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## MARYLAND CUSTODY LAW—FULLY COMMITTED TO THE CHILD'S BEST INTERESTS?

JOHN W. ESTER\*

The resolution of a custody dispute between parents or between parents and substitute parents is particularly difficult, not because of the complexity of the "rules" involved, but because of the nature of the problem. In both situations the child's existing family is disintegrating or threatening to disintegrate and the child can do little to keep it together — the child is "a victim of his environmental circumstances, . . . he is greatly at risk."<sup>1</sup> The child is "at risk" because his or her welfare, "both present and future, is usually profoundly affected by the court's resolution of the private dispute over who shall be entrusted with its care."<sup>2</sup> The child is "at risk" also because he or she is likely to feel abandoned<sup>3</sup> and experience grief.<sup>4</sup> "No matter how the custodial arrangements are made, the child will sustain an inevitable deprivation . . . . Awareness of this fact will precipitate any or all of the possible grief responses in the child. He may become depressed [or] 'bad'. Or he may fail in such life tasks as school performance."<sup>5</sup> Thus *the child* should be the focal point of such litigation. The courts must act in the context of litigation between adversaries who sometimes argue that their "rights" must be considered, but the "rights" of the adult litigants should not be the determining factor. "In such disputes it is always *the child* who is not only the innocent victim, but who has the most at stake."<sup>6</sup> Therefore, the courts should strive to further *the child's* best interests,<sup>7</sup> not the adult litigants' "rights."

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1. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 54 (1973).

2. *Ross v. Hoffman*, 280 Md. 172, 174, 372 A.2d 582, 584 (1977).

3. J. DESPERT, *CHILDREN OF DIVORCE* 17 (1962).

4. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 72 (1969).

5. *Id.*

6. *Ross v. Hoffman*, 280 Md. 172, 173-74, 372 A.2d 582, 584 (1977).

7. In *Sullivan v. Auslaender*, 12 Md. App. 1, 3 n.2, 276 A.2d 698, 699 n.2 (1971), the court said:

That securing the welfare and promoting the best interest of the child is decisive is emphasized by the various other ways reference is made to that "clean and well defined" requirement. It was stated to be the "paramount question" in *Piotrowski v. State*, 179 Md. 377, 381; the "sole question" in *Young v. Weaver*, 185 Md. 328, 331; the "paramount consideration" in *Glick v. Glick*, 232 Md. 244, 248; the "determining factor" in

Because custody litigation should be concerned primarily with the child's best interests, it might seem to follow that the child's "rights" are central to such litigation. For example, one might say: the child has a "right" to companionship and affection and to live in a home that will provide the best possible environment; if the child's best interests are adversely affected by a custodian's wrongful conduct, then the child has a "right" to have the conduct stopped or to have a new custodian appointed; and so forth.<sup>8</sup> However, while it is possible to speak in terms of the child's "rights" (and obligations?) and the custodian's "obligations" (and rights?), neither the problem of custody in general nor the resolution of specific custody disputes is thereby made easier to resolve. In fact, any attempt to itemize the basic rights of a child or the basic obligations of a custodian is likely to divert the decisionmaker's attention from the special nature of child custody litigation. Each case is unique due to the nature of the circumstances that ought to be considered before a decision is reached, and the decision itself must be based not only on past events, but also on a prediction concerning the future.<sup>9</sup> Moreover, the child's environment has either recently disintegrated or is disintegrating, and the child's new environment is likely to be sufficiently different from the old to create serious adjustment problems.<sup>10</sup> Add to all of this the likelihood that the litigation will provoke strong emotions, including anger and feelings of wounded pride, and one begins to appreciate why "judges continually characterize custody litigation as the most taxing and frustrating part of their work."<sup>11</sup>

In order to perform this most frustrating task with any hope of success, the judge must carefully evaluate the many intangible factors that might affect the child's welfare. Even at a young age, each child is a complex individual whose welfare cannot be resolved without examining such things as the child's personality, physical and mental health, aptitudes, and emotional needs and attachments.<sup>12</sup> Similarly, the judge must view each potential custodian as a unique individual having both

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*Heaver v. Bradley*, *supra*, at 242; the "ultimate test" in *Fanning v. Warfield*, *supra*, at 24; "of transcendent importance" in *Dietrich v. Anderson*, 185 Md. 103, 116.

8. For attempts to itemize the "rights" of children, see Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972); H. KRAUSE, FAMILY LAW CASES AND MATERIALS 1033 (1976).

9. H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 1026 (3d ed. 1980); Land, *Children*, in MARYLAND DIVORCE AND SEPARATION LAW 157-58 (J. Ester ed., Md. Inst. Cont. Prof. Educ. of Laws 1979).

10. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, 31-34 (1973); H. CLARK, *supra* note 9, at 1026.

11. B. BOTEIN, TRIAL JUDGE 273 (1952).

12. See, e.g., *Trenton v. Christ*, 216 Md. 418, 422-23, 140 A.2d 660, 662 (1958); *Piotrowski v. State*, 179 Md. 377, 383, 18 A.2d 199, 201 (1941).

strengths and weaknesses — a person who will sometimes help and sometimes hinder the child's physical well being and intellectual and emotional growth.<sup>13</sup> In addition, the court must consider future relationships between the child and persons other than the custodian, particularly relationships with siblings, stepbrothers and stepsisters, peers, grandparents, and other relatives.<sup>14</sup> The characteristics of the environment provided by a potential custodian are also relevant.<sup>15</sup> Will the child have a "decent place to live"? What opportunities will the child have for education and eventual employment? And finally, a court cannot avoid at least thinking about the interests that the state may have. For example, which custodian is most likely to teach the child to be a "good, law abiding citizen"? Will an award of custody to one claimant rather than the other be more likely to create a need for financial assistance from the state?

So. It may be tempting to think of custody disputes in terms of "rights" and "obligations," particularly for lawyers and judges who are likely to feel comfortable (we hope) with the process of analyzing a problem in terms of adversaries' "rights." However, a custody dispute ought not to fit into that comfortable pattern. Although the courts should consider the competing interests of all persons who will have a significant relationship with the child,<sup>16</sup> they ought not to view these interests as the warring adversaries' "rights." The court's ultimate purpose is not to secure an adult's rights, but to further a child's welfare. This is undoubtedly why Maryland cases have insisted that the determining factor must always be *the child's* best "interests."<sup>17</sup>

If achieving this goal is as "taxing and frustrating" as judges claim, then the most troublesome problems may be finding judges who have both the inclination and ability to decide such cases and providing them with the time needed to do so. Perhaps King Solomon's contribution to the folk lore of child custody disputes is still mentioned today<sup>18</sup>

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13. *Hild v. Hild*, 221 Md. 349, 360, 157 A.2d 442, 448 (1960); *Kirstukas v. Kirstukas*, 14 Md. App. 190, 197, 286 A.2d 535, 539 (1972). See generally *Andrews v. Andrews*, 242 Md. 143, 218 A.2d 194 (1966); *Palmer v. Palmer*, 238 Md. 327, 207 A.2d 481 (1965).

14. *E.g.*, *Burns v. Bines*, 189 Md. 157, 165, 55 A.2d 487, 490-91 (1947); *Kartman v. Kartman*, 163 Md. 19, 26, 161 A. 269, 271 (1932); *Barsallo v. Barsallo*, 18 Md. App. 560, 570, 308 A.2d 457, 462 (1973).

15. See, *e.g.*, *Bray v. Bray*, 225 Md. 476, 483, 171 A.2d 500, 503 (1961); *Melton v. Connolly*, 219 Md. 184, 187, 148 A.2d 387, 388 (1959); *Alston v. Thomas*, 161 Md. 617, 620-21, 158 A. 24, 25 (1932).

16. *E.g.*, *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952); *Dietrich v. Anderson*, 185 Md. 103, 119-20, 43 A.2d 186, 193 (1945); *Kartman v. Kartman*, 163 Md. 19, 26, 161 A. 269, 271-72 (1932).

17. See *supra* cases cited note 7.

18. See, *e.g.*, *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406,

because his "wisdom" was in devising a test that (a) provided the "right" conclusion, (b) was easy to administer, and (c) resulted in a quick resolution of a difficult problem. If there are other tests or rules that can serve these functions, keeping in mind that a "right" conclusion is reached only if the child's best interests are secured, then we would be wise indeed to adopt them.

## I. THE EFFICACY OF PRESUMPTIONS

### A. *The Maternal Preference Doctrine*

Is it possible that a custody dispute between the parents can be more quickly and easily resolved, and the child's best interests furthered, if the courts presume that one parent's sex makes that person a better custodian?

"Under the early English common law the father had the absolute right to custody regardless of the welfare of the child."<sup>19</sup> This absolute right was given to the father because he alone had the obligation to support the couple's children; therefore, it was claimed, he should have a correlative right to their custody.<sup>20</sup> Since the welfare of the child was irrelevant, the courts might more accurately have spoken of the father's absolute right to possession of a thing, rather than custody of a child.

In 1929, the Maryland legislature enacted article 72A, section 1, providing that "the father and mother are the joint natural guardians of their minor child and . . . they shall have equal powers and duties, and neither parent has any right superior to the right of the other concerning the child's custody . . ." <sup>21</sup> Although the Maryland House and Senate Journals do not indicate why this statute was enacted,<sup>22</sup> the plain meaning of the statutory language indicates that one purpose was to abolish the father's "absolute" (i.e., "superior") right to custody under the early common law. Surprisingly, however, the Maryland Court of Appeals spoke of fathers' rights after article 72A was enacted and did so without explaining how a father could have a "superior" right notwithstanding a statute declaring that "*neither* parent has any

414, 381 A.2d 1154, 1160 (1977); Note, *Best Interests of the Child: Maryland Child Custody Disputes*, 37 MD. L. REV. 641 (1978).

19. *McAndrew v. McAndrew*, 39 Md. App. 1, 4, 382 A.2d 1081, 1083 (1978); see also *Haddad & Roman, No Fault Custody*, 2 FAM. L. REV. 95, 96-97 (1979).

20. *McAndrew v. McAndrew*, 39 Md. App. 1, 4, 382 A.2d 1081, 1083 (1978).

21. 1929 Md. Laws ch. 561, § 1.

22. Legislative intent occasionally is stated in a preamble or suggested by changes to a proposed statute prior to enactment. There are no such indications of legislative intent for article 72A, § 1. See 1929 MD. S. JOUR.; 1929 MD. H. JOUR.

right superior" to those of the other.<sup>23</sup> Even more surprising is the fact that, when the paternal preference rule began to disappear, the Court of Appeals was developing a "maternal preference" doctrine without explaining how a *maternal* preference was consistent with the strong language in article 72A.<sup>24</sup>

The maternal preference doctrine is easy to state: "Ordinarily, the welfare of a young child, particularly a girl, is best served by awarding custody to the mother."<sup>25</sup> The justification given for this doctrine was that it

is simply a recognition by the law, as well as by the commonality of man, of the universal verity that the maternal tie is so primordial that it should not lightly be severed or attenuated. The appreciation of this visceral bond between mother and child will always be placed upon the balance scales . . . .<sup>26</sup>

Those who might question the propriety of preferring the mother, merely because she is a mother, are therefore placed in the position of appearing to attack "motherhood."

Before considering whether to launch such an attack, we first need to examine two problems concerning when and how this doctrine applies. First, how "young" must the child be in order for the "maternal tie" to be sufficiently "primordial" to give the mother a preference? In *Parker v. Parker*,<sup>27</sup> a case involving the custody of an eight year old boy, the court concluded that the maternal preference doctrine had no application, but failed to clarify whether that was because of the child's age, sex, or both. On the other hand, the courts relied on the preference in *Cullotta v. Cullotta*,<sup>28</sup> in which the oldest of the four children was almost ten, and in *Kirstukas v. Kirstukas*,<sup>29</sup> in which the children were

23. MD. ANN. CODE art. 72A, § 1 (1978) (emphasis added); *see, e.g.*, *Piotrowski v. State*, 179 Md. 377, 381, 382, 18 A.2d 199, 200, 201 (1941) (however, the determining factor was the child's best interests).

24. *See, e.g.*, *Miller v. Miller*, 191 Md. 396, 408, 62 A.2d 293, 298-99 (1948).

25. *Alden v. Alden*, 226 Md. 622, 624, 174 A.2d 793, 794 (1961). The phrase, "particularly a girl," is sometimes not included; the doctrine has been used for both boys and girls. *Compare id. with* *Cooke v. Cooke*, 21 Md. App. 376, 319 A.2d 841 (1974) (no significance attributed to the child's being a boy). The phrase, "tender years," is sometimes used instead of "young child." *E.g.*, *Roussey v. Roussey*, 210 Md. 261, 264, 123 A.2d 354, 355 (1956).

26. *Kirstukas v. Kirstukas*, 14 Md. App. 190, 196, 286 A.2d 535, 538 (1972). A Missouri court expressed a similar idea by saying that "there is but a twilight zone between a mother's love and the atmosphere of heaven." *Tuter v. Tuter*, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938).

27. 222 Md. 69, 75, 158 A.2d 607, 610 (1960).

28. 193 Md. 374, 384, 66 A.2d 919, 924 (1949).

29. 14 Md. App. 190, 192, 196, 286 A.2d 535, 536, 538 (1972).

five, nine, and ten years old. The safest conclusion is that the Maryland cases leave "unclear" how young the child must be.

The second problem relates to the procedural effect of the doctrine when it applies. Because Maryland cases claimed that young children "should not be separated from their mother *without grave and weighty reasons*"<sup>30</sup> and that "[u]nless the mother is an unfit person she is usually preferred where the children are of tender years,"<sup>31</sup> the mother in *Kirstukas* argued that the doctrine functioned as a presumption. She maintained that she should win unless proven unfit to be a custodian. In rejecting her argument, the Court of Special Appeals responded that the

so-called "preference" for the mother . . . is simply a recognition by the law [of a factor which is so basic and important that it] will always be placed upon the balance scales and, all else being equal or nearly so, will tilt them. As heavy a factor as it may be, however, it is still but a factor. Every statement of the preference is hedged about by the context, "all else being equal." If, after giving due weight to the maternal preference, the scales nonetheless demonstrate the better suitability of the father or, indeed, of some third person to serve the interests of the child, the path for the chancellor is clearly indicated.<sup>32</sup>

Although this statement made it clear that the mother should not win *merely* because the father fails to prove that she is unfit, it is ambiguous in another respect. A subsequent Court of Special Appeals case interpreted it to mean that the maternal preference doctrine is merely a "tie-breaker," as suggested by the phrase "all else being equal or nearly so, [the maternal preference] will tilt [the balance scales]."<sup>33</sup> However, the last sentence in the quote above reads: "If, *after* giving due weight to the maternal preference, the scales *nonetheless* demonstrate the *better* suitability of the *father* . . . ."<sup>34</sup> How can the maternal preference doctrine be merely a "tie-breaker" if it is possible for the scales to tip in the *father's* favor "*after* giving due weight to the maternal preference"? This suggests that the maternal preference doctrine is not merely a "tie-breaker" to be used only *after* all other factors have been weighed, but that it is a "heavy" factor that should "*always* be placed upon the balance scales . . . ."<sup>35</sup> The Court of Appeals has not eliminated this un-

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30. *Cullotta v. Cullotta*, 193 Md. 374, 384, 66 A.2d 919, 924 (1949) (emphasis added).

31. *Roussey v. Roussey*, 210 Md. 261, 264, 123 A.2d 354, 355 (1956) (emphasis added).

32. *Kirstukas v. Kirstukas* 14 Md. App. 190, 196, 286 A.2d 535, 538 (1972).

33. *Cooke v. Cooke*, 21 Md. App. 376, 380, 319 A.2d 841, 843 (1974).

34. *Kirstukas v. Kirstukas*, 14 Md. App. 190, 196, 286 A.2d 535, 538 (1972) (emphasis added).

35. *See id.* (emphasis added).

certainty. Although the court has never used the term "tie-breaker," it has said that the custody of young children is ordinarily awarded to the mother rather than the father "when other things are equal,"<sup>36</sup> thereby suggesting a "tie-breaker" role for the maternal preference doctrine. However, other Court of Appeals decisions seem to view the doctrine as the source of an important factor that is always entitled to great weight.<sup>37</sup> The safest conclusion, once again, is that Maryland law is "unclear."

