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Measuring the Child's Best Interests - A Study of Incomplete Considerations

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MEASURING THE CHILD'S BEST INTERESTS— A STUDY OF INCOMPLETE CONSIDERATIONS

INTRODUCTION

THE problem of determining the custody of children presents the courts with the task of resolving complex social issues within a framework of legal rules and procedures. Today the governing legal principle in custody matters is that the best interests of the child will be the paramount consideration.[1] In theory this doctrine has great merit since the words "best interests of the child" seem to recognize the social aspect of child custody while providing a legal justification for the court's award, based upon the guidelines of a sound and equitable rule of law.

At the same time this rule has opened new channels of inquiry to the courts to aid them in weighing the intricate human factors that comprise a custody proceeding. The courts now often appoint investigators or social workers to analyze the various non-legal facets of a custody matter, accepting their reports and recommendations as evidence to aid them in arriving at a decision.[2]

In the final analysis, however, it is the judge himself who, in the exercise of his discretion,[3] must render his decision in the child's best interests. He must sift through the psychological test reports and the social worker's statistical data, maintaining an awareness of the human equities of the situation.[4] Then he must assimilate the evidence according to his own notions of what is really in the best interests of the child.

These notions reflect traditional assumptions of social behavior, yet from the standpoint of the behavioral sciences they are incomplete. An awareness of the sociological implications and ramifications of these conceptions might aid the judge, faced with the di-

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[1] Oster, *Custody: A Study of Vague and Indefinite Standards,* 5 J. FAM. L. 21 (1965); Sayre, *Awarding Custody of Children,* 9 U. CHI. L. REV. 672 (1942). For cases in various jurisdictions see 24 AM. JUR. 2D *Divorce and Separation* § 783 (1966).

[2] Fewel v. Fewel, 23 Cal. 2d 431, 144 P.2d 592 (1943); Gluckstern v. Gluckstern, 2 App. Div. 2d 744, 153 N.Y.S.2d 184 (1956); West v. West, 208 S.C. 1, 36 S.E.2d 856 (1946).

[3] Usually the decision of the trial court will not be overruled unless there has been a clear abuse of discretion. Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949). See also Oster, *supra* note 1, at 23.

[4] One judge described the situation as follows:

> These contested child custody cases are never easy, and this case is no exception. From the nature of such disputes, involving as they do one of the basic instincts and great primal urges of human existence, whichever way judges rule is bound to leave a trail of heartache and pain. But decide them we must, for it is our job. . . .

Bowler v. Bowler, 355 Mich. 686, 694, 96 N.W.2d 129, 133 (1959).

lemma of a child custody determination, in the exercise of his discretion for the best interests of the child.

I. Background of the Best Interests Rule

At early common law the courts based their decisions in custody matters primarily on the principle of the father's property right in the child.[5] The concept of a child as property vested in the father gave him an almost absolute custody right. Little attention was given to the interests of the mother, who as a married woman had relinquished her property rights to her husband. Likewise, the welfare of the child was not always considered. The father by virtue of his property right was considered the child's natural guardian and as such was entitled to custody. It was only upon proof of misconduct on the part of the father resulting in abuse of the child that the father's natural guardianship would not prevail.[6]

Gradually this strict doctrine favoring the father was modified by statute in England[7] and by case law and statute in the United States[8] toward a recognition of an equal right to custody in the mother. The traditional property right concept became replaced by more equitable considerations concerning the welfare of the child, resulting in the development of the best-interests-of-the-child rule.

The underlying principle of the rule is that no longer does either parent have a prima facie right to the child's custody. Henceforth, the court will exercise its discretion for the child's best interests.[9] The best interests rule seemed at the time to serve as a panacea for the delicate problems with which the courts had been faced of overcoming presumptions in favor of one parent or the other.[10]

The principle was codified in the United States in varying forms,[11] but always giving the courts a broad guideline for their determination of custody. Within the penumbra of the rule, the courts were forced to create various classifications of abstract terms indicative of the child's best interests to be used as criteria for the

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[5] *Cf. Ex parte* Skinner, 9 Moore C.P. 278, 29 Rev. R. 710 (C.P. 1824); Rex v. Greenhill, 4 Ad. & E. 624, 111 Eng. Rep. 922 (K.B. 1836).

[6] *Re* Spence, 2 Ph. 247 (1847).

[7] Talfourd's Act, 1839, 2 & 3 Vict., c. 54; Guardianship of Infants Act, 1886, 49 & 50 Vict., c. 27.

