73, at 422-23 (discussing mother's primary right to custody regardless of child's welfare).

76. *See supra* note 15 and accompanying text.

77. *See* Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (noting all states recognize the child's best interests as the paramount concern in custody disputes); *see also supra* notes 28, 49 & 54 and accompanying text.

78. *See supra* notes 28, 54 & 76 and accompanying text.

79. *See supra* note 66 and accompanying text.