These questions may be moot, for in *McAndrew v. McAndrew*,<sup>38</sup> the Court of Special Appeals recently concluded that the maternal preference doctrine is no longer a part of Maryland law. Although the party opposing the doctrine relied on Maryland's Equal Rights Amendment,<sup>39</sup> the court based its decision exclusively on a 1974 amendment to article 72A, section 1, which provided that "in any custody proceeding, neither parent shall be given preference solely because of his or her sex."<sup>40</sup> The court reasoned that "at the time this Act was passed, there was *no* preference of either spouse in a custody proceeding, *based on sex*, other than the maternal preference."<sup>41</sup> Therefore, the court concluded, the only conceivable purpose for the 1974 amendment was abolition of the maternal preference rule. Although there are still no Court of Appeals cases in point, and the issue may therefore be "open," the Court of Appeals most likely will agree with the Court of Special Appeals. In *Rand v. Rand*,<sup>42</sup> the Court of Appeals declared that the "clear and unambiguous" language in Maryland's Equal Rights Amendment was "cogent evidence that the people of Maryland are fully committed to equal rights for men and women," and that, therefore, "[c]hild support awards must be made on a sexless basis."<sup>43</sup> For the same reasons, Maryland's Equal Rights Amendment may demand that custody, like child support, be awarded on a sexless basis.

If the Court of Appeals agrees, it might abolish the maternal preference doctrine, relying only on Maryland's Equal Rights Amendment

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36. *Hild v. Hild*, 221 Md. 349, 357, 157 A.2d 442, 446 (1960).

37. *See, e.g.*, *Oberlander v. Oberlander*, 256 Md. 672, 676, 261 A.2d 727, 729 (1970); *Roussey v. Roussey*, 210 Md. 261, 264, 123 A.2d 354, 355 (1956); *Cullotta v. Cullotta*, 193 Md. 374, 384, 66 A.2d 919, 924 (1949).

38. 39 Md. App. 1, 382 A.2d 1081 (1978).

39. *Id.* at 8 n.9, 382 A.2d at 1085 n.9; *see* MD. CONST. Decl. of Rights art. 46 (enacted 1972).

40. 1974 Md. Laws ch. 181 (codified at MD. ANN. CODE art. 72A, § 1 (1978)).

41. *McAndrew v. McAndrew*, 39 Md. App. 1, 8, 382 A.2d 1081, 1085 (1978) (emphasis added).

42. 280 Md. 508, 511-12, 374 A.2d 900, 903 (1977).

43. *Id.* at 515-16, 374 A.2d at 905.



and the 1974 amendment to article 72A. However, the court should discuss an additional question because of its significance in regard to other child custody issues: Do "preferences" or "presumptions" improperly dilute Maryland's commitment to resolving such cases in accordance with the child's best interests? Limiting our present inquiry to the maternal preference doctrine, motherhood should not give *all* claimants who are mothers a "preference" over *all* claimants who are fathers, unless *Kirstukas* was correct that there is a "universal verity" making it significantly more likely that a young child's welfare ordinarily is best served by awarding custody to the mother.<sup>44</sup> If the courts are to rely on this "verity," they must demonstrate — not merely assume or declare — that mothers as a class of persons are born with physical, intellectual, or emotional endowments, or have subsequently acquired skills, that make them better able than fathers to care for young children. The Maryland cases have not demonstrated that mothers have any such superiority; they have only assumed or declared that they do.<sup>45</sup> Undoubtedly some mothers are better able than some fathers to care for the child involved: "[D]ifferences between the parents . . . [that] bear upon their ability to provide the care needed by the child"<sup>46</sup> are clearly relevant and should be considered. However, a child needs good "parenting"; therefore, the inquiry should always focus on determining which of the parents is best equipped with the parenting skills, attitudes, and personality characteristics needed by the specific child.<sup>47</sup> A maternal *or* paternal preference, even if used only as a "tie-breaker," improperly diverts attention from this need to individualize each custody dispute.

Even if the Court of Appeals rejects the maternal preference doctrine, decisionmakers may continue to prefer mothers as custodians for young children. Attitudes are hard to change.<sup>48</sup> Indeed, in the very act

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44. See *Kirstukas v. Kirstukas*, 14 Md. App. 190, 196, 286 A.2d 535, 538 (1972). Some recent studies support the conclusion that this "universal verity" is *not* true. Foster & Freed, *Life With Father: 1978*, 11 FAM. L.Q. 321, 334 (1978); Orthner & Lewis, *Evidence of Single-Father Competence in Childrearing*, 13 FAM. L.Q. 27 (1979); see Note, *supra* note 18, at 654-55.

45. See, e.g., *Alden v. Alden*, 226 Md. 622, 624, 174 A.2d 793, 794 (1961); *Roussey v. Roussey*, 210 Md. 261, 264, 123 A.2d 354, 355 (1956); *Cullotta v. Cullotta*, 193 Md. 374, 384, 66 A.2d 919, 924 (1949); *Kirstukas v. Kirstukas*, 14 Md. App. 190, 196, 286 A.2d 535, 538 (1972).

46. *McAndrew v. McAndrew*, 39 Md. App. 1, 8-9, 382 A.2d 1081, 1086 (1978).

47. "Studies of maternal deprivation have shown that the essential experience for the child is that of mothering — the warmth, consistency and continuity of the relationship, rather than the sex of the individual who is performing the mothering function." *Watts v. Watts*, 77 Misc. 2d 178, 182, 350 N.Y.S.2d 285, 290 (Fam. Ct. 1973).

48. Although New York no longer retains the maternal preference rule, a recent study indicated that New York courts still award custody to the mother in nine out of ten cases.

of discrediting the doctrine, the Court of Special Appeals revealed how the doctrine may be dressed in other words and continue in force:

This is not to suggest that the best interests of the child may not require a consideration of the *biological and psychological differences between the parents* (or other potential custodians) to the extent that they bear upon their ability to provide the care needed by the child at the time. The inquiry here must concern the needs of the particular child and each of the parties' relationship with the child. A parent is no longer presumed to be clothed with or to lack a particular attribute merely because that parent is male or female.<sup>49</sup>

The court is right, but those who would perpetuate the maternal preference doctrine may do so fairly easily by eliminating from their declared reasoning any hint of a preference for mothers, and by talking instead in terms of specific "biological and psychological differences between the parents." However, the necessity to disguise the maternal preference doctrine will force the decisionmaker to speak in terms of specific facts rather than in terms of an assumption or preference based on a parent's sex. The need to speak in terms of specific facts may well impress upon the decisionmaker the need to *think* in terms of specific facts rather than assumptions. This is the primary reason for abolishing the maternal preference doctrine.

### B. *The Presumption Against An Adulterous Parent*

Should an adulterous parent be presumed "unfit" to raise a child? For many years, Maryland cases recognized such a presumption,<sup>50</sup> "not as a matter of punishment or reward, but because it is assumed that the child will be reared in a cleaner and more wholesome moral atmosphere."<sup>51</sup> That some element of punishment probably was involved, is suggested by the absence of any requirement that the parent's adultery must have had some actual effect on the child's welfare or that the child must have at least known or had reason to know that "immoral" con-

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Haddad & Roman, *No-Fault Custody*, 2 FAM. L. REV. 95, 95 (1979). One apparent reason for this imbalance is that many New York judges and lawyers still think in terms of the traditional bias favoring mothers. *Id.*; see also Miller, *Joint Custody*, 13 FAM. L.Q. 345, 353 (1979) (suggesting that this disparity between theoretical equality and practical application exists in many states).

49. *McAndrew v. McAndrew*, 39 Md. App. 1, 8-9, 382 A.2d 1081, 1086 (1978) (emphasis added).

50. See, e.g., *Palmer v. Palmer*, 238 Md. 327, 331, 207 A.2d 481, 483 (1965); *Wallis v. Wallis*, 235 Md. 33, 36-37, 200 A.2d 164, 165-66 (1964) and cases cited therein.

51. *Hild v. Hild*, 221 Md. 349, 358, 157 A.2d 442, 447 (1960); accord *Raible v. Raible*, 242 Md. 586, 594, 219 A.2d 777, 780 (1966).

duct had occurred.<sup>52</sup> Punishment also is suggested by such cases as *Pangle v. Pangle*,<sup>53</sup> in which the Court of Appeals said: "Having lost his wife through her misconduct, he ought not to be deprived of the custody of his daughter and subjected to the humiliation of surrendering her to the support and control of the author of his marital misfortune." There also seems to be an element of punishment in the heavy burden of proof placed on an adulterous parent who attempted to rebut the presumption. Such a parent was required to make a "strong showing" that "the adulterous relationship has ceased and appears unlikely to be revived because [she] has changed her way of living . . . ."<sup>54</sup> Marriage to the former paramour, which might have shown at least an attempt to change one's "way of living," was held insufficient to rebut the presumption,<sup>55</sup> and seemed to be viewed in some cases as additional evidence of unfitness.<sup>56</sup> To be "strong" enough to rebut the presumption, there had to be evidence of "repentance," of termination of the illicit affair, and of conduct demonstrating rehabilitation.<sup>57</sup> As might be expected, judges sometimes disagreed as to whether this rigorous standard was satisfied.<sup>58</sup>

Beginning in the early 1970's, Maryland cases began to suggest a possible relaxation of the presumption against an adulterous parent,<sup>59</sup>

52. The cases cited notes 50-51 *supra*, do not mention any such requirement. In *Mullinix v. Mullinix*, 12 Md. App. 402, 278 A.2d 674 (1971), the court used the presumption although the record indicated that the four children involved were not aware of their mother's adultery.

53. 134 Md. 166, 170, 106 A. 337, 338 (1919).

54. *Hild v. Hild*, 221 Md. 349, 358, 157 A.2d 442, 447 (1960); *accord* *Palmer v. Palmer*, 238 Md. 327, 331, 207 A.2d 481, 484 (1965).

55. *McCabe v. McCabe*, 218 Md. 378, 146 A.2d 768 (1958); *Pangle v. Pangle*, 134 Md. 166, 106 A. 337 (1919).

56. *See* *Bray v. Bray*, 225 Md. 476, 483-84, 171 A.2d 500, 504 (1961); *Pangle v. Pangle*, 134 Md. 166, 169, 106 A. 337, 338 (1919). The dissenting opinion in *Hild v. Hild*, 221 Md. 349, 364-65, 157 A.2d 442, 450-51 (1960) (Hammond, J., dissenting), made a particularly strong argument against viewing marriage to the paramour as additional evidence of unfitness.

57. *Raible v. Raible*, 242 Md. 586, 594, 219 A.2d 777, 780 (1966); *Wallis v. Wallis*, 235 Md. 33, 37, 200 A.2d 164, 166 (1964); *Wood v. Wood*, 227 Md. 112, 115, 175 A.2d 573, 574-75 (1961).

58. *Compare, e.g.,* *Cornwell v. Cornwell*, 244 Md. 674, 224 A.2d 870 (1966) (awarding custody to the adulterous mother) *with id.* at 680, 224 A.2d at 874 (Barnes, J., dissenting) (arguing that the standard was not satisfied). *See* *Parker v. Parker*, 222 Md. 69, 158 A.2d 607 (1960) for an example of a case in which the court could have concluded that the presumption was rebutted, but did not. The mother testified that she had "repented," that she was sorry for her misconduct, and that she had joined a church. Her pastor's favorable testimony was not enough to dispel the court's doubts concerning the sincerity of her repentance.

59. *See* *Pontoro v. Pontoro*, 257 Md. 576, 263 A.2d 820 (1970); *Neuwiller v. Neuwiller*, 257 Md. 285, 262 A.2d 736 (1970).

and in 1977, the Court of Appeals abolished it in *Davis v. Davis*.<sup>60</sup> The court noted that "rapid social and moral changes in our society" justified a reexamination of the presumption, and concluded that "a finding of adultery per se [is not] a 'highly persuasive indicium of unfitness,' " but is merely one factor that "should be weighed, along with all other pertinent factors, *only* insofar as it affects the child's welfare."<sup>61</sup> The meaning of this new rule was tested just two years later in *Swain v. Swain*.<sup>62</sup> The circuit court had concluded that, but for the mother's adultery, it was in her children's best interests to live with her. Her adultery, however, posed a particularly difficult problem because she had continued living with her paramour until the date of the hearing, and her children were aware of the relationship — he was in their apartment when the children went to bed at night and there when they got up in the morning. However, the circuit court judge found nothing "that mars or stains in any way the life of the children"<sup>63</sup> and concluded that the children's awareness of their mother's adultery did not outweigh the circumstances otherwise supporting the conclusion that it was in their best interests to live with their mother. On appeal, the father argued that *Davis* abolished the presumption that an adulterous parent was unfit, but not the presumption that exposure to an adulterous relationship has an adverse effect on a child's welfare.<sup>64</sup> The Court of Special Appeals affirmed the circuit court's award to the mother, and said that *Davis* means:

[T]here are now no presumptions whatsoever with respect to the fitness of a parent who has committed, or is committing, adultery. Rather, adultery is relevant *only* insofar as it *actually* affects a child's welfare . . . . [T]he *mere* fact of adultery cannot "tip the balance" against a parent in the fitness determination. Thus, a chancellor should weigh, not the adultery itself, but only any actual harmful effect that is supported by the evidence.<sup>65</sup>

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60. 280 Md. 119, 372 A.2d 231, *cert. denied*, 434 U.S. 939 (1977). In all but two of the earlier Maryland appellate cases, the mother had been the adulterous parent. In *Raible v. Raible*, 242 Md. 586, 219 A.2d 777 (1966), and *Trudeau v. Trudeau*, 204 Md. 214, 221, 103 A.2d 563, 566 (1954), that the father also had committed adultery was mentioned as possibly having some bearing on his fitness as a custodian, but no presumption was used against him. Since the *Davis* case abolished the presumption, this possible violation of Maryland's Equal Rights Amendment, MD. CONST. Decl. of Rights art. 46 (enacted 1972), need not be resolved.

61. *Davis v. Davis*, 280 Md. 119, 127, 372 A.2d 231, 235 (emphasis added), *cert. denied*, 434 U.S. 939 (1977).

62. 43 Md. App. 622, 406 A.2d 680 (1979).

63. *Id.* at 625, 406 A.2d at 682.

64. *Id.* at 629, 406 A.2d at 683.

65. *Id.* at 629, 406 A.2d at 683-84. By taking this position, the Court of Special Appeals aligned itself with the three members of the United States Supreme Court who would have

*Davis* and *Swain* are particularly important, not merely because they made it clear that there are no presumptions concerning a parent's adultery, but also because they relied upon a principle that ought to be used in all custody disputes: A particular circumstance concerning a child's parent, whether it be the parent's conduct, morality, attitude, or whatever, ought to be considered only if it has had, or will have, some *actual* effect on the *child's* welfare. Custody litigation ought not to be used as justification for declaring open season on a parent's privacy, and to the extent that a parent's character and beliefs, or private interests and activities, do not actually affect the child's welfare, they should not be considered at a custody hearing.<sup>66</sup>

### C. *The Presumption Favoring Parents Over Others*

Where parents claim the custody of a child, there is a *prima facie* presumption that the child's welfare will be best subserved in the care and custody of its parents rather than in the custody of others, and the burden is then cast upon the parties opposing them to show the contrary.<sup>67</sup>

Although in *Powers v. Hadden*,<sup>68</sup> the court claimed that this "pa-

granted certiorari in *Jarrett v. Jarrett*, 449 U.S. 927 (1980). The Illinois Supreme Court had concluded that a divorced mother's violation of a fornication statute by cohabiting with a man she had not married, justified awarding custody of her children to their father because of the possibility that her children's awareness of the illicit relationship might adversely affect their future welfare. Since the relationship had existed for some time and was not shown to have had any actual adverse effect on the children, the three dissenting Justices argued that the Illinois court improperly used what amounted to a conclusive presumption: "Nothing in the record or in logic supports a conclusion that divorced parents who fornicate, for that reason alone, are unfit or adversely affect the well-being and development of their children . . ." *Id.* at 930. They also maintained that a custody decision based on such a conclusive presumption resulted in the denial of a hearing at which the mother could present evidence of facts that might justify an award in her favor, thereby depriving her of her fourteenth amendment right to a meaningful hearing. The Court cited *Stanley v. Illinois*, 405 U.S. 645 (1972), in which the Supreme Court struck down a conclusive presumption that an unmarried father was not fit to have custody, as authority for the proposition that certiorari should have been granted and that the conclusive presumption used against the mother should have been invalidated.

66. See *Andrews v. Andrews*, 242 Md. 143, 147, 218 A.2d 194, 196-97 (1966).

67. *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952). Although not relied upon in *Ross v. Pick*, or in other Maryland cases applying the parental presumption, see *infra* cases cited notes 68-76 there is statutory authority for the presumption:

Provided: The provisions of this article shall not be deemed to affect the existing law relative to the appointment of a third person as guardian of the person of the minor where the parents are unsuitable, or the child's interests would be adversely affected by remaining under the natural guardianship of its parent or parents.

MD. ANN. CODE art. 72A, § 1 (1978). This provision should be repealed if Maryland's legislature decides to discard the parental presumption.