[8] For a collection of American cases showing this shift toward recognition of the mother's right to custody, see *Ex parte* Badger, 286 Mo. 139, 226 S.W. 936 (1920).

[9] Oster, *supra* note 1, at 22.

[10] "For that matter, the law reviews and critical writers generally approve this test without exception and hail the high achievement of the courts in deciding this delicate question by such worthy principles. Courts and legal writers alike seem so pleased with themselves in hitting on the best-interests-of-the-child test, that they are both unable and unwilling to think of anything else."

Sayre, *supra* note 1, at 678.

[11] Oster, *supra* note 1, at 22.

adjudication of custody cases. Such measures as age and sex of the child, preference of the child, and fitness of the parent are examined in the cases for the purpose of determining the child's best interests.[12] These are the considerations announced by the courts which serve to reveal the underlying assumptions upon which custody is awarded in the exercise of discretion.

II. CUSTODY BETWEEN PARENTS: THE UNDERLYING NOTIONS

A. *Age of the Child: A Relative Concept*

Many jurisdictions will award custody of very young children to the mother.[13] In *Fitzpatrick v. Fitzpatrick,*[14] the husband sought to have the custody decree awarding the five-year-old daughter to the mother changed in his favor. The trial court granted custody to the father, but the appellate court reversed the decree, saying, "There is the natural right of the mother, who is not shown to be unfit, to nurture and care for her child of tender years, and ordinarily the child's best interests are served by her love, care and attention."[15] Little consideration was given to the fact that the husband had remarried, and that his new wife was always at home and willing to care for the child. The mother, on the other hand, was working at the time the divorce was granted and had worked ever since, hiring babysitters to care for the child. As to these facts, the court simply concluded that the husband's remarriage disclosed no change of conditions that would support a modification in the custody decree and that the child who was of kindergarten age would no longer need babysitters as much as before.[16]

While the child of five in the *Fitzpatrick* case was considered to be of "tender years," children of ten and twelve were not so classified in *Nicol v. Conlan,*[17] where custody was awarded to the father.

In some jurisdictions the preference of the child is given consideration by the courts, provided that he has reached a certain age. In *Hurly v. Hurly,*[18] the custody of two girls, aged eleven and thir-

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[12] *Ibid.*

[13] Ross v. Ross, 89 Colo. 536, 541, 5 P.2d 246, 249 (1931):

> "Courts are disposed — properly so — to award to the mother . . . custody of very young children, especially girls, even where the mother's conduct has been such that, if the child were older its custody would have been placed elsewhere."

Accord, Leary v. Leary, 61 Ill. App. 2d 152, 209 N.E.2d 663 (1965); Payne v. Payne, 399 S.W.2d 619 (Mo. Ct. App. 1966).

[14] 207 N.E.2d 794 (Ohio Ct. App. 1965).

[15] *Id.* at 797.

[16] *Ibid.*

[17] 385 S.W.2d 779 (Ky. Ct. App. 1965).

[18] 411 P.2d 359 (Mont. 1966).

teen was awarded to the father. The court reasoned, "We cannot overlook the present ages of both; each child is at sufficient age to form an intelligent opinion as to custody."[19] The consideration of a child's age from the legal standpoint seems to serve a twofold purpose. It can be used to determine the parental needs of the child "of tender years" or it can serve as a measure of the merit in allowing the child to exercise his choice.

A sociological analysis of this issue discloses that any arbitrary age at which maturity is reached is impossible to calculate for all children. A young boy or girl may reach physical maturity at an early age ahead of his emotional experiences.[20] The critical time of puberty may not always conform to the chronological norms which the law imposes, and this conflict between legal requirements and actual conditions deserves recognition by the courts.

Under the age and sex tests used by the courts when applying the best interests rule, a teen-aged girl may be placed in the father's custody for reasons of preference or economy at an age when she needs a mother's understanding. One court has recognized the sociological problems involved in any arbitrary chronological age of legal maturity. In *Russell v. Russell*[21] the argument was raised that a child under the age of fourteen was "of tender years" because a statute declared that a child over fourteen could choose his own guardian. The court found the contention to be unsound, reasoning that:

> The Legislature has not declared that a child under the age of 14 years is to be treated by the courts as a child of tender years within the meaning of those terms as used in section 246 of the Civil Code. The sex is to be considered as is also the physical development. There cannot be any fixed and certain age of minority which, in all cases and for all purposes, can be said to constitute a child of "tender years."[22]

B. *Fitness of the Parent: The Notion of Motherhood*

The test to determine the fitness of the parent to have custody is most revealing of the underlying assumptions of the best interests rule. One criterion is, "which parent can best provide an atmosphere conducive to the child's healthy growth?"[23] In the case of *Gluckstern v. Gluckstern,*[24] the custody of a seven-year-old boy was awarded to the mother, despite the fact that, since she was a Christian Scientist, doubts were raised whether she would provide

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[19] *Id.* at 361-62.

[20] SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 94-95 (4th ed. 1947).

[21] 20 Cal. App. 457, 129 Pac. 467 (1912).

[22] *Id.* at 461, 129 Pac. at 468.

[23] Oster, *supra* note 1, at 25.

[24] 17 Misc.2d 83, 158 N.Y.S.2d 504 (Sup. Ct.), *aff'd,* 165 N.Y.S.2d 432 (1st Dept.), *aff'd,* 4 N.Y.2d 699, 151 N.E.2d 897 (1958).

the child with proper medical care. The court reasoned that if custody of the child were awarded to his father, the child would be deprived of the adult companionship he needed, due to the father's absence from the home during his working hours. On the other hand, if the boy were given to his mother, "he would enjoy the companionship, care and *parental* guidance normally received by a child of his age."[25]

The court's assumption favoring the mother as being more fit to have custody of the child rested on its traditional concept of the motherhood role. The notion of motherhood is inextricably linked to any conception of the home, family, and child. Its natural attributes have been described as love, care, and nurture of the child.[26] As one legal writer has said, "The assumption is that woman, by nature or culture or through a combination of natural and cultural forces, is better suited than man for providing the care every child needs."[27]

Conversely, the notion of the father's traditional role in the family is equally as pervasive in the court's determination of parental fitness. This notion has been ably described by a sociologist and expert on family relations.

> The average father is lacking in appropriate "child-care" skills, because his socialization in the male role has (1) led him to deprecate such skills, (2) required him to have little practice in them, and (3) permitted him to hand the appropriate duties over to his wife. The role of husband and father, moreover, is defined particularly as breadwinner, and with few exceptions in our society this activity requires at least eight hours or so daily for at least five days weekly, at the times when children require most care.[28]

Society's concept of motherhood, which many courts employ in their application of the best interests rule, seems to create a presumption in favor of the mother that can only be overcome by a showing of unfitness which would place the mother at fault.[29]

It is difficult to describe with precision the positive attributes that constitute the court's notion of motherhood. The term is as undefinable as the best interests rule itself. Insight into the concept can be gained, however, by examining the negative attributes of motherhood, evidenced by a mother's behavior by which the courts deem her unfit to have custody.

In *Bunim v. Bunim*,[30] the wife was admittedly shown to have committed repeated adulteries with another married man. The court

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[25] *Id.* at 85, 158 N.Y.S.2d at 507.

[26] Fitzpatrick v. Fitzpatrick, 207 N.E.2d 794 (Ohio Ct. App. 1965).

[27] Oster, *supra* note 1, at 26.

[28] GOODE, AFTER DIVORCE 312 (1956).

[29] Oster, *supra* note 1, at 29.

[30] 298 N.Y. 391, 83 N.E.2d 848 (1949).

found that such conduct was "repugnant to all normal concepts of sex, family, and marriage,"[31] and awarded custody to the father. While the court couched its reasoning in terms of "sex, family, and marriage," it seems clear that the wife's moral transgressions had contradicted its basic notion of motherhood.[32] It would seem to be inconsistent that a wife can be an adultress and a proper mother at the same time.

However, the wife's adulterous conduct does not always create a presumption against her in custody matters. In *Verdin v. Wade,*[33] a mother who was pregnant by her lover was successful in regaining custody of her two children after she subsequently married him. The court reasoned that her present "path of rectitude" was more important than her past misconduct in determining the question of custody.[34] The woman's moral misconduct may or may not conflict with the court's notion of motherhood, depending on the peculiar facts and mitigating circumstances of each case. It is submitted that in *Verdin,* the mother's marriage to her lover not only legitimized her child but also restored the image of motherhood and family which had been previously shaken by her adulterous conduct.

Alcohol and motherhood are as incompatible as drinking and driving in terms of a mother's fitness to have custody. The alcoholic mother finds difficulty in receiving custody of her children.[35] Her drinking seems to contradict the devotedness a court expects in a mother.