68. 30 Md. App. 577, 583, 353 A.2d 641, 645 (1976).

rental presumption" is "not based upon sympathetic concern for the parent nor upon parent's rights," many Maryland cases assert that the "law of nature" gives parents a "right" to the custody of "their own" children.<sup>69</sup> At the same time, courts sometimes say substitute parents have "rights" concerning custody, or at least a strong and legitimate interest because it is but "fair and proper that their previous faithfulness, and the interest and affection which these labors have created in them, should be respected."<sup>70</sup> Having identified opposing "rights," the courts then strike a balance by saying that "the right of either parent is ordinarily superior to that of anyone else."<sup>71</sup> Finally, to complete their justification for the presumption favoring parents, the courts assert that it is ordinarily in the child's best interests to live with a parent because "[t]he affection which springs from [the relation of parent and child] is stronger and more potent than any which springs from any other human relation,"<sup>72</sup> and the strength of this affection "leads to desire and efforts to care properly for and raise the child, which are greater than another would be likely to display."<sup>73</sup>

Whether these arguments adequately justify a presumption favoring biological parents, may depend to some extent upon how difficult it is to convince a court that the presumption has been rebutted. Unfortunately, there is some uncertainty in Maryland as to what a non-parent must prove in order to succeed. In *Ross v. Hoffman*,<sup>74</sup> the court said the presumption was so strong that

it is *only* upon a determination by the equity court that [1] the parent is *unfit* or [2] that there are *exceptional circumstances which make custody in the parent detrimental to the best interests of the child*, that the court need inquire into the best interests of the child in order to make a proper custodial disposition.<sup>75</sup>

Other cases have agreed that the burden of proof is heavy, but have not even mentioned the stringent requirement imposed on the foster parents in *Ross v. Hoffman*. Rather than holding that non-parents *must*

69. *E.g.*, *Ross v. Pick*, 199 Md. 341, 352, 86 A.2d 463, 468 (1952); *Dietrich v. Anderson*, 185 Md. 103, 118, 43 A.2d 186, 192 (1945); *Kartman v. Kartman*, 163 Md. 19, 23, 161 A. 269, 270 (1932); *see also* *White v. Seward*, 187 Md. 43, 48, 48 A.2d 335, 338 (1946).

70. *Dietrich v. Anderson*, 185 Md. 103, 119-20, 43 A.2d 186, 193 (1945); *accord* *Ross v. Pick*, 199 Md. 341, 352, 86 A.2d 463, 469 (1952).

71. *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952).

72. *Dietrich v. Anderson*, 185 Md. 103, 118, 43 A.2d 186, 192 (1945).

73. *Melton v. Connolly*, 219 Md. 184, 188, 148 A.2d 387, 389 (1959).

74. 280 Md. 172, 372 A.2d 582 (1977).

75. *Id.* at 178-79, 372 A.2d at 587 (emphasis added); *accord* *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952); *Powers v. Hadden*, 30 Md. App. 577, 584, 353 A.2d 641, 645 (1976).

specifically show that a parent is "unfit" or that there are "exceptional circumstances," these cases merely require a strong showing that it is not in the child's best interests for the parent to have custody.<sup>76</sup>

Perhaps the best way to understand what Maryland courts require is to look at cases that awarded custody to non-parents. A variety of factors was involved: (1) The child was only an infant when left by its parents with others — three and one-half months;<sup>77</sup> four months;<sup>78</sup> ten months.<sup>79</sup> (2) The child had been separated from its parents for a long period of time — eight and one-half years;<sup>80</sup> four and one-half years;<sup>81</sup> two and one-half years;<sup>82</sup> ten years.<sup>83</sup> (3) The parent had, to some extent, neglected or abandoned the child.<sup>84</sup> (4) The parent rarely attempted to visit the child — sporadic visits;<sup>85</sup> infrequent visits for the first three years, followed by none for two and one-half years.<sup>86</sup> (5) The parent made little or no contribution toward the child's support.<sup>87</sup> (6) There was some basis for questioning the sincerity of the parent's current interest in having custody — no attempt was made to obtain custody until the foster parents attempted to adopt the child;<sup>88</sup> the mother was asking for the custody of a child she probably had not seen for almost ten years.<sup>89</sup> (7) The child had a strong and affectionate rela-

76. *DeGrange v. Kline*, 254 Md. 240, 242-43, 254 A.2d 353, 354 (1969); *Melton v. Connolly*, 219 Md. 184, 188-89, 148 A.2d 387, 389 (1959); *Maddox v. Maddox*, 174 Md. 470, 477, 199 A. 507, 510 (1938); *Kartman v. Kartman*, 163 Md. 19, 23, 161 A. 269, 270 (1932). In *Trenton v. Christ*, 216 Md. 418, 420, 140 A.2d 660, 661 (1958), the court mentioned the requirement that substitute parents have the burden of proving "unfitness" or "exceptional circumstances," but they resolved the dispute involved without stating that either had been proved by the grandparents to whom custody was awarded.

77. *Ross v. Hoffman*, 280 Md. 172, 181, 372 A.2d 582, 588 (1977) (substitute parents were only babysitting for the first few weeks).

78. *Melton v. Connolly*, 219 Md. 184, 186, 148 A.2d 387, 388 (1959).

79. *Dietrich v. Anderson*, 185 Md. 103, 106, 43 A.2d 186, 187 (1945). But see *DeGrange v. Kline*, 254 Md. 240, 241, 254 A.2d 353, 354 (1969), in which the child was older — two and one-half when first separated from his father, and then four when they finally separated.

80. *Ross v. Hoffman*, 280 Md. 172, 192, 372 A.2d 582, 594 (1977).

81. *Melton v. Connolly*, 219 Md. 184, 186, 189, 148 A.2d 387, 388, 389-90 (1959).

82. *DeGrange v. Kline*, 254 Md. 240, 241, 254 A.2d 353, 353-54 (1969).

83. *Ross v. Pick*, 199 Md. 341, 351-52, 86 A.2d 463, 469 (1952).

84. *Lippy v. Breidenstein*, 249 Md. 415, 417, 240 A.2d 251, 252 (1968); *Ross v. Pick*, 199 Md. 341, 351-52, 86 A.2d 463, 469 (1952); *Alston v. Thomas*, 161 Md. 618, 620, 158 A. 24, 25 (1932).

85. *Ross v. Hoffman*, 280 Md. 172, 182, 372 A.2d 582, 589 (1977).

86. *Lippy v. Breidenstein*, 249 Md. 415, 418, 240 A.2d 251, 253 (1968). But see *Trenton v. Christ*, 216 Md. 418, 421-22, 140 A.2d 660, 662 (1958), and *Maddox v. Maddox*, 174 Md. 470, 472-73, 199 A. 507, 508-09 (1938), in which the parent to whom custody was denied had visited with the child when possible, or at least had attempted to do so.

87. *Ross v. Hoffman*, 280 Md. 172, 182, 372 A.2d 582, 589 (1977); *Lippy v. Breidenstein*, 249 Md. 415, 418, 240 A.2d 251, 253 (1968).

88. See *Lippy v. Breidenstein*, 249 Md. 415, 240 A.2d 251 (1968).

89. *Ross v. Pick*, 199 Md. 341, 351-52, 86 A.2d 463, 469 (1952).

tionship with his or her substitute parent or parents — the substitute parents were the child's "primary source of nurturers";<sup>90</sup> the child was given a secure home and affectionate care.<sup>91</sup> (8) The child had strong positive feelings toward the environment in which he or she had been living — the child was happy, well adjusted, and had many friends;<sup>92</sup> the eleven year old child expressed a feeling of strong attachment to his foster parents.<sup>93</sup> (9) A change in custody would probably be very traumatic for the child — would cause emotional upheaval;<sup>94</sup> the mere contemplation of the possibility of change produced serious emotional upset.<sup>95</sup> (10) And finally, many miscellaneous factors, such as a pattern of misconduct on the parent's part,<sup>96</sup> and a significant difference between the physical characteristics of the two homes.<sup>97</sup> In each of the cases discussed, several of the above factors were present, and it is clear that no one factor would have justified an award to the non-parent.

All but one of the cases cited above were decided prior to 1973,<sup>98</sup> the publication date of *Beyond the Best Interests of the Child*.<sup>99</sup> In this book, Joseph Goldstein, Anna Freud, and Albert Solnit introduce a new approach to child custody decisions. They favor awarding custody to a "psychological parent," who will not necessarily be a biological parent. A "psychological parent" is defined as "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs."<sup>100</sup> Once established as a child's psychological parent, a person remains that child's psychological parent until there is such a break in the continuity of the relationship that the child stops thinking of him or her as a psychological parent.<sup>101</sup>

The authors formulate several guidelines for making custody decisions; each contributes to their conclusion that custody should normally

90. *Ross v. Hoffman*, 280 Md. 172, 182, 372 A.2d 582, 589 (1977).

91. *Piotrowski v. State*, 179 Md. 377, 383, 18 A.2d 199, 201 (1941); *Maddox v. Maddox*, 174 Md. 470, 475, 477, 199 A. 507, 510 (1938).

92. *Trenton v. Christ*, 216 Md. 418, 422, 140 A.2d 660, 662 (1958); *Piotrowski v. State*, 179 Md. 377, 383, 18 A.2d 199, 201 (1941).

93. *Ross v. Pick*, 199 Md. 341, 353-54, 86 A.2d 463, 469-70 (1952).

94. *Ross v. Hoffman*, 280 Md. 172, 192, 372 A.2d 582, 594 (1977); *Melton v. Connolly*, 219 Md. 184, 189, 148 A.2d 387, 390 (1959).

95. *Trenton v. Christ*, 216 Md. 418, 422, 140 A.2d 660, 662 (1958).

96. *Ross v. Hoffman*, 280 Md. 172, 181, 372 A.2d 582, 588 (1977); *Lippy v. Breidenstein*, 249 Md. 415, 416-17, 240 A.2d 251, 252 (1968).

97. *Melton v. Connolly*, 219 Md. 184, 186-87, 148 A.2d 387, 388 (1959).

98. *See Ross v. Hoffman*, 280 Md. 172, 372 A.2d 582 (1977).

99. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) [hereinafter cited as *BEYOND THE BEST INTERESTS*].

100. *Id.* at 98.

101. *Id.* at 31-34, 40-42, 47-49.



be awarded to the psychological parent. First, they assert that “[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child’s normal development.”<sup>102</sup> This implies, not only that each child placement should be final,<sup>103</sup> but that an existing relationship should not be disrupted. Interrupting such a relationship will cause a child great emotional pain.<sup>104</sup> Second, the authors maintain that custody decisions should reflect “the child’s, not the adult’s, sense of time.”<sup>105</sup> A child’s sense of time changes greatly with age. The younger the child, the more rapidly he will feel abandoned if separated from a psychological parent, and the more rapidly he will replace the old relationship with a new one.<sup>106</sup> Once a new relationship is established, a court should allow the child to remain with the person who is *in fact* a psychological parent, even though the adult decisionmaker may have trouble appreciating that such a strong bond could form in what, to an adult, may seem like a short time.<sup>107</sup> Finally, the authors argue that “child placement decisions must take into account the law’s incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.”<sup>108</sup> As the authors note, no one can predict in detail a child’s future development. They conclude that we should therefore confine ourselves to those short term predictions that they feel we can make with some accuracy. We know, for example, that separating a child from a psychological parent will cause the child immediate emotional pain. Accordingly, we know that we should not disrupt such a relationship unnecessarily.<sup>109</sup> Of course, if a child has no psychological parent, the court will have to try to identify someone who has the capacity to become one. It should do so as quickly as possible in order to minimize the damage that flows from uncertainty in the child’s life.<sup>110</sup>

The authors use these guidelines and the concept of the psychological parent as the basis for a new standard — the “least detrimental available alternative,” which is to replace the best interests doctrine.<sup>111</sup>

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102. *Id.* at 31-32.

103. *Id.* at 35.

104. *Id.* at 32-35.

105. *Id.* at 40. “Unlike adults, who measure . . . time by clock and calendar, children have their own built-in time sense, based on the urgency of their instinctual and emotional needs. This results in their marked intolerance for postponement of gratification or frustration, and an intense sensitivity to the length of separations.” *Id.* at 11.

106. *Id.* at 31-34, 40-42, 47-49.

107. *Id.*

108. *Id.* at 49.

109. *Id.* at 49-52.

110. *Id.* at 42-45.

111. *Id.* at 53.

They contend that the least detrimental available alternative will require placement with a psychological parent or with an individual who will become a psychological parent.<sup>112</sup>

They give several reasons for adopting the new standard. First, although the authors agree with the manifest purpose of the best interests standard, they argue that courts often claim to be serving the child's best interests when they actually are giving primary consideration to the interests of competing adults.<sup>113</sup> Second, they maintain that focusing on the *least detrimental* alternative will encourage courts to think in terms of minimizing damage to the child, who is "already a victim of his environmental circumstances."<sup>114</sup> They hope that thinking in this manner will prompt courts to eliminate the delays that often attend custody litigation and are so damaging to the children concerned.<sup>115</sup> They suggest that the best interests standard, on the other hand, contributes to delays by encouraging open-ended and, therefore, lengthy inquiries.<sup>116</sup> And finally, the authors consider inquiries concerning "best interests" to be too "awesome and grandiose," and assert that the concept of *available alternatives* encourages the decisionmaker to realize his or her inability to make accurate predictions about the child's future.<sup>117</sup> They argue that the court therefore should seek only to satisfy the immediate predictable developmental needs of the child.

Are these arguments likely to persuade a Maryland court to adopt the psychological parent doctrine? Although Maryland cases always have insisted that there should be a strong presumption favoring biological parents over others,<sup>118</sup> a careful examination of the cases in which this presumption was rebutted reveals that Maryland courts appreciated the concerns underlying the psychological parent concept long before the 1973 publication of *Beyond the Best Interests of the Child*. As early as 1938, a Maryland court stressed the importance of maintaining the continuing relationship of mutual affection that had existed for five years between two young girls and their substitute parent.<sup>119</sup> In 1945, the Court of Appeals emphasized the significance of what today might be called a psychological parent-child relationship, when it said:

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112. *Id.*

113. *Id.* at 54.

114. *Id.*

115. *Id.* at 54-55.

116. *Id.* at 37.

117. *Id.* at 63.

118. *See supra* cases cited notes 68-73.

119. *Maddox v. Maddox*, 174 Md. 470, 475, 199 A. 507, 510 (1938).

[W]hen reclamation [of a child left with others] is not sought until a lapse of years, when new ties have been formed and a certain current given to the child's life and thought, much attention should be paid to the probabilities of a benefit to the child from the change. It is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties . . . .<sup>120</sup>

And in two different cases involving girls who had lived with their grandparents for approximately eight years,<sup>121</sup> the courts again awarded custody to what might today be called "psychological parents," although both the biological parent *and* the substitute parents were found to be *fit and proper custodians*. The courts noted the long-standing relationships of mutual affection between the girls and their respective grandparents, the emotional stability and happiness that the girls had achieved, their "roots" in their existing environments, and the emotional turmoil they would have suffered if taken from the only homes they had ever known. In short, as between equally "fit" custodians, custody was awarded to the longtime substitute parents to protect the girls' happiness and emotional well-being and to preserve the continuity of their relationships with longtime custodians who had provided them affection and a sense of stability. This sensitivity for the psychological and emotional needs of children is also evident in all of the other pre-1973 Maryland cases that awarded custody to someone other than a biological parent.<sup>122</sup>

Because of these attitudes, one might have predicted that the psychological parent concept would receive favorable treatment when first argued to a Maryland appellate court. However, in *Ross v. Hoffman*,<sup>123</sup> the only case to date in which the Court of Appeals has had an opportunity to respond, the court mentioned the doctrine only in a footnote and did not indicate the extent to which it should or should not become a part of Maryland law. The Court of Special Appeals, however, has left no uncertainty concerning its attitude toward the merits of preferring psychological parents over biological parents. In *Montgomery County Department of Social Services v. Sanders*,<sup>124</sup> a three judge panel expressly refused to use the concept of the psychological parent as "the

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120. *Dietrich v. Anderson*, 185 Md. 103, 119, 43 A.2d 186, 192-93 (1945).

121. *Trenton v. Christ*, 216 Md. 418, 140 A.2d 660 (1958); *Piotrowski v. State*, 179 Md. 377, 18 A.2d 199 (1941).

122. See *supra* cases cited notes 77-97.

123. 280 Md. 172, 193 n.7, 372 A.2d 582, 594 n.7 (1977).

124. 38 Md. App. 406, 381 A.2d 1154 (1977). In *Powers v. Hadden*, 30 Md. App. 577, 590-92, 353 A.2d 641, 649-50 (1976), (Davidson, J., dissenting), Judge Davidson would have

test" for resolving a custody dispute between a young boy's mother and his substitute parents.