Since the notion of motherhood is so closely related to the concept of the home, the fact that a mother neglects her household duties may be a consideration in depriving her of custody.[36] Also, if the mother has voluntarily relinquished custody of her child by abandonment or agreement, custody is very often given to the father.[37] By her abandonment she seems to have contradicted the concept of motherhood and raised serious doubts as to her fitness

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[31] *Id.* at 394, 83 N.E.2d at 849.

[32] For other cases where an adulterous mother has lost custody, see Grubaugh v. Grubaugh, 200 Cal. App. 2d 151, 19 Cal. Rptr. 141 (1962); Heater v. Heater, 254 Iowa 586, 118 N.W.2d 587 (1962); Shrout v. Shrout, 224 Ore. 521, 356 P.2d 935 (1960). In Parker v. Parker, 222 Md. 69, 158 A.2d 607 (1960), there was an inferred presumption that the mother was unfit to have custody if found guilty of adultery.

[33] 129 So.2d 571 (La. Ct. App. 1961).

[34] *Id.* at 573. *But see* Keer v. Cress, 194 Pa. Super. 529, 168 A.2d 788 (1961).

[35] Floyd v. Floyd, 218 Ga. 606, 129 S.E.2d 786 (1963); Lichtenberg v. Lichtenberg, 15 Wash. 2d 226, 130 P.2d 371 (1942).

[36] Howells v. Howells, 79 S.D. 480, 113 N.W.2d 533 (1962).

[37] Leach v. Leach, 179 Kan. 557, 296 P.2d 1078 (1956); Townsend v. Townsend, 358 S.W.2d 271 (Mo. Ct. App. 1962); *In re* Smith, 222 N.Y.S.2d 705 (Sup. Ct. 1961). In the cases involving parental agreement, it might be argued that the wife relinquished her right to custody solely because she could not otherwise have obtained the divorce from her husband. See Cantor, *The Right of Divorce,* The Atlantic Monthly, Nov. 1966, p. 70.

to be trusted with the child's custody. In *Ullman v. Ullman*,[38] the father had been awarded custody of his 2½-year-old child in a separation decree alleging abandonment by the wife. The court acknowledged that "the child at tender age is entitled to have such care, love and discipline as only a good and devoted mother can usually give,"[39] but found that in the light of her voluntary act of abandonment, "it would be a strange inconsistency should the court, after deciding that the mother had gone unjustifiably from her husband's house, visit upon him the penalty of the home broken by her fault and of losing his child. . . ."[40]

Some of these tests of parental fitness are closely allied with the traditional fault concept. In determining the fitness of the parent, the premise seems to be that the fit parent is the one who is not at fault. The woman who does not conform to the notion of motherhood is at fault and the assumption is that the father will better care for the child.

C. *Modern Roles of the Mother*

A role analysis of the family members is a useful tool of sociologists in determining family relationships and attitudes. Motherhood is only one of the various sociological roles assumed by the wife in our society. The behavioral scientist recognizes the other emerging roles of companion and partner played by the modern American wife.[41]

The companion role depicts the wife as enjoying the privilege of being the object of romantic aspirations and having leisure time for social or educational activity. The duties of the companion role include the wife's cultivation of social contacts beneficial to the husband and the maintenance of intellectual alertness.

The partner role obliges the wife to contribute to the financial support of the family according to her earning ability and to maintain the status of the family by success in a career. The wife as partner enjoys the privilege of equal status with the husband, exemption from domestic duties to him, and financial independence.

While these two emerging roles may appear distinctly attributable to specific socio-economic groups, they in fact overlap and are commingled. One finds that a companion-wife in the upper middle class may often be working, an obligation peculiar to the partner

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[38] 151 App. Div. 419, 135 N.Y. Supp. 1080 (1912).

[39] *Id.* at 424-25, 135 N.Y.Supp. at 1083.

[40] *Id.* at 421, 135 N.Y.Supp. at 1081.

[41] See generally BROOM & SELZNICK, SOCIOLOGY 369-72 (3d ed. 1963). A detailed description of several roles of the American wife is found in BOSKOFF, THE SOCIOLOGY OF URBAN REGIONS 157-59 (1962).

role.[42] However, her motivations for discharging this function of the partner role may in fact be toward the fulfillment of her role as companion, such as an attempt to overcome the boredom that can accompany leisure.[43] She may be economically motivated, not to maintain financial stability in the family, but to retain its upper class social status for the preservation and cultivation of advantageous social contacts of her husband.