The facts involved in *Sanders* are worth noting. When the boy was ten months old, his mother took him to a hospital for treatment of a suspected infection, only to be told that his "shocking physical condition" was due to numerous physical injuries including broken bones, bruises, scratches, and a bite mark, all of which suggested that the infant had been physically abused.<sup>125</sup> The Montgomery County Department of Social Services (hereinafter MCDSS) filed a petition to have the boy declared to be a "Child in Need of Assistance," and at an emergency hearing held three weeks after he was first taken to the hospital, the court ordered that he be removed from his parent's custody and committed to the MCDSS for "temporary" shelter care.<sup>126</sup> Very shortly thereafter, he was placed with the foster parents who subsequently asked for permanent custody.

At two subsequent hearings, the evidence indicated that the mother was not responsible for the boy's physical injuries and that they were probably caused by his father's "rough play" and misguided attempts at discipline.<sup>127</sup> Although she was not found to be at fault, the mother voluntarily engaged in a number of activities that suggested she was attempting to become a better parent. For instance, she participated in a therapy program, took a course on child development, worked with young children in the Sunday school at her church, and took a number of steps to create a better environment for her son.<sup>128</sup> Although limited finances prevented travelling from Ohio to visit her son in Maryland, there was some indication that she made frequent telephone calls to inquire about him. And then, nine months after her son had been placed with foster parents, she filed a petition asking that he be returned to her. Several months later, when the child had been living with his foster parents for approximately eighteen months, the mother's request was granted.

These facts are worth noting because *Sanders* is one of the few Maryland cases in which it was almost certain that the biological parent would win *if* the court retained Maryland's traditional parental presumption, but would lose *if* the court adopted the psychological parent

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used the psychological parent doctrine as the basis for awarding custody to the substitute parents.

125. 38 Md. App. at 408, 381 A.2d at 1157.

126. *Id.* at 408-09, 381 A.2d at 1157.

127. *Id.* at 409, 381 A.2d at 1157.

128. There was testimony that she was "capable of putting her newly acquired knowledge on child rearing into practice." *Id.* at 410-11, 381 A.2d at 1158.

doctrine. As the Court of Special Appeals noted, Maryland law traditionally presumed that the child's best interests dictate awarding custody to a biological parent unless "the parent is unfit to have custody, or . . . there are such exceptional circumstances as make such custody detrimental to the best interest of the child."<sup>129</sup> In *Sanders*, the mother had not abandoned the child and there was no evidence that she had abused him or that she was guilty of any other misconduct making her "unfit."<sup>130</sup> In fact, she had made bona fide efforts to become a better parent and had sought to reacquire custody as soon as she felt capable of providing a proper home.<sup>131</sup> And although the boy and his mother had been separated for eighteen months, neither the trial court nor the Court of Special Appeals considered this an "exceptional circumstance" making custody in the mother detrimental to the boy's best interests.<sup>132</sup>

On the other hand, had the Court of Special Appeals adopted the psychological parent doctrine, it almost certainly would have awarded custody to the foster parents. First: The boy was only ten months old when custody was transferred from his mother to the foster parents. Considering *his* "sense of time" at that age, it is likely that he had ceased to view his biological mother as his psychological parent some time before eighteen months had passed.<sup>133</sup> Second: The record suggested that a relationship of mutual affection had developed between him and his foster parents, that they had fulfilled his emotional and physical needs on a day-to-day basis, and that he felt wanted and loved by them.<sup>134</sup> They therefore had become his "psychological parents."<sup>135</sup> Third: When the final review hearings were held on the mother's petition, the boy was approximately two and one-half years old, and at that age children have a very strong need for continuity in their relationships with the adults who have been fulfilling their physical and emotional needs — particularly in a case such as *Sanders*, where the child had previously experienced a separation from his mother, the adult who was his first "psychological parent."<sup>136</sup>

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129. *Id.* at 416, 381 A.2d at 1161.

130. *Id.* at 424, 381 A.2d at 1165.

131. *Id.* at 410-11, 381 A.2d at 1158.

132. *See id.* at 421-23, 381 A.2d at 1163-64.

133. *See* BEYOND THE BEST INTERESTS, *supra* note 99, at 40-42.

134. *See id.* at 17-21.

135. *See id.*

136. "Where continuity of such relationships is interrupted more than once, as happens due to multiple placements in the early years, the children's emotional attachments become increasingly shallow and indiscriminate. They tend to grow up as persons who lack warmth in their contacts with fellow beings." *Id.* at 33.

Because custody would have been awarded to the foster parents if the court had accepted the psychological parent doctrine, *Sanders* was a good test case. The Court of Special Appeals decided that psychological parent status ought not to be determinative.<sup>137</sup> The court began by stressing the importance of a biological parent's *right* to the custody of his or her own children, describing this right as being "essential," one of the "basic civil rights of man," and "far more precious . . . than property rights."<sup>138</sup> The court then rejected MCDSS's argument that no biological parent could remain the psychological parent of a child under five once they have been separated for at least six months, and that no such child should ever be returned to his biological parents if others have become his psychological parents.<sup>139</sup> The court maintained that no pre-established time period should operate to deprive biological parents of custody: "The intricacies of the many human relationships that are interwoven into each custody dispute defy [such] simplification . . ." <sup>140</sup> Emphasizing that the law must leave room for adjustments in individual cases, the court concluded that judges must be free to consider all relevant circumstances and should not focus on any one factor, such as the length of time that a parent and child have been separated.<sup>141</sup> The court also suggested that "unrestrained application" of a time formula could lead to "absurd results," such as awarding custody to kidnappers if they have kept the child long enough to become its psychological parents.<sup>142</sup> Moreover, a time formula might encourage even conscientious substitute parents to abscond with a child in order to create "squatter's rights."<sup>143</sup> And finally, the court expressed a clear disinclination to adopt any rule that would give undue weight to the testimony of psychologists, psychiatrists, and social workers. Such experts "'sometimes develop 'rescue fantasies' . . . [that] tend to obscure objective evaluations of the strengths of the child's own home,'" <sup>144</sup> and routine reliance upon such experts "could lead the courts, in acts of misapplied psychology, to separate unjustly family members."<sup>145</sup>

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137. *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 408, 381 A.2d 1154, 1157 (1977).

138. *Id.* at 414, 381 A.2d at 1160.

139. *Id.* at 414, 381 A.2d at 1159.

140. *Id.* at 421, 381 A.2d at 1164.

141. *Id.* at 420-21, 381 A.2d at 1163.

142. *Id.* at 422, 381 A.2d at 1164.

143. *Id.*

144. *Id.* at 424, 381 A.2d at 1165 (quoting Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspective*, 50 N.C.L. REV. 293, 347 (1972)).

145. *Id.* at 423, 381 A.2d at 1165.

The court's rather cavalier response to the role of psychologists, psychiatrists, and social workers was unfortunate. All judges are not incapable of making objective evaluations merely because some may react emotionally to a particular custody case. Similarly, all psychologists, psychiatrists, and social workers are not incapable of making objective evaluations that accurately identify a child's emotional problems and needs just because some of them may sometimes develop "rescue fantasies."

It is a bit more difficult to respond to the Court of Special Appeal's objection to the use of a pre-established time period that resolves disputes in favor of substitute parents once they have had custody for the prescribed length of time. In fact, *Beyond the Best Interests of the Child* did *not* advocate the use of any specific time period because "[t]he process through which a new child-parent status emerges is too complex and subject to too many individual variations for the law to provide a rigid statutory timetable."<sup>146</sup> However, in 1979, two years after *Sanders* was decided, Goldstein, Freud, and Solnit reluctantly concluded that specific time periods should be established because of the difficulty of proving something as subjective as a child's mental attitude concerning who his psychological parents are.<sup>147</sup> They noted that such a determination requires many sessions between the child and a properly qualified clinician and that such sessions are likely to be intrusive to the child and create intolerable periods of uncertainty and delay.<sup>148</sup> Therefore they concluded:

We propose the following statutory periods during which a child is in the direct and continuous care of the same adult(s) as maximum intervals beyond which it would be unreasonable to presume that a child's residual ties with his absent parents are more significant than those that have developed between him and his longtime caretakers:

- (a) 12 months for a child up to the age of 3 years at the time of placement; [i.e., at the time the child was first placed with the "longtime caretakers" who are claiming to be the child's psychological parents];
- (b) 24 months for a child from the age of 3 years at the time of placement.

. . . [T]hese time spans coupled with the longtime caretaker's wish

146. *BEYOND THE BEST INTERESTS*, *supra* note 99, at 48.

147. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 42-45 (1979) [hereinafter cited as *BEFORE THE BEST INTERESTS*].

148. *Id.* at 43-44.

to continue custody are reliable indicators for granting legal recognition to the "new" relationships and for terminating the legal relationship between the children [and] absent parents . . . .<sup>149</sup>

The only exception to these time period rules is for children in the older age group. Since "some older children may hold emotional attachments to absent parents all the more fiercely and possessively the longer the separation lasts," a special hearing should be held for any child over the age of five,

- (a) who, at the time of placement, had been in the continuous care of his parents for not less than the 3 preceding years;  
*and*
- (b) who had *not* been separated from his parents because they inflicted or attempted to inflict serious bodily injury upon him or where convicted of a sexual offense against him.

Drawing upon the best available professional personnel, and recognizing the limits of such inquiries, the [decisionmaker] would determine whether the child's absent parents are still his psychological parents and whether his return to them would be the least detrimental alternative. In the event that such evidence is inconclusive, the child's relationship to his longtime caretakers should be given legal recognition.<sup>150</sup>

Although these time periods are subject to the same objections that the Court of Special Appeals made in *Sanders*, today a Maryland court might be less inclined to reject them because they are significantly longer than the six-month period that provoked such a negative response in *Sanders*. They are long enough to enable an adult to appreciate the probability that a one- or two-year old child will form a very strong attachment to any person who has continuously fulfilled the child's physical and psychological needs on a day-to-day basis for at least one year (i.e., for at least one-half of the child's life). Similarly, an adult should recognize the probability that the same thing is true for a child three years of age or older who has received such care for at least two years. Moreover, Goldstein, Freud, and Solnit have added a significant element of flexibility to their proposed timetable by providing an exception for children who are over the age of five when first placed with substitute parents.

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149. *Id.* at 46. If these statutory periods had been used in Montgomery County Dep't of Social Servs. v. *Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1977), *discussed at* text accompanying notes 124-36 *supra*, custody would have been awarded to the foster parents. The boy was less than three years old when first placed with foster parents, he was in their direct and continuous care for at least twelve months, and they wanted to retain custody.

150. BEFORE THE BEST INTERESTS, *supra* note 147, at 47-48.



However, even if a Maryland court might be more inclined today to adopt these significantly longer time periods, we should consider the other objections raised in *Sanders* before deciding whether Maryland ought to adopt the psychological parent doctrine. The Court of Special Appeals feared that adoption of this doctrine might create an incentive for substitute parents to abscond with the child and then petition for custody after they have become his or her "psychological parents."<sup>151</sup> The court was right when it said that this is a more realistic danger than the unlikely possibility that "the average youngster will be carried off by kidnappers or gypsies."<sup>152</sup> But it does not necessarily follow that this problem justifies the court's refusal to adopt the psychological parent doctrine as "the test." If furthering *the specific child's* best interests is the goal to be achieved, then custody arguably should be awarded to the persons who have *in fact* become *this* child's "parents" even if they wrongfully prevented the child from having contact with his or her biological parents. After all, Maryland cases have stressed that the purpose of custody litigation is not to punish adults; it is to further *the child's* best interests.<sup>153</sup>

On the other hand, perhaps a specific child's best interests are most likely to be protected if the law is structured to discourage adults from engaging in conduct likely to destroy the relationship between a child and a biological parent, who usually is also the child's psychological parent.<sup>154</sup> According to *Beyond the Best Interests of the Child*, the mere physical fact of separation does not automatically destroy a child's perception concerning who his psychological parents are, nor does the mere physical fact of "moving in" with others automatically create a new psychological parent-child relationship. A child continues to identify psychological parents as such until others, on a "day-to-day basis, through interaction, companionship, interplay, and mutuality," have created in the child a sense of being "wanted" and have fulfilled the child's physical and psychological needs, thereby becoming the child's new "psychological parents."<sup>155</sup> Prior to that time, the relationship that ordinarily should be preserved, if possible, is that which still exists in the child's mind and heart.<sup>156</sup> If this is so, it follows that the law

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151. *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 422, 381 A.2d 1154, 1164 (1977).

152. *Id.*

153. *E.g.*, *Raible v. Raible*, 242 Md. 586, 594, 219 A.2d 777, 780 (1966); *Hild v. Hild*, 221 Md. 349, 358, 157 A.2d 442, 447 (1960).

154. *BEYOND THE BEST INTERESTS*, *supra* note 99, at 19, makes it clear that "biological" parents also can be, and often are, "psychological" parents.

155. *Id.* at 98; *see also id.* at 17-21, 31-34, & 40-42.

156. *Id.*

should be structured to encourage attempts to reunite children with their biological-psychological parents and to discourage unreasonable attempts to weaken this relationship, at least until after the prior relationship has been replaced by a new one.

In *Sanders* the Court of Special Appeals reasoned that adoption of the psychological parent concept might encourage substitute parents to be unreasonably destructive of the relationship between the child and his or her biological parents — that as the new relationship grows into one involving strong mutual attachment and affection, the substitute parents may be tempted to insulate the child unreasonably from contact with the biological parents until the relevant time period has elapsed and they have acquired “squatter’s rights.”<sup>157</sup> While this may be true, it is just as possible that the psychological parent doctrine might encourage biological parents to make every effort to bring about a reunion with their child as quickly as possible in order to *prevent* the custodians from acquiring “rights” in “their” child.

The traditional presumption favoring biological parents might affect behavior in the same way. If substitute parents have strong feelings for the child, the knowledge that the law does not favor them might prompt increased efforts to prevent the child from being reunited with his or her biological parents. At the same time, once biological parents know that the law favors them, this knowledge might give them added hope for success and act as an incentive to increase their efforts to be reunited with their child. Thus, either rule of law might act as an incentive to behavior that should be discouraged *and* to behavior that should be encouraged. It is not clear that one rule is better in this respect than the other. In fact, other factors are likely to have a greater effect on behavior than whether Maryland uses the psychological parent doctrine or the traditional presumption favoring biological parents — for instance, the extent to which a child is loved and the extent to which one or more of the adults involved has come to view the custody dispute as an attack on his or her rights or a threat to his or her ego.

Citing a series of Supreme Court cases that spoke of biological parents’ constitutional rights against arbitrary state interference with the family, the *Sanders* court also suggested that the psychological parent doctrine disregards the “rights” of biological parents.<sup>158</sup> In *Smith v. Organization of Foster Families for Equality & Reform*,<sup>159</sup> decided after *Sanders*, the Supreme Court suggested in dicta that foster families, like

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157. *Montgomery County Dep’t of Social Servs. v. Sanders*, 38 Md. App. 406, 422-23, 381 A.2d 1154, 1164 (1977).

158. *Id.* at 414, 381 A.2d at 1160.

159. 431 U.S. 816, 843-44 (1977).

biological families, may have liberty interests that are entitled to constitutional protection. However, the Supreme Court has never been faced with the problem of determining whose "rights" are superior — those of biological or of substitute parents.<sup>160</sup>

The Supreme Court thus has provided no guidance to states choosing whether to use a presumption favoring either biological or psychological parents in custody disputes between the two.<sup>161</sup> Of course, a state has an alternative to both of these approaches. It can renounce all presumptions and direct judges to decide each dispute in light of its unique circumstances, remembering always that the court's goal should be to further the *child's* welfare, not the adults' "rights."

The latter is the best approach. Maryland should avoid all arbitrary rules because they improperly limit the decisionmaker's discretion. Each person involved in a custody dispute — the child, the biological parent or parents, and the substitute parent or parents — is a complex individual whose emotional, intellectual, and physical needs and capabilities are unique. In addition, the environments in which the competing claimants live are likely to be different in ways that will affect the child's welfare. A court must be free to consider *all* of these factors and to evaluate their effects on the individual child's welfare. If custody is awarded *because* a claimant is a biological or a psychological parent, these other important factors will not be considered and the court will have insufficient discretion to be as responsive as possible to the unique needs of each child involved in a custody battle. As the Court of Special Appeals said in *Sanders*, "[t]he intricacies of the many human relationships that are interwoven into each custody dispute defy [such] simplification . . . . [There must be] room for adjustments to individual situations."<sup>162</sup>

Thus we should encourage decisionmakers to consider *all* circumstances that might affect the child's welfare, and to give them sufficient discretion to do so effectively, we must reject any rule that isolates one factor and makes it controlling or uses it as the basis for a presumption. *All* presumptions should be discarded.