The commingling of these two roles and their underlying motivations are as important for this discussion as the suggestion that both of these roles are distinguishable from, and represent a departure from the traditional motherhood role assumed by the courts. If equal consideration were given to these emerging roles of the modern wife and mother in our society, it might be discovered that the mother in a custody matter may no longer be confined to traditional household and child-rearing duties consistent with the notion of motherhood. Instead, she may very often be actively engaged in outside social activities within the upper middle class or may be working.

D. *Motherhood and Family Unity: Practical Difficulties*

Assuming that the wife has fulfilled the court's notion of motherhood on the basis of her conduct prior to the custody award, the issue is raised whether she will in fact continue to fulfill this role as a single parent. An examination of this question rests on the concept of the organization of the family in our culture. Family unity is a desired goal in our society in which the role of motherhood plays a major part.

However, marriage does not automatically give rise to a family relationship as expected, but may in fact amount to no more than a means of legitimizing the child conceived out of wedlock.[44] Furthermore, the family in a custody matter is always a disunited family. Its structure as an organized unit has been dissolved by the divorce or separation decree. Kingsley Davis has described the plight of the child in such a disunited family:

> Having formed a union which is socially defined, which involves mutual rights and obligations, and which clearly has as its main function the rearing of children, the parents separate and thus deprive the child of its socially prescribed milieu. If he remains with one parent he lacks the other — a real loss, because each parent plays a necessary and complementary role in the child's life.[45]

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[42] For a discussion on married women in the labor force, see MILLER & FORM, INDUSTRIAL SOCIOLOGY: THE SOCIOLOGY OF WORK ORGANIZATIONS 59-60 (2d ed. 1964).

[43] For a discussion on boredom as an attribute of the companion role, see BROOM & SELZNICK, *op. cit. supra* note 41, at 370.

[44] Goode, *Family Disorganization*, in CONTEMPORARY SOCIAL PROBLEMS 491 (2d ed. Merton & Nisbet ed. 1966).

[45] Davis, *Sociological and Statistical Analysis*, 10 LAW & CONTEMP. PROB. 700 (1944).

An anthropological approach to the concept of family organization shows the shortcomings of any notion of family unity in American custody matters. The family structures of various cultures are divided into two basic types. The nuclear or conjugal family structure consists of the husband, wife, and children. The extended or consanguine family is made up of several blood relatives and their own conjugal units. The extended family consists of the clan, a wider concept of the kinship group.[46]

The structure of the modern American family is dominantly conjugal,[47] whereas the family in many non-Western cultures is of the extended type. Care and custody of children in an extended family relationship presents few problems, since the cultural values do not consider the immediate family as the sole or most important kinship unit, and the functions of child rearing are distributed from the outset. The child thinks of his family not as centering around his immediate parents, but as a joint household of various blood relatives. Therefore, if a divorce or separation occurs, the child's family unit is not really dissolved, since the remaining clan members continue to fulfill the duties of child raising.[48]

In the American conjugal family, however, divorce or separation of the parents means dissolution of the unit. As Kingsley Davis observes:

> With the principle of kinship substitution and the custom of the great household abandoned, the child of a . . . divorced parent has as a rule nowhere to turn except to the other parent. He does not retain the balanced family life that a child in a kinship society is likely to have. He is therefore a 'problem' in a much more pressing sense.[49]

Upon the dissolution of the nuclear family by divorce or separation, three responses of the remaining spouse may be manifested.[50] (1) *Reconstruction of the Basic Unit With a New Member.* The parent can remarry with the anticipation that her new spouse will legally adopt the children to restore the family to its original state or take on a lover who will fill part of the role of the missing parent but may not restore the family to a legitimized nuclear status. The remaining spouse may also find a surrogate parent for the child in the person of a relative or housekeeper. (2) *Reorganization of the Remaining Members By Assignment of New Roles Within the Structure.* The parent may reassign obligations performed by the absent spouse to herself and her children, such as delegating her

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[46] See generally BROOM & SELZNICK, *op. cit. supra* note 41, at 355-56.

[47] *Ibid.*

[48] Davis, *supra* note 45, at 701.

[49] *Id.* at 705.

[50] See generally WINCH, THE MODERN FAMILY 721 (rev. ed. 1965).

usual household chores to her children and assuming a new role of provider herself. (3) *Dissolution of the Family Unit.* The parent may terminate the nuclear family by taking the children to live with grandparents.