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160. See Curtis, *The Psychological Parent Doctrine in Custody Disputes Between Foster Parents and Biological Parents*, 16 COLUM. J.L. & SOC. PROBS. 149, 157-72 (1980).

161. See *id.* But see Muench & Levy, *Psychological Parentage: A Natural Right*, 13 FAM. L.Q. 129 (1979), in which the authors argue that foster children ought to have a substantive due process right to remain with their psychological parents and that the Supreme Court seems to be moving toward recognition of such a right.

162. *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 421, 381 A.2d 1154, 1164 (1977).

## II. CONSIDERATIONS FOR A PROPER APPLICATION OF THE BEST INTERESTS STANDARD

### A. "Joint Custody"

Our first task is to define "joint custody." A particular decree is clearly a joint custody decree if it provides that (1) the parents will share equally the authority and responsibility for making decisions that significantly affect the welfare of their child; *and* (2) the child is to live with each of them on an equal or split time basis — for example, alternating weeks with each parent, or school days with one parent and weekends and most vacation days with the other.<sup>163</sup> "Joint custody," however, also has been used as a descriptive label for arrangements in which only one of these two parental responsibilities is shared.<sup>164</sup> This usage has prompted some critics to suggest that this label not be used at all,<sup>165</sup> or at least not "when physical or actual custody is lodged primarily in [only] one parent."<sup>166</sup> However, this label ought to be used for both of the situations described above. Two very important parenting functions are involved — providing a home for the child and making decisions concerning the child's welfare. If either function is being shared by both parents, then they are both "custodians" in the sense that they are *functioning* as parents, are *actively involved* in the child's life, and are responsible for his or her welfare. The label "joint custody" is therefore appropriate because it suggests to the parents, to the child, and to others that both parents are continuing to *act* as responsible parents even though they no longer live together as husband and wife.<sup>167</sup>

It is unclear whether a joint custody award, as defined above, would be affirmed today by either of Maryland's appellate courts, because there is very little Maryland authority in point. In 1934, the Court of Appeals said that what today is called joint custody "is to be avoided, whenever possible, as an evil fruitful in the destruction of dis-

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163. Zima, *Custody: A Realistic Approach*, 2 FAM. L. REV. 27, 27 (1979). For a good discussion of how the child's time might be divided between the parents, see Miller, *Joint Custody*, 13 FAM. L.Q. 345, 388-90, 394 (1979); Woolley, *Shared Custody*, 1 FAM. ADVOC. 6 (Summer 1978).

164. See, e.g., *Dodd v. Dodd*, 93 Misc. 2d 641, 644, 403 N.Y.S.2d 401, 403 (Sup. Ct. 1978) and cases cited therein.

165. Paryne & Boyle, *Divided Opinions on Joint Custody*, 2 FAM. L. REV. 163, 166 (1979).

166. *Dodd v. Dodd*, 93 Misc. 2d 641, 645, 403 N.Y.S.2d 401, 403 (Sup. Ct. 1978); see also Miller, *supra* note 163, at 360 n. 79, listing fifteen different labels used for alternatives to sole custody. Mr. Miller recommends "joint legal custody" for shared decisionmaking, and "joint physical custody" for shared residence.

167. See Haddad & Roman, *No-Fault Custody*, 2 FAM. L. REV. 95, 100 (1979), which uses "joint custody" to describe a sharing of either of the two functions discussed in text.

cipline, in the creation of distrust, and in the production of mental distress in the child."<sup>168</sup> And in another case from the 1930's, the court said that it was not "wise to impair the authority and control of the [children's paternal grandmother who had been their custodian,] by dividing it with [the mother] whose place [had] been taken by the custodian."<sup>169</sup> Although both cases express distaste for joint custody,<sup>170</sup> neither is very persuasive. Joint custody was not an issue in the second case,<sup>171</sup> and in the first, the court merely declared that joint custody would produce the evil effects listed, without explaining how or why. Today, a Maryland court should evaluate arguments both for and against joint custody before deciding whether to follow dicta in one case and an unexplained denunciation in another.

The Maryland Code, however, arguably precludes an award of joint custody because article 72A, section 1, provides: "Where the parents live apart, the court may award the guardianship of the child to *either* of them . . . ."<sup>172</sup> This language suggests an award to either the mother or the father, not to both. This interpretation is plausible, however, only if the remainder of the sentence is ignored. The sentence concludes: "but, in any custody proceeding, neither parent shall be given preference *solely because of his or her sex.*"<sup>173</sup> Read as a whole, the sentence deals with whether a parent's sex should be relevant when both are requesting custody, not with joint versus sole custody.

The conclusion that article 72A, section 1, does not prohibit joint custody awards in Maryland is supported by other provisions in this statute:

The father and mother are the *joint natural guardians* of their child

168. *McCann v. McCann*, 167 Md. 167, 172, 173 A. 7, 9 (1934).

169. *Maddox v. Maddox*, 174 Md. 470, 477, 199 A. 507, 510 (1938).

170. The only other Maryland case that might be interpreted to express an opinion on joint custody is *Sullivan v. Auslaender*, 12 Md. App. 1, 276 A.2d 698 (1971). The parents had agreed that the children would live with the father in Israel for three years, then with the mother in Maryland for three years. The Court of Special Appeals reversed a circuit court decree incorporating this agreement, and instead awarded sole custody to the mother. However, the court did not reverse specifically because it opposed joint custody decrees. The court was concerned about losing control over the children if they lived in Israel, feared that moving them from one country to another at the end of three years might cause too severe a disruption in their lives, and gave some weight to the children's desire to remain with their mother.

171. In *Maddox v. Maddox*, 174 Md. 470, 199 A. 507 (1938), the trial court had ordered that the children be placed in an institution and that the mother and the paternal grandmother have visitation rights. The issue on appeal was whether the children should live in the institution, with their grandmother, or with their mother, and not whether the mother and grandmother should have joint custody.

172. MD. ANN. CODE art. 72A, § 1 (1978) (emphasis added).

173. *Id.* (emphasis added).

under eighteen years of age and are *jointly and severally charged* with its *support, care, nurture, welfare and education*. They shall have *equal powers and duties*, and *neither parent has any right superior to the right of the other concerning the child's custody*. . . .

Provided: The provisions of this article shall not be deemed to affect the existing law relative to the appointment of a third person as guardian of the person of the minor where the parents are unsuitable, or the child's interest would be adversely affected by remaining under the natural guardianship of its *parent or parents*.<sup>174</sup>

Although the legislature did not use the term "joint custody," the plain meaning of the italicized words is that *both* parents have equal rights and duties concerning guardianship or custody because they are their minor child's "joint natural guardians." A decree that awards "joint custody" to both parents clearly is consistent with this legislative declaration that parents are — and should be treated as — "joint natural guardians."<sup>175</sup>

The only other relevant statutes provide simply that an equity court may "[d]irect who shall have the custody or guardianship of a child,"<sup>176</sup> and that an agreement between parents concerning custody may be enforced by a court, either with or without modification, depending upon whether the court concludes that modification is necessary to protect the child's best interests.<sup>177</sup> These two statutes do not expressly prohibit joint custody; indeed, in the first statute, the unrestricted use of the word "who" and, in the second statute, the absence of any specific provision prohibiting enforcement of an agreement providing for joint custody, seem to give the courts broad authority to make whatever custody award is in the child's best interests. The language of these statutes coupled with that of article 72A, section 1, indicates that a Maryland court has the authority to award joint custody, and should do so if such an award is in the child's best interests.

Because a Maryland court's statutory authority is broad enough to include authority to award joint custody, we should examine the arguments for and against joint custody to determine whether the Court of Appeals ought to reject its earlier denunciation of such awards.<sup>178</sup>

In *Beyond the Best Interests of the Child*, Joseph Goldstein, Anna Freud, and Albert Solnit claim that:

174. *Id.* (emphasis added).

175. There are no Maryland appellate cases in point.

176. MD. CTS. & JUD. PROC. CODE ANN. § 3-602(a)(1) (Supp. 1981); *see also* MD. ANN. CODE art. 16, § 25 (1981).

177. MD. ANN. CODE art. 16, § 28 (1981).

178. *See supra* cases cited notes 168-69.

Children have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents.<sup>179</sup>

Because of these serious adverse effects and the value of protecting the security and continuity of the relationship between the child and at least one psychological parent,<sup>180</sup> the authors are not only opposed to joint custody, but also assert that "the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits."<sup>181</sup>

Other critics agree that joint custody is undesirable, but would not necessarily preclude a noncustodial parent from visiting his or her child or give the custodial parent authority over visitation. These critics argue that joint custody may create chaos.<sup>182</sup> They contend that moving the child back and forth between two houses, and differences in discipline and home life, may create confusion and instability for the child,<sup>183</sup> may significantly increase the child's opportunities to play one parent against the other in order to gain favors or weaken discipline,<sup>184</sup> and may provide the parents with additional reasons to argue with each other.<sup>185</sup> It has also been claimed that "the requirements of joint custody are inherently contrary to the fact of the divorce."<sup>186</sup> Divorce occurs because the parents are incompatible to some extent; thus, they are likely to be resentful, even hostile, and unlikely to be able to achieve the degree of cooperation necessary to be joint custodians.<sup>187</sup> Opponents of joint custody also argue that a child who has experienced the trauma of witnessing his parent's relationship deteriorate, needs a feeling of certainty and finality concerning his own relationship with them.

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179. BEYOND THE BEST INTERESTS, *supra* note 99, at 38; *see also id.* at 12.

180. *Id.* at 31-35.

181. *Id.* at 38.

182. *Braiman v. Braiman*, 44 N.Y.2d 584, 587, 407 N.Y.S.2d 449, 451, 378 N.E.2d 1019, 1021 (1978). For additional cases expressing opposition to joint custody, *see, e.g., Hölley v. Holley*, 158 So. 2d 620, 622 (La. Ct. App. 1963); *Fuhrman v. Fuhrman*, 254 N.W.2d 97, 100 (N.D. 1977); *In re Marriage of Pergament*, 28 Or. App. 459, 462, 559 P.2d 942, 943 (1977); *Lumbra v. Lumbra*, 136 Vt. 529, 532, 394 A.2d 1139, 1142 (1978).

183. *Miller, supra* note 163, at 366-67; *Paryne & Boyle, supra* note 165, at 167-68.

184. *Miller, supra* note 163, at 367-68.

185. *Id.* at 367; *Zima, supra* note 163, at 27-28.

186. *Miller, supra* note 163, at 367.

187. *Id.* at 368; In Reprise, *Joint Custody — Does it Always Work?*, 1 CHILDREN'S LEGAL RTS. J. 32, 33 (Jan./Feb. 1980).

An award of sole custody to one parent, as opposed to joint custody to both, provides this sense of certainty and finality because it establishes a long term relationship with one custodian who is clearly in charge.<sup>188</sup> Finally, these critics have suggested that joint custody may be chosen by some parents and judges for the wrong reasons — to avoid wounding the feelings of one of the parents, as an easy way for the parents or a judge to avoid making a hard decision, or as a method for continuing some relationship between the parents.<sup>189</sup>

The proponents of joint custody have responded that joint custody does not necessarily create chaos or confusion and instability for the children involved. In a study conducted in the 1970's, all of the joint custody children interviewed had living spaces in both of their parents' homes, and each home contained toys and clothes belonging to the child or children. This kept the children from "living out of suitcases," and after an initial period of adjustment, they rarely experienced confusion and came to identify both as stable homes rather than places of transient residence.<sup>190</sup> The same study revealed that several of the fathers involved had very hostile relationships with their ex-wives, but that joint custody was working because both parents cared for their children and were able to cooperate when their children's interests were at stake.<sup>191</sup> Actually, in some cases joint custody has increased the incidence of cooperation between hostile parents, because it "fosters an atmosphere of detente rather than hostility."<sup>192</sup> And, although some have maintained that joint custody creates loyalty conflicts, joint custody children interviewed for another study said that they "felt free and comfortable about loving each parent."<sup>193</sup>

Other responses to the arguments against joint custody are found in the affirmative arguments supporting such awards. For example, although an award of sole custody to one parent and visitation to the other may help to create a long term relationship with the custodial parent, it also may seriously damage the child's relationship with the other parent. Damage may occur in part because such an award "is an unambiguous signal to the child that one parent is right and one is wrong,"<sup>194</sup> and in part because visits with a noncustodial parent can be strained and superficial. Moreover, a vengeful custodial parent can

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188. Miller, *supra* note 163, at 367.

189. *Id.* at 368.

190. Haddad & Roman, *supra* note 167, at 98-99.

191. *Id.* To ease tensions and reduce the opportunities for argument, some parents used the child's schools as a transfer point, rather than using one of the parents' homes.

192. Miller, *supra* note 163, at 364.

193. Woolley, *Shared Custody*, 1 FAM. ADVOC. 6, 33 (Summer 1978).

194. Miller, *supra* note 163, at 355.



sometimes prevent the other parent from having any meaningful contact with his or her child, and even the child's teachers may be reluctant to discuss the child's performance at school with someone who is not a "custodian."<sup>195</sup> As a result, "even the most caring [noncustodial parent] may despondently lose interest."<sup>196</sup>

A sole custody award might also damage the child's relationship with the custodial parent. Giving one parent the full responsibility for living with and raising one or more children may create enormous burdens for that parent, who now must do what two parents previously did. The work involved, and the drain on physical and emotional resources, may be so great that the custodian understandably grows to resent being "trapped." As a result, the children may experience feelings of guilt, sensing that they are a burden to someone they love.<sup>197</sup>

The advocates of joint custody also stress the importance of frequent association between a child and both of his or her parents, not only because a personal relationship with both a male and a female adult helps a child to mature, but also because studies have shown that the lack of any meaningful relationship with both parents has serious adverse effects on a child's emotional well-being.<sup>198</sup> Thus, these advocates argue that joint custody is preferable to sole custody because it more nearly approximates an intact nuclear family and, therefore, is more likely to provide "an atmosphere for normal development and a framework for establishing sound relationships with both parents."<sup>199</sup>

Several miscellaneous arguments for joint custody also should be noted. Joint custody arguably is consistent with the trend toward equality between the sexes, because it may facilitate a mother's pursuit of goals outside the home and may make fathers more conscious of, and responsive to, their child rearing responsibilities.<sup>200</sup> It also has been claimed that a parent who is a joint custodian, rather than just a visitor, is more likely to be satisfied with his or her involvement with the child, and therefore less likely to use the child as a "'pawn'" in battles with the other parent<sup>201</sup> or to default on child support pay-

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195. *Id.* at 356.

196. *Id.*

197. *Id.* at 356-57.

198. Haddad & Roman, *supra* note 167, at 99-100; Miller, *supra* note 163, at 348-50, 358-59, 362; Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 68-69 (1969).

199. Haddad & Roman, *supra* note 167, at 98. *see also* Miller, *supra* note 163, at 363.

200. Miller, *supra* note 163, at 365.

201. Haddad & Roman, *supra* note 167, at 99 (quoting Grief, *Fathers, Children and Joint Custody*, presented at 1978 Meeting of the American Orthopsychiatric Association in San Francisco, California).

ments.<sup>202</sup> Also, when one parent has only visiting rights, saying good-bye at the conclusion of a visit can be very difficult and emotional for both the child and the visiting parent because neither is satisfied with the quality of their time together, and they can look forward to only more of the same. With joint custody, however, there is less pain for both parent and child because both know they will be "living together" again soon.<sup>203</sup> In addition, joint custody has provided some children with more time and attention from each parent than they received when their parents were still together, thereby strengthening the relationships involved.<sup>204</sup> Finally, because a successful joint custody arrangement usually is based on an agreement between the parents, their ability to agree on the major issues of residence and responsibility for decisionmaking is likely to mean that they will be able to agree on other less important issues as well. This will add a useful element of flexibility to the manner in which they discharge their responsibilities as parents.<sup>205</sup> For example, as the child's need to be with a particular parent fluctuates, or as a parent's need to have free time changes, the parents can easily modify the existing custody arrangement simply by agreement.<sup>206</sup>

In addition to evaluating the merits of these arguments for and against joint custody, a Maryland court determining whether joint custody should be awarded also ought to consider that joint custody has worked in some cases,<sup>207</sup> but not in others.<sup>208</sup> Is it possible to identify the factors that contribute to success or failure? In his very helpful article, David J. Miller concludes that three conditions must be met if joint custody of any sort is going to work, and that six other factors may be relevant, but are not prerequisites to success.<sup>209</sup> The prerequisites are: (1) that both parents are "fit" custodians; (2) that there is "some degree of cooperation" between the parents, and at least a "moderate amount of mutual respect and trust";<sup>210</sup> and (3) that the parents have some shared values. The factors that are important, but not

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202. Miller, *supra* note 163, at 365.

203. Haddad & Roman, *supra* note 167, at 99 (1979) (quoting Grief, *supra* note 201).

204. Miller, *supra* note 163, at 363. See L. SALK, WHAT EVERY CHILD WOULD LIKE HIS PARENTS TO KNOW 177 (1972).

205. For a good checklist of provisions that might be included in a joint custody agreement, see Miller, *supra* note 163, at 390-93.

206. *Id.* at 361-62.

207. See, e.g., *id.* at 385-86.

208. See, e.g., *Dodd v. Dodd*, 93 Misc. 2d 641, 403 N.Y.S.2d 401 (Sup. Ct. 1978); In Reprise, *Joint Custody — Does It Always Work?*, 1 CHILDREN'S LEGAL RTS. J. 32, 33 (Jan./Feb.1980).

209. Miller, *supra* note 163, at 369-74.

210. *Id.* at 369.

essential, are:<sup>211</sup> (1) Both parents must want to be joint custodians. (2) At least one parent should have a flexible work schedule. (3) If the child is to live in two homes, they should not provide him or her with extremely different physical environments; and (4) one home should not be too far away from the other. (5) If joint custody will create additional expenses, as is often the case, the parents should be able to afford the increased cost. (6) The number of children involved, and their ages, *may* be important, but the authorities are so widely divided as to the significance of these factors that it "is impossible to reach even tentative conclusions" until there has been more experience with joint custody.<sup>212</sup> Although some advocates of joint custody argue that there must be *more* than a "moderate" amount of cooperation and congeniality between the parents,<sup>213</sup> and that joint custody should be awarded *only* if both parents consent,<sup>214</sup> these arguments reflect disagreement only as to how important these particular factors are, not whether they are important. If a judge considers all nine factors in each case, he or she ought to have a sound basis for predicting whether joint custody is likely to succeed or fail.

What conclusions should a Maryland court reach concerning joint custody? First, if such an award is in a child's best interests, the relevant provisions in the Maryland Code are broad enough to permit such a decree.<sup>215</sup> Second, when evaluating the arguments for and against joint custody, a Maryland court should also consider that it has worked in some cases, but not in others, and that the nine factors identified by Mr. Miller seem to be the keys to success or failure.<sup>216</sup> In some specific cases, the dire predictions of the opponents of joint custody can come true; joint custody may create confusion, instability for the child, loyalty conflicts, additional arguments between hostile parents, and so forth. However, in other specific cases the advocates of joint custody will be right; if joint custody is awarded the child may maintain a more stable and loving relationship with both parents, both parents may be more satisfied with their involvement with the child, the child may be happier and experience less emotional upset, and so forth. Because joint custody will not work in all cases, there should be no presumption

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211. *Id.* at 370-74.

212. *Id.* at 374.

213. *E.g.*, Zima, *supra* note 163, at 28; In Reprise, *supra* note 208.

214. *E.g.*, Zima, *supra* note 163, at 28.

215. See *supra* text accompanying notes 172-77. However, since joint custody is still a relatively new concept, and might be viewed by some judges and lawyers as too "novel" or "experimental" to be tried, it might be wise to enact a statute declaring that joint custody may be awarded when in the child's best interests.

216. See *supra* text accompanying notes 207-12.

favoring such awards.<sup>217</sup> However, because joint custody will work in some cases and is more likely to further some children's best interests than is an award of sole custody with visitation rights, a Maryland court should at least consider joint custody in all cases where child custody is in issue.<sup>218</sup>

### B. *Custody and Visitation for Grandparents*

In *Burns v. Bines*,<sup>219</sup> the Court of Appeals said that "[g]randparents have no 'right' to custody; . . . they unfortunately have only burdens and responsibilities which they assume on account of the parent's misconduct or misfortune." It makes little practical difference, however, whether the courts speak in terms of "rights," because custody has been awarded to grandparents when they overcame the parental presumption and demonstrated that the child's best interests were served by awarding them custody.<sup>220</sup>

Maryland cases also make it clear that a court can award visitation to grandparents. For example, in *Powers v. Hadden*,<sup>221</sup> a circuit court had decided that it would be in the child's best interests to live with her father, but since he was in the military service, the court awarded custody to the paternal grandparents, with visitation rights reserved for the mother and the maternal grandparents. Approximately two years later, the court concluded that circumstances had changed significantly so that it was in the child's best interests for custody to be transferred to the mother, with visitation rights reserved for the father and the paternal grandparents. In reviewing the decree, the Court of Special Appeals did not question whether grandparents ought to have "rights" concerning visitation, or whether the court had the authority to make such awards.<sup>222</sup> The court's only concern was the *child's* best interests.<sup>223</sup>

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217. Paryne & Boyle, *supra* note 165, at 170.

218. *Id.*; see also sources cited *supra* notes 190-205, all of which agree that joint custody ought to at least be considered a possible alternative to sole custody with visitation rights.

219. 189 Md. 157, 164, 55 A.2d 487, 490 (1947).

220. *Trenton v. Christ*, 216 Md. 418, 140 A.2d 660 (1958); *Piotrowski v. State*, 179 Md. 377, 18 A.2d 199 (1941). Custody has been denied when grandparents failed to rebut the parental presumption. *Sibley v. Sibley*, 187 Md. 358, 50 A.2d 128 (1946); *Powers v. Hadden*, 30 Md. App. 577, 353 A.2d 641 (1976).

221. 30 Md. App. 577, 353 A.2d 641 (1976).

222. See also *Maddox v. Maddox*, 174 Md. 470, 475, 199 A. 507, 509 (1938), in which the Court of Appeals did not question the circuit court's authority to enter a decree providing that the children's grandmother be permitted to see them.

223. 30 Md. App. 577, 581 & *passim*, 353 A.2d 641, 643 & *passim* (1976). Even when a grandparent does not request visitation, one of the reasons for awarding visitation to a particular parent may be that the child thereby will be afforded a better opportunity to become

A recent amendment to the Maryland Code, however, creates several problems concerning awards of custody and visitation to grandparents. Prior to July 1, 1981, section 3-602(a) of Courts and Judicial Proceedings provided that equity courts had jurisdiction over both custody and visitation and that they could: "(1) Direct who shall have the *custody* or guardianship of a child . . . [and] (4) Determine who shall have *visitation* rights to a child."<sup>224</sup> Subsection four was amended by adding the following sentence:

At any time following the termination of a marriage, the court may consider a petition for reasonable visitation by one or more of the grandparents of a natural or adopted child of the parties whose marriage has been terminated, and may grant such visitation if the court believes it to be in the best interests of the child.<sup>225</sup>

Note that subsection one, which deals with *custody*, was not similarly amended. Does this failure to add such language to subsection one mean that Maryland equity courts are to have authority to award visitation, but not custody, to grandparents? Because courts have awarded custody to grandparents in the past,<sup>226</sup> it would be unfortunate if the legislature, in its zeal to emphasize that courts can award *visitation* to grandparents, inadvertently abolished an equity court's authority to award *custody* to grandparents.

There are at least two reasons why the Maryland courts are likely to conclude that the amendment to subsection four has not, by negative implication, abolished an equity court's authority to award custody to a grandparent. First, although "custody" and "visitation" are related topics, they are also significantly different because a child "lives with" a custodian, but only "visits" a person to whom visitation has been awarded.<sup>227</sup> Because of this difference, and because the amendment deals only with visitation, the courts may reasonably conclude that the legislature intended to affect only the law of visitation. Had the legislature intended to change Maryland's custody law, it would have dealt with custody specifically.<sup>228</sup> Second, the new sentence in subsection

acquainted with that parent's relatives. *E.g.*, *Barsallo v. Barsallo*, 18 Md. App. 560, 570, 308 A.2d 457, 462 (1973).

224. MD. CTS. & JUD. PROC. CODE ANN. § 3-602(a) (Supp. 1981) (emphasis added), amended by 1981 Md. Laws ch. 276.

225. 1981 Md. Laws ch. 276.

226. *See supra* cases cited notes 219-21.

227. Because of this difference, visitation rights have been preserved even when the court has concluded that the right to custody has been "lost." *See, e.g.*, *Radford v. Matczuk*, 223 Md. 483, 164 A.2d 904 (1960); *Piotrowski v. State*, 179 Md. 377, 18 A.2d 199 (1941).

228. In *DiBlasio v. Kolodner*, 233 Md. 512, 197 A.2d 245 (1964), the court used this reasoning to interpret MD. ANN. CODE art. 75C, § 9 (1957) (now found at MD. CTS. & JUD.

four suggests that the legislature intended to support, not destroy, the interests of grandparents. By declaring that equity courts "may grant such visitation," the legislature recognized the legitimacy of grandparents' interests in their grandchildren and acted to insure that the courts have the authority to assist them when it is necessary and proper to do so. These words manifest no intent to abolish anything.

The amendment creates another problem that should be considered — what is the significance of the words, "at any time *following* the *termination* of a marriage, the court may . . ."?<sup>229</sup> None of the prior Maryland cases dealing with custody or visitation said anything suggesting that custody or visitation could be awarded to grandparents *only* after the marriage between the child's parents had "terminated."<sup>230</sup> Indeed, in *Maddox v. Maddox*,<sup>231</sup> the court awarded custody to the children's paternal grandmother in a proceeding in which the father's request for a divorce was denied, and in subsequent litigation, a circuit court entered a decree preserving the grandmother's right to see the children.<sup>232</sup> The Court of Appeals made no comment concerning the fact that the marriage between the parents had not been legally "terminated" prior to the date of either decree. The new amendment therefore appears to make Maryland law more restrictive than it was prior to July 1, 1981.

One might argue that such a restriction on visitation rights is wise. When the parents and child are still living together and the parents' marriage is intact, visitation litigation between the parents and grandparents might adversely affect the child's feelings for one or the other, and might weaken the parents' "authority" over the child. However, in some instances, this restriction might prevent the courts from acting to further the child's best interests. For instance, cases may arise where, although the parents' marriage has not "terminated," the child is not living with them and could benefit from the affection and companionship that visits with the grandparents would provide. There also may be cases in which the parents ignore requests that they help with the

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PROC. CODE ANN. § 3-301(a)(1980)), which specifically abolished actions for "alienation of affections," but said nothing concerning "criminal conversation." The court admitted that these two common law torts were closely related, but noted that they were different in that "criminal conversation" was not actionable unless intercourse had occurred between the defendant and the plaintiff's wife, whereas intercourse was not required for "alienation of affections." Since the two torts were "different," the court concluded that the legislature meant "exactly what it said — no more and no less," 233 Md. at 519, 197 A.2d at 249, and the plaintiff therefore was allowed to sue for "criminal conversation."

229. 1981 Md. Laws ch. 276 (emphasis added).

230. See *supra* cases cited notes 219-21.

231. 174 Md. 470, 199 A. 507 (1938).

232. *Id.* at 475, 199 A. at 509.

child's school work and the grandparents are willing, if allowed, to tutor the child once a week. In such cases — in fact in all custody and visitation cases — the courts should have the authority to do whatever is necessary to protect the child's best interests.

If the legislature does not remove this unfortunate restriction, the courts should interpret the phrase "termination of a marriage" to mean *any* "termination." The *legal status* of marriage is "terminated" only by the death of one of the spouses or by a court decree.<sup>233</sup> However, a marriage may *in fact* "terminate" long before either spouse dies or obtains a court decree. It may in fact "terminate" because of, for example, desertion by one spouse, a mutually agreed upon separation, or irreconcilable differences. If the word "terminated" is interpreted to include termination in fact as well as in law, then this limitation on the courts' authority at least will not prevent the courts from awarding visitation to grandparents in cases where the marriage is in fact no longer functioning as a unit, but has not been legally terminated.

### C. *The Desires of the Parents and of the Child*

If parents voluntarily agree that a particular custody arrangement is in their child's best interests, their agreement merits careful consideration, particularly if it is based on experience with, and love for, the child.<sup>234</sup> However, because they are so personally involved and such agreements often are made during times of emotional stress or while the parents are attempting to resolve property and money problems, perhaps it is best to provide, as does Maryland Code article 16, section 28, that:

[W]henever any deed or agreement shall make provision for or in any manner affect the care, custody, education or maintenance of any infant child or children of the parties, the court has the right to modify the deed or agreement in respect to the infants as to the court may seem proper, looking always to the best interests of the infants.<sup>235</sup>

This statute does not mean that parental custody and visitation

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233. For an interesting case illustrating the practical significance of the rule that the legal status of marriage is not "terminated" unless and until one of the parties dies or a court decree is "officially" granted, see *Corte v. Cucchiara*, 257 Md. 14, 261 A.2d 775 (1970).

234. "[T]he full authority of the law should stand behind what we know or believe is best — the development of a custody arrangement by consent of the parties, not by mandate of the state." Trombetta, *Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes*, 19 J. FAM. L. 213, 232 (1981); accord *BEYOND THE BEST INTERESTS*, *supra* note 99, at 49-50; *BEFORE THE BEST INTERESTS*, *supra* note 147, at 31-33.

235. MD. ANN. CODE art. 16, § 28 (1981).

agreements are to be given little weight or modified routinely; they are in fact frequently incorporated without modification into divorce decrees.<sup>236</sup> Article 16, section 28, means that the parents' wishes need not be honored *if* the court is convinced that enforcement of their agreement will adversely affect the child's best interests.<sup>237</sup> It also means that a "contract" between parents concerning child custody or visitation may not be subject to the normal "contract" rules. For example, in *Stancill v. Stancill*,<sup>238</sup> a contract between the parents provided that the mother would have custody of one child, that the father would have visitation rights, and that he would pay child support and alimony. When the mother allegedly interfered with the father's visitation rights, he argued that the breach of her promise concerning visitation barred her from enforcing his promise concerning alimony. The court responded that "the chancellor cannot be handcuffed in the exercise of his duty to act in the best interests of a child by any understanding between parents,"<sup>239</sup> and concluded that when such a contract is incorporated into a divorce decree, "the covenants, *as a matter of public policy*, cease to be, if they formerly were, mutually dependent, and therefore, noncompliance with the decree by one party does not constitute a defense to an action to enforce the decree by the other."<sup>240</sup>

In addition to considering the parents' wishes concerning custody, Maryland courts sometimes also consider the child's wishes, giving them great "weight if [the child] is of sufficient age and capacity to form a rational judgment."<sup>241</sup> The child's desires should be respected, not because he or she has any "legal right to decide the question of custody"<sup>242</sup> or because the child is "able to wisely judge what is best for [his or her] future,"<sup>243</sup> but because the child's feelings concerning who the custodian ought to be are some indication of the strength of his or her attachment to and affection for the person named.

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236. See, e.g., *Kemp v. Kemp*, 287 Md. 165, 167, 411 A.2d 1028, 1030 (1980); *Stancil v. Stancil*, 286 Md. 530, 531, 408 A.2d 1030, 1031 (1979); *Coffman v. Hayes*, 259 Md. 708, 709, 270 A.2d 808, 809 (1970); see also *Brown v. Brown*, 287 Md. 273, 277, 412 A.2d 396, 397 (1980) (agreement concerning custody and support of husband's step-daughter incorporated into divorce decree).

237. See, e.g., *Sullivan v. Auslaender*, 12 Md. App. 1, 276 A.2d 698 (1971). Although there is no statute in point, the same rule has been applied to an agreement between a parent and a non-parent. *Kartman v. Kartman*, 163 Md. 19, 161 A. 269 (1932).

238. 286 Md. 530, 408 A.2d 1030 (1979).

239. *Id.* at 535, 408 A.2d at 1033.

240. *Id.* at 533, 408 A.2d at 1032 (emphasis added).

241. *Ross v. Pick*, 199 Md. 341, 353, 86 A.2d 463, 469 (1952); *accord Wood v. Wood*, 227 Md. 112, 115, 175 A.2d 573, 575 (1961); *Mullinix v. Mullinix*, 12 Md. App. 402, 412, 278 A.2d 674, 680 (1971).

242. *Ross v. Pick*, 199 Md. 341, 353, 86 A.2d 463, 469 (1952).

243. *Trenton v. Christ*, 216 Md. 418, 423, 140 A.2d 660, 662 (1958).



The Maryland courts have identified no specific age at which a child has sufficient capacity to form a rational judgment,<sup>244</sup> but they are unlikely to consider a child's preference if he or she is under the age of nine.<sup>245</sup> And even if the child is of sufficient age and capacity, the child's preference should be given little or no consideration if it was the product of improper coaching by one parent.<sup>246</sup> For example, in *Radford v. Matczuk*,<sup>247</sup> an eleven-year-old boy had not seen or heard from his father for approximately nine years. Although the boy's desire to have no contact with his father did have some "rational" basis — his father was a stranger — the court properly refused to honor the boy's request and concluded that the father's visitation rights should be enforced. The court said the boy's wishes were entitled to "slight, if any, consideration," because "the child has not seen or known his father nor had an opportunity to make an independent choice based on something more than what had been imparted to him by others."<sup>248</sup>

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244. In *Ross v. Pick*, 199 Md. 341, 353, 86 A.2d 463, 469 (1952), the Court of Appeals specifically refused to adopt a rule that the child's wishes are irrelevant unless he or she is at least fourteen years old.

A Maryland statute provides that a child who is sixteen years old or older may petition to amend an existing decree concerning his or her custody, and may do so without a guardian ad litem or next friend. MD. ANN. CODE art. 16, § 66(g) (1981). When such a petition is filed, "the court shall hold further hearings and may amend the decree and place the child in the custody of the parent designated by the child." *Id.* (emphasis added). This statute probably was not intended to make a sixteen- or seventeen-year-old child's preference binding on the courts. Its apparent purpose was to allow such a child to file a petition without using a guardian ad litem or next friend, and to make it clear that the court "shall" hold a hearing and "may" honor the child's request. The court, not the child, is to be the decisionmaker, and the statute does not suggest that the best interests standard be replaced by the child's preference. (There are no appellate cases in point.)

245. A child who was seven years old, *Hild v. Hild*, 221 Md. 349, 359, 157 A.2d 442, 447 (1960), and another who was eight, *Parker v. Parker*, 222 Md. 69, 75, 158 A.2d 607, 610 (1960), were said to be too young and immature for their preferences to be considered. However, courts have found nine-year-olds to be sufficiently mature. *Wilhelm v. Wilhelm*, 214 Md. 80, 84, 133 A.2d 423, 425-26 (1957); *Sullivan v. Auslaender*, 12 Md. App. 1, 18, 276 A.2d 698, 707 (1971). In other cases, courts considered the wishes of children who were ten years old or older. *Wood v. Wood*, 227 Md. 112, 115, 175 A.2d 573, 575 (1961) (age 12); *Trenton v. Christ*, 216 Md. 418, 422-23, 140 A.2d 660, 662 (1958) (age 10); *Ross v. Pick*, 199 Md. 341, 353-54, 86 A.2d 463, 470 (1952) (age 11); *Kirstukas v. Kirstukas*, 14 Md. App. 190, 199, 286 A.2d 535, 539-40 (1972) (age 10); *Mullinix v. Mullinix*, 12 Md. App. 402, 412, 278 A.2d 674, 680 (1971) (ages 12, 14 and 15).

246. *Wallis v. Wallis*, 235 Md. 33, 37, 200 A.2d 164, 166 (1964).

247. 223 Md. 483, 164 A.2d 904 (1960).

248. *Id.* at 491, 164 A.2d at 909. For a good discussion of the problem of coaching, and of the other problems involved when a court decides to consider a child's wishes concerning custody — from a judge's point of view, see Newman & Collester, *Children Should Be Seen and Heard*, 2 FAM. ADVOC. 8 (Spring 1980).

#### D. *Facts Concerning the Child or a Potential Custodian*

Any fact concerning the child should be considered if relevant to the child's well-being. If the child has been nervous and upset or his school attendance has been irregular and his progress unsatisfactory, these facts suggest that it might not be in the child's best interests to continue living with the current custodian.<sup>249</sup> Likewise, the court may properly consider that the child has been happy and well adjusted or has made good progress in school while living with a particular custodian.<sup>250</sup> In addition, the child's physical health should also be considered. If a particular custodian neglected the child when the child was ill,<sup>251</sup> or one potential custodian is better able to provide close attention to the care of a child whose health requires such care,<sup>252</sup> these matters are clearly relevant.

Similar circumstances concerning a potential custodian may be equally important. If a claimant is or has been mentally ill,<sup>253</sup> is "temperamental" and "highstrung,"<sup>254</sup> or is physically disabled,<sup>255</sup> these facts may be relevant, but should not be decisive. They do not preclude an award when a weighing of all circumstances indicates that it is in the child's best interests to live with that claimant.<sup>256</sup> Finally, although there are no Maryland appellate cases in which a parent known to have beaten the child involved was nevertheless awarded custody, it clearly ought to be difficult for such a parent to succeed.<sup>257</sup>

249. *Palmer v. Palmer*, 238 Md. 327, 330, 207 A.2d 481, 483 (1965) (mother ignored requests for help with child's problems in school); *Parker v. Parker*, 222 Md. 69, 72-73, 158 A.2d 607, 608 (1960).

250. *Trenton v. Christ*, 216 Md. 418, 422, 140 A.2d 660, 662 (1958); *Piotrowski v. State*, 179 Md. 377, 383, 18 A.2d 199, 201 (1941).

251. *Lippy v. Breidenstein*, 249 Md. 415, 417, 240 A.2d 251, 252 (1968); *see also DeGrange v. Kline*, 254 Md. 240, 242, 254 A.2d 353, 354 (1969) (child's health improved after father left him with substitute parents); *Levitsky v. Levitsky*, 231 Md. 388, 392, 190 A.2d 621, 623 (1963) (mother refused blood transfusion for child).

252. *Kauten v. Kauten*, 257 Md. 10, 12, 261 A.2d 759, 761 (1970).

253. *Wood v. Wood*, 227 Md. 112, 114, 175 A.2d 573, 574 (1961); *Alden v. Alden*, 226 Md. 622, 623, 174 A.2d 793, 793 (1961). In both *Wood* and *Alden*, it is difficult to determine whether the parent's mental illness actually affected the child's welfare. If it had no actual effect, it should have been ignored. *See infra* text accompanying notes 265-68.

254. *Andrews v. Andrews*, 242 Md. 143, 154, 218 A.2d 194, 201 (1966).

255. *Palmer v. Palmer*, 238 Md. 327, 332, 207 A.2d 481, 484 (1965).

256. In *Palmer v. Palmer*, 238 Md. 327, 207 A.2d 481 (1965), custody was awarded to a father who was paraplegic, and in *Alden v. Alden*, 226 Md. 622, 174 A.2d 793 (1961), custody was awarded to a mother notwithstanding her previous fourteen months of hospitalization for schizophrenia.

257. In *Lippy v. Breidenstein*, 249 Md. 415, 417, 240 A.2d 251, 252 (1968), the court mentioned the father's previous neglect in support of a prior removal of the child from his custody. However, in *McClary v. Follett*, 226 Md. 436, 442, 174 A.2d 66, 69 (1961), the court concluded that the father was not "unfit" to have custody of his son merely because he once

Other forms of parental "misconduct" also may be relevant. Maryland courts have considered: a parent's frequent, long visits to taverns, often late at night;<sup>258</sup> frequent intoxication;<sup>259</sup> low "ethical and moral standards";<sup>260</sup> mendacity;<sup>261</sup> arrests for physically abusing the other parent;<sup>262</sup> criminal conduct for which the parent has been prosecuted and convicted;<sup>263</sup> and, improper interference with the other parent's rights to visit the child.<sup>264</sup> However, it is important to note that these circumstances were not considered in a vacuum. In all of these cases, numerous circumstances were involved; all were considered, yet no single circumstance was said to be controlling.

Furthermore, the conduct or character of a potential custodian, and his or her physical or mental attributes, should be relevant *only* to the extent that they have had, or will have, some *actual effect* on the child's welfare. *Andrews v. Andrews*,<sup>265</sup> illustrates this point. Shortly after a court awarded custody of ten- and twelve-year-old boys to their father, the mother petitioned for a change of custody, arguing that the father was unfit because of his interest in, and collection of, what the

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hit his step-daughter. The mother apparently considered this "isolated incident" insignificant because, when mother and step-father separated four years later, she asked him to take custody of her daughter.

In *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1977), the custody of a child who had been either beaten or seriously mishandled, was awarded to his mother. Although the Court of Special Appeals concluded that the mother was not responsible for the boy's deplorable physical condition, this case is disturbing because the court does not adequately discuss the possibility that the mother may have knowingly overlooked possible abuse or mishandling by the father.

258. *Palmer v. Palmer*, 238 Md. 327, 330, 207 A.2d 481, 483 (1965) (seven year old son sometimes taken along); *Kirstukas v. Kirstukas*, 14 Md. App. 190, 197, 286 A.2d 535, 539 (1972).

259. *Wallis v. Wallis*, 235 Md. 33, 35, 200 A.2d 164, 165 (1964); *Barnard v. Godfrey*, 157 Md. 264, 270, 271, 145 A. 614, 617 (1929). But see *Kerger v. Kerger*, 156 Md. 607, 608, 145 A. 10, 11 (1929), in which both parents were regular drinkers. The circuit court awarded custody of one child to the father and custody of the other child to the mother. The Court of Appeals affirmed without discussing the parents drinking problems.

260. *Melton v. Connolly*, 219 Md. 184, 187, 148 A.2d 387, 389 (1959) (other facts probably were more important than the father's low moral standards).

261. In *Hild v. Hild*, 221 Md. 349, 360, 157 A.2d 442, 448 (1960), the mother's lying, combined with other character traits, convinced a majority of the court that she was unfit to have custody. Two judges dissented.

262. *Cockerham v. Children's Aid Soc'y*, 185 Md. 97, 100, 43 A.2d 197, 199 (1945); *Barnard v. Godfrey*, 157 Md. 264, 270, 145 A. 614, 617 (1929).

263. In *Radford v. Matczuk*, 223 Md. 483, 164 A.2d 904 (1960), the father had been convicted of stealing government property, had served an eight month sentence in prison, and had been dishonorably discharged from the armed services. In support of its conclusion that his visitation rights should be enforced, the court indicated that the father's "life of crime" had not continued after his conviction. *Id.* at 490, 164 A.2d at 908.

264. *Hild v. Hild*, 221 Md. 349, 360, 157 A.2d 442, 448 (1960).

265. 242 Md. 143, 218 A.2d 194 (1966).

court described as "‘hardcore’ pornography by any standard."<sup>266</sup> The record on appeal also indicated that the chancellor was displeased with some of the mother's conduct — she had received money and valuable property pursuant to a contract in which she had agreed that the father would have custody, and subsequently had used some of the pictures from the father's collection as a weapon to get her boys back without returning any of the property and cash. The Court of Appeals could have censured both parents, or could have viewed custody as a reward or a punishment for one parent or the other. The court did neither. The mother's conduct was said to be relevant only to the extent that it indicated whether she would be a better custodian than the father.<sup>267</sup> As to the father's collection, the court first noted that he had stopped collecting new photographs approximately ten years earlier and had never shown them to the boys. The court then concluded:

It is not within the functions or competence of courts to pass judgment upon a man's private tastes or hobbies unless these interests are transmuted into character, and then only to the extent that they influence, or are apt to influence, the legal relationships with which the law must deal . . . .<sup>268</sup>

### E. "Split Custody"

When custody disputes involve two or more children, the court might have to consider whether custody should be "split" between two claimants — whether one or more should live with one claimant, and the other child or children, with the other.<sup>269</sup> Maryland cases rely on the proposition that "[o]rdinarily, the best interests and welfare of the children of the same parents are best served by keeping them together to grow up as brothers and sisters under the same roof."<sup>270</sup> These cases give several reasons: Children should not be deprived of each other's companionship when they have lost the companionship of one or both

266. *Id.* at 147, 218 A.2d at 197.

267. *Id.*

268. *Id.* Maryland law is consistent with the Uniform Marriage and Divorce Act, § 402, 9A UNIF. L. ANN. 197 (1979), which provides: "The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."

269. "Split custody" sometimes is used as a label for decrees giving one parent custody and the other parent the authority to make decisions concerning significant events in the child's life. *E.g.*, Paryne & Boyle, *supra* note 165, at 166; Zima, *supra* note 163, at 27. In all of the Maryland cases cited in notes 270-76 *infra*, this label was used when the issue was whether two or more children should live with the same custodian. This is how "split custody" is used in this article.

270. *Hild v. Hild*, 221 Md. 349, 359, 157 A.2d 442, 447 (1960).

parents;<sup>271</sup> children ought not be raised in "hostile camps";<sup>272</sup> and, in one case, the court reasoned that two brothers should be kept together because, "[i]f there is one thing that a boy needs in a house it is another boy."<sup>273</sup> Nevertheless, "when separation becomes necessary or inevitable . . . there is no reason why it should not be done,"<sup>274</sup> and if it appears that split custody is in the best interests of all of the children involved, the courts will make such an award.<sup>275</sup> When such an award is made, however, the court can, and should, maintain some contact between siblings by including an appropriate provision in its decree.<sup>276</sup>

Only one change should be made in Maryland's approach to "split custody." The proposition that "[o]rordinarily, the best interests and welfare of the children of the same parents are best served by keeping [the children] together,"<sup>277</sup> expresses a preference that should be discarded. In each case judges should *ask* whether it is in the children's best interests to keep them together, considering *all* circumstances affecting their welfare. Judges should not *assume* that this issue should be resolved the same way in all cases. Each case uniquely combines many different factors, all of which should be evaluated.

#### F. *Characteristics of the Environment in which the Child Might Live*

Various characteristics of the environment accompanying a particular home may be relevant. Courts may compare the physical characteristics of the houses where the child might live, and the number of occupants in each.<sup>278</sup> If it will be necessary for the child to live in a boarding school if custody is awarded to a particular claimant, the desirability of such a living arrangement should be considered.<sup>279</sup> Also, it is important to evaluate the many intangible factors that might contribute to the child's well-being, such as the extent to which the child's

271. *Burns v. Bines*, 189 Md. 157, 165, 55 A.2d 487, 490 (1947) (father serving life sentence for having killed mother — their two children kept together).

272. *Roussey v. Roussey*, 210 Md. 261, 264, 123 A.2d 354, 356 (1956).

273. *Kartman v. Kartman*, 163 Md. 19, 26, 161 A. 269, 271 (1932). And perhaps a dog?

274. *Hild v. Hild*, 221 Md. 349, 359, 157 A.2d 442, 447 (1960).

275. See *Davis v. Davis*, 280 Md. 119, 372 A.2d 231, *cert. denied*, 434 U.S. 939 (1977); *Daubert v. Daubert*, 239 Md. 303, 211 A.2d 323 (1965); *Melton v. Connolly*, 219 Md. 184, 148 A.2d 387 (1959); and *Kerger v. Kerger*, 156 Md. 607, 145 A. 10 (1929), in all of which "split" custody was awarded.

276. See *Melton v. Connolly*, 219 Md. 184, 190, 148 A.2d 387, 390 (1959).

277. *Hild v. Hild*, 221 Md. 349, 359, 157 A.2d 442, 447 (1960) (emphasis added).

278. *Bray v. Bray*, 225 Md. 476, 479, 171 A.2d 500, 502 (1961); *Melton v. Connolly*, 219 Md. 184, 187, 148 A.2d 387, 388-89 (1959); *Alston v. Thomas*, 161 Md. 617, 621, 158 A. 24, 25 (1932).

279. *Sibley v. Sibley*, 187 Md. 358, 363, 50 A.2d 128, 130 (1946).

"curiosity in intellectual matters" will be stimulated,<sup>280</sup> whether the child would experience a "subconscious strain [if] brought up in a religion different from that of his father and sisters,"<sup>281</sup> and whether the child has been receiving religious training from his or her current custodians, but would receive little if any from the other person seeking custody.<sup>282</sup> However, the mere fact that "a parent teaches a child religious doctrines which are at variance with those of the majority is not a ground for a change of custody,"<sup>283</sup> and Maryland courts will not deny visitation to a parent merely because he or she has remarried in violation of the beliefs of the religious faith in which the child is being raised.<sup>284</sup>

The length of time a child has lived in a particular environment is also important because it may be harmful to remove a happy and well adjusted child from a stable and familiar environment.<sup>285</sup> It also is risky to award custody to a person who will move the child to another state or country, not only because the child may be moved to an unfamiliar environment, but also because "it might become difficult or impossible for [a Maryland court] to have effective control in the future."<sup>286</sup> If, however, the child will be removed from Maryland only for short periods of time, there is less reason to be concerned about the court's loss of "supervisory power."<sup>287</sup> Moreover, even if the court will lose all control over the child, the basic purpose of custody litigation is to determine what will be in the child's best interests, not to jealously guard the court's "power." This probably explains why Maryland courts sometimes express no concern about losing control over children

280. *Andrews v. Andrews*, 242 Md. 143, 149, 218 A.2d 194, 198 (1966).

281. *Daubert v. Daubert*, 239 Md. 303, 309-10, 211 A.2d 323, 327 (1965) (religious strain results "whatever the religions involved may be").

282. *Melton v. Connolly*, 219 Md. 184, 187, 148 A.2d 387, 389 (1959); *Ross v. Pick*, 199 Md. 341, 352, 86 A.2d 463, 469 (1952).

283. *Levitsky v. Levitsky*, 231 Md. 388, 398, 190 A.2d 621, 626 (1963). In this case, the circuit court awarded custody to the mother notwithstanding her refusal to allow her child to have a necessary blood transfusion and her unequivocal statement that her religious beliefs would prompt her to deny consent in the future even if the result might be "swift and sudden death." *Id.* at 394, 190 A.2d at 623. The Court of Appeals concluded that the first and fourteenth amendments to the United States Constitution gave the mother an absolute right to believe whatever she chose, but not an absolute right to act if her acts would jeopardize the life of her child. The Court of Appeals therefore concluded that the custody decree should be amended to provide that under certain circumstances the mother's consent to blood transfusions would not be necessary.

284. *England v. Megear*, 145 Md. 574, 579, 125 A. 731, 732 (1924).

285. *Trenton v. Christ*, 216 Md. 418, 423, 140 A.2d 660, 662 (1958); *Piotrowski v. State*, 179 Md. 377, 383, 18 A.2d 199, 201 (1941); *Powers v. Hadden*, 30 Md. App. 577, 592, 353 A.2d 641, 650 (1976) (Davidson, J., dissenting).

286. *Sullivan v. Auslaender*, 12 Md. App. 1, 18-19, 276 A.2d 698, 708 (1971).

287. *Barsallo v. Barsallo*, 18 Md. App. 560, 569, 308 A.2d 457, 462 (1973).

when awarding custody to parents who will not live in Maryland.<sup>288</sup>

Other possibly relevant characteristics of the environment in which the child might live include such things as race and culture. In *Kauten v. Kauten*,<sup>289</sup> the custody of an eight-year-old girl was awarded to her mother, thereby placing her in a family consisting of her and her mother, who were both white, and the mother's illegitimate child, whose father was black. The eight-year-old's white father argued that he should be awarded custody because of the "deleterious effects the child might suffer from the discrimination which might befall her younger half sister who is half white."<sup>290</sup> The court responded: "The simple answer to this contention is that such potential problems are only one factor in determining where the best interests of the child lie."<sup>291</sup>

In regard to "culture," two Maryland cases are of particular interest. In *Barsallo v. Barsallo*,<sup>292</sup> the Court of Appeals noted that one reason for enlarging the father's visitation rights from Sunday afternoons to one month each year at his home in Panama was the possibility that his nine-year-old daughter might thereby "absorb some of the culture and language of her Panamanian ancestry and thus broaden her education."<sup>293</sup> However, in *Sullivan v. Auslaender*,<sup>294</sup> the Court of Special Appeals refused to enforce a parental agreement that the father was to have custody in Israel for three years and that the mother was then to have custody in Maryland for three years. Although the court was justifiably concerned about the possible adverse effect of uprooting the two children in three years, and about its loss of effective control while the children were in Israel, the court's decision to award custody exclusively to the mother is a little disturbing. The court deprived the children of an opportunity to "absorb some of the culture and language of their ancestry," and allowed the mother to disregard the custody agreement notwithstanding the circuit court's conclusion that enforcement of the agreement was in the children's best interests.<sup>295</sup>

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288. See *Andrews v. Andrews*, 242 Md. 143, 218 A.2d 194 (1966); (custody to father who lived in Mexico); *Sibley v. Sibley*, 187 Md. 358, 50 A.2d 128 (1946) (custody to father who lived in Texas).

289. 257 Md. 10, 261 A.2d 759 (1970).

290. *Id.* at 13, 261 A.2d at 761.

291. *Id.*

292. 18 Md. App. 560, 308 A.2d 457 (1973).

293. *Id.* at 570, 308 A.2d at 462.

294. 12 Md. App. 1, 17-18, 276 A.2d 698, 707 (1971).

295. See *id.* A third Maryland case is of interest although not in point. In *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975), the custody of a young Crow Indian boy was awarded to his Indian mother who lived on a Crow reservation in Montana, even though the boy had lived with his non-Indian substitute parents in Maryland for approximately two

“Standard of living” is another potentially relevant characteristic of the environment in which the child might live, but it is difficult to assess the Maryland courts’ attitude toward this factor. On the one hand, the Court of Appeals said, in *Alston v. Thomas*:<sup>296</sup> “[T]he station in life and the poverty of the father is not to weigh against his claim, since an humble status and indigence are the honorable condition of many, and often the fruitful soil of virtue, discipline, and aspiration.” And in fact, custody has been awarded to a parent who was not a high wage earner<sup>297</sup> and to one who was unemployed and living on social security payments.<sup>298</sup> These cases properly considered standard of living to be relevant but not controlling. On the other hand, a close reading of some cases where custody was awarded to the claimant who could provide the higher standard of living, might lead some readers to suspect that this factor was given too much weight.<sup>299</sup> Indeed, in *Alston v. Thomas*, the fact that the father was “unable to support his present family, and, for some time, [had] been the object of public charity,”<sup>300</sup> was arguably one of the key factors that led the court to conclude that the child’s foster parents should be allowed to adopt the child notwithstanding the father’s refusal to consent.

The only other “standard of living” issue that we should consider is the extent to which a parent’s need to earn a living should be viewed as a negative factor because of that parent’s inability to be with his or her child while on the job. The Court of Appeals concluded in 1956 that employment outside the home “should not be controlling. Working mothers are commonplace in the present day and babysitters are a national institution. . . . With adequate support from the father, we see no reason why custody should be denied to the mother on this ground.”<sup>301</sup> This solution to the problem makes as much sense today

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and one-half years. The court reasoned that it was obligated to respect a previous decree of the Crow Court of Indian Offenses terminating that court’s earlier appointment of the substitute parents as the child’s temporary guardians for one year. *Id.* at 343, 351, 347 A.2d at 234, 238. However, although *not* mentioned, the possibility that it may have been in the child’s best interests to be raised as an Indian with his Indian mother and relatives, may have had some effect on the court’s decision.

296. 161 Md. 617, 620, 158 A. 24, 25 (1932); *accord*, *McClary v. Follett*, 226 Md. 436, 442, 174 A.2d 66, 69 (1961).

297. *McClary v. Follett*, 226 Md. 436, 442, 174 A.2d 66, 69 (1961); *Montgomery County Dep’t of Social Servs. v. Sanders*, 38 Md. App. 406, 424, 381 A.2d 1154, 1165 (1978).

298. *Palmer v. Palmer*, 238 Md. 327, 330, 207 A.2d 481, 483 (1965).

299. *See, e.g.*, *Wood v. Wood*, 227 Md. 112, 114, 175 A.2d 573, 574 (1961); *Parker v. Parker*, 222 Md. 69, 73, 158 A.2d 607, 609 (1960), and particularly, *Cockerham v. Children’s Aid Soc’y*, 185 Md. 97, 101-02, 43 A.2d 197, 199 (1945).

300. *Alston v. Thomas*, 161 Md. 617, 621, 158 A. 24, 25 (1932).

301. *Roussey v. Roussey*, 210 Md. 261, 264, 123 A.2d 354, 356 (1956); *see also Dunnigan v. Dunnigan*, 182 Md. 47, 31 A.2d 634 (1943), where the mother’s having to work because



as it did in 1956 and should also be used when it is in a child's best interests to live with a "working father."<sup>302</sup>

G. *Recommendation of a Psychologist, Psychiatrist, or Social Worker*

Maryland has no statute requiring that child custody cases be investigated by a psychologist, psychiatrist, or social worker, but it is clearly within a court's authority to recommend or order such an investigation.<sup>303</sup> When the investigation is completed, the court must determine how much weight to give the professional's opinion. If the witness is properly qualified, has no personal interest in the outcome of the litigation, and has provided a well reasoned, objective evaluation of what the court might do to further the child's best interests, it might seem to follow that the expert's opinion should be given "great weight."<sup>304</sup> However, Maryland courts have insisted that the opinions of such witnesses are advisory only, are never "controlling," and should be viewed as merely another circumstance to consider along with all other relevant circumstances.<sup>305</sup>

*Montgomery County Department of Social Services v. Sanders*,<sup>306</sup> seems to be the only Maryland case explaining the failure to give such testimony special weight.<sup>307</sup> Quoting from a law review article, the Court of Special Appeals said: "[S]ocial workers sometimes develop 'rescue fantasies' in well-intentioned efforts to save helpless children from bad parents. These emotions tend to obscure objective evalua-

the father was not helping to support her and their two children was not mentioned as a circumstance weighing against an award in her favor.

302. There are no Maryland appellate cases in point. *Cf.* *Rand v. Rand*, 280 Md. 508, 517, 374 A.2d 900, 905 (1977). The Court of Appeals, relying on the language of MD. ANN. CODE art. 72A, § 1 (1978), and the mandate of Maryland's Equal Rights Amendment, MD. CONST. Decl. of Rights. art. 46 (enacted 1972), held that child support is an obligation to be shared by both parents "in accordance with their respective financial resources." Even though the mother had custody in *Rand*, the principle of a proportional division of child support also should apply where a "working father" is awarded custody.

303. *McClary v. Follett*, 226 Md. 436, 443, 174 A.2d 66, 69-70 (1961); *Powers v. Hadden*, 30 Md. App. 577, 587, 353 A.2d 641, 647 (1976). When a court appointed investigator testifies, "at the request of either party, [he or she] may be called as the court's witness, [and is] subject to cross-examination by both parties." *Draper v. Draper*, 39 Md. App. 73, 81, 382 A.2d 1095, 1099 (1978).

304. *See, e.g., Painter v. Bannister*, 258 Iowa 1390, 1397-1400, 140 N.W.2d 152, 156-58 (1966), *cert. denied*, 385 U.S. 949 (1967).

305. *Palmer v. Palmer*, 238 Md. 327, 331, 207 A.2d 481, 484 (1965); *McClary v. Follett*, 226 Md. 436, 443, 174 A.2d 66, 69-70 (1961); *Bray v. Bray*, 225 Md. 476, 481, 171 A.2d 500, 503 (1961).

306. 38 Md. App. 406, 424, 381 A.2d 1154, 1165 (1977).

307. *See, e.g., Palmer v. Palmer*, 238 Md. 327, 332, 207 A.2d 481, 484 (1965); *Bray v. Bray*, 225 Md. 476, 481, 171 A.2d 500, 503 (1961); *Melton v. Connolly*, 219 Md. 184, 188, 148 A.2d 387, 389 (1959); *Ross v. Pick*, 199 Md. 341, 346, 86 A.2d 463, 466 (1952).

tions of the strengths of the child's own home.'"<sup>308</sup> In addition, the court warned that if reliance upon the testimony of social workers, psychologists, or psychiatrists is "too obsequious or routine," it might "lead the courts, in acts of misapplied psychology, to separate unjustly family members."<sup>309</sup> The court also offered a more telling (and less judgmental) reason — that caution is particularly important when one of the litigants cannot afford to hire experts to "match the weight of the experts brought forth by" the other side.<sup>310</sup> However, the court failed to see that miscellaneous statements made elsewhere in *Sanders* might provide the basis for a better reason: "[C]ustody cases are like fingerprints because *no two are exactly the same.*"<sup>311</sup> "There can be very little constructive or useful precedent on the subject of custody determinations, because *each case must depend upon its unique fact pattern.*"<sup>312</sup> "Present methods for determining a child's best interest . . . involve a *multitude of intangible factors . . .*"<sup>313</sup> And finally, "[t]he court should examine the totality of the situation . . . and *avoid focusing on any single factor . . .*"<sup>314</sup> Although these comments were not made in reference to the weight accorded an expert's opinion, they support the conclusion that no special weight ought to be given. The court is right — each custody dispute is unique and involves a multitude of complex, intangible factors, *all* of which should be taken into consideration; therefore, the courts should "*avoid focusing on any single factor,*" not even the opinion of a highly skilled and perceptive professional who is both objective and impartial.

### CONCLUSION

When parents separate or demand the return of a child who is living with substitute parents, "it is always the child who is not only the innocent victim, but who has the most at stake."<sup>315</sup> Thus, the child's best interests should be the focal point of such cases, not the "rights" of adults.

These cases are particularly difficult because of the complexity of

308. *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. at 424, 381 A.2d at 1165 (quoting Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspective*, 50 N.C.L. REV. 293, 347 (1972)).

309. 38 Md. App. at 423, 381 A.2d at 1165.

310. *Id.*

311. *Id.* at 414, 381 A.2d at 1160 (emphasis added) (quoting *Mullinix v. Mullinix*, 12 Md. App. 402, 412, 278 A.2d 674, 679 (1971)).

312. 30 Md. App. at 419, 381 A.2d at 1162 (emphasis added).

313. *Id.* at 419, 381 A.2d at 1163 (emphasis added).

314. *Id.* at 420-21, 381 A.2d at 1163 (emphasis added).

315. *Ross v. Hoffman*, 280 Md. 172, 174, 372 A.2d 582, 584 (1977).

the factors affecting the child's best interests. Each person involved is unique; the intricacies of the many human relationships interwoven into each dispute defy simplification; the environments in which the child might live are often significantly different; all of these tangible and intangible factors change as time passes. Add that the judge must predict the future while the child's family is disintegrating or threatening to disintegrate, and it is easy to understand why Maryland courts adopted three rules that simplified decision making: (1) a preference favoring mothers when young children were involved;<sup>316</sup> (2) a presumption that an adulterous parent was "unfit";<sup>317</sup> and (3) a presumption that custody should be awarded to biological parents rather than to others.<sup>318</sup>

The Maryland legislature and courts subsequently discarded two of the three rules. The Court of Appeals abolished the presumption that an adulterous parent is "unfit," holding that a parent's conduct is relevant only if it has had, or will have, some *actual* effect on the child's welfare.<sup>319</sup> The Court of Special Appeals concluded that Maryland's maternal preference doctrine was abolished by a statute providing: "[I]n any custody proceeding, neither parent shall be given a preference solely because of his or her sex."<sup>320</sup> The court's conclusion is consistent with the growing realization that a child needs good "parenting" and that the courts should always try to determine which parent *in fact* has the skills, interests, attitudes, capacity for affection, and personality characteristics that are most likely to further the child's welfare.

Should Maryland also discard the presumption that custody be awarded to biological parents rather than to others? The Court of Special Appeals recently used this presumption rather than one favoring "psychological parents."<sup>321</sup> Both should have been rejected. Maryland's commitment to the best interests principle is compromised by any presumption. Presumptions improperly focus attention on one circumstance, diverting attention from the many other tangible and intangible factors affecting a child's welfare. Presumptions also improperly restrict the decisionmaker's discretion. Discretion is necessary because of the nature of child custody litigation — each child is unique; each potential custodian is unique; each case uniquely combines many dif-

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316. See *supra* text accompanying notes 24-26.

317. See *supra* text accompanying notes 50-51.

318. See *supra* text accompanying notes 67-73.

319. *Davis v. Davis*, 280 Md. 119, 372 A.2d 231, *cert. denied*, 434 U.S. 539 (1977).

320. *McAndrew v. McAndrew*, 39 Md. App. 1, 382 A.2d 1081 (1978); (construing MD. ANN. CODE art. 72A, § 1 (1978)).

321. *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1977).

ferent circumstances affecting the child's welfare. The courts must have sufficient freedom to resolve each case on its unique facts, because only then can they be as responsive as possible to the needs of each child. There should be no presumptions.

Discarding all presumptions does not, however, insure full commitment to the best interests principle. To achieve this goal, the courts must identify and evaluate *all* circumstances affecting each child's welfare. For example, the courts always should determine whether to award "joint custody." Should the child live with one parent or with both on an alternating time basis? Should one or both parents resolve important problems in the child's life? The child's interests will be affected significantly by the court's answers to these joint custody questions. Parental agreements also merit careful consideration if the parents were sensitive to the child's interests and were not using custody as a bargaining tool for resolving other issues, such as alimony or a division of property. The child's preference concerning custody is relevant if the child is sufficiently mature to form a rational judgment and he or she was not improperly "coached." The child's physical, psychological, intellectual, and spiritual needs — and each potential custodian's ability to respond to these needs — are important. The many tangible and intangible factors concerning each possible custodian and the environments each will provide the child, are relevant insofar as they actually affect the child's welfare. Relationships between the child and persons other than the custodians also are important, particularly relationships with children who will live in the same home. Will the child have a good relationship with a particular step-brother or step-sister? Should siblings live with the same custodian?

To continue listing relevant factors would be superfluous because the conclusion is already clear. Full commitment to the best interests principle means that there should be no presumptions and that custody awards should not be based on any one factor. Custody should be awarded only after a thoughtful evaluation of all relevant circumstances — those actually affecting the child's welfare — convinces the decisionmaker that a particular award is the one most likely to further the child's best interests.