When any of these three responses is manifested, any traditional notion of motherhood seems to be undermined, due to the practical difficulties with which the divorced custodian is faced. As Robert F. Drinan has stated, "It seems fair to say that American law has not thought out a consistent legal theory by which the once-married but emancipated, and now divorced, woman can fulfill all her duties to . . . the children over whom she has custody."[51]

In a few jurisdictions a tacit sociological analysis of the issues raised by these practical difficulties has afforded a basis for a change in the custody award. In *Thalassinos v. Thalassinos*[52] the wife who had been awarded custody was employed on a part-time basis and absent from her daughter for three days a week. She had employed several different maids to care for the child in her absence. The husband, on the other hand, had remarried and his new wife was not employed. The court, in awarding custody to the father concluded that the wife's absence from her daughter during working hours "deprives the child of the care, instruction, supervision and companionship of a parent which are not only desirable but essential to her well being and happiness."[53]

The mother in that case had attempted to assume the role of provider out of necessity and had delegated her motherhood role to a surrogate parent in the person of the various maids she had employed. The husband had reconstructed the basic family unit by remarrying. His second wife, who was not working, seems to have fulfilled the role of motherhood which would more fully serve the child's best interests.

The wife in *Wood v. Wood*[54] had taken her two children to live with another young mother and child. The two mothers, who were employed at different hours, shared the care of the children. The husband who had subsequently remarried, sought to have the custody award changed in his favor. The court found that the wife's arrangement for the care of her children was temporary at best, and concluded that she "had not been able to establish a home that gave assurance of continued adequate care and supervision."[55] Cus-

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[51] Drinan, *The Rights of Children in Modern American Family Law,* 2 J. FAM. L. 101, 102 (1962).

[52] 77 N.Y.S.2d 311 (Sup. Ct. 1947), *aff'd,* 274 App. Div. 807, 81 N.Y.S.2d 155 (1948).

[53] *Id.* at 314.

[54] 207 Cal. App. 2d 33, 24 Cal. Rptr. 260 (1962).

[55] *Id.* at 36, 24 Cal. Rptr. at 262.

tody was awarded to the father, who "appears to have established a stable home and was prepared to provide adequate care, supervision and training for the children."[56]

These two cases represent an awareness on the part of the courts of the importance of a sociological inquiry into all of the circumstances involving parental roles and their relationship to the responses of the remaining spouse upon dissolution of the conjugal family.

In both cases the mothers, in order to meet the practical necessities of their situation as sole parent, had assumed roles opposed to the traditional notion of motherhood and more analagous to the fatherhood role. It is submitted that in cases where the mother must assume the role of father, which the courts have found is usually not in the best interests of the child, that she should not be entitled to custody under the traditional "motherhood" test. In such cases, the mother and father should be considered on an equal role status and other factors should be given consideration in determining custody.

III. THE INCOMPLETE USE OF SOCIOLOGICAL CONSIDERATIONS: A CASE IN POINT

The situation that occurs when custody is to be determined between one natural parent and third parties presents somewhat different judicial considerations. One reason is that the cause of family dissolution may often have been involuntary rather than voluntary. Family disunity may have resulted from the death of one parent rather than divorce or judicial separation. A recent decision by the Supreme Court of Iowa in *Painter v. Bannister*[57] has aroused much public interest and controversy. Although the court in the *Bannister* case announces that its decision was in the best interests of the child,[58] the case is an exceptional one in terms of the assumptions used in its determination.

The issue which usually faces the court in these cases is whether to proceed on a premise of family unity from the standpoint of blood ties and parental rights or to regard the child as an entity apart from the nuclear family. The presumption of parental rights, stemming in part from old common law doctrines and in part from the natural notion of blood unity is difficult to overcome, unless the parent is shown to be unfit.[59]

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[56] *Id.* at 37, 24 Cal. Rptr. at 262.

[57] 140 N.W.2d 152 (Iowa), *cert. denied*, 87 Sup. Ct. 317 (1966).

[58] *Id.* at 156.

[59] For a discussion of the parental right doctine, see 33 CALIF. L. REV. 306, 309-10 (1945).

Painter v. Bannister appears to be an attempt by the court to inquire into the role of the family as a socializing factor in the child's development. The traditional issue of parental right is not considered. Instead the court seems to assume as a sociological axiom the notion of family stability, and further to determine which social class is exemplary of family stability in the best interests of the child. It is for this reason that *Painter v. Bannister* merits discussion.

Mark Painter's mother died in an automobile accident in 1962 when he was three years old. His father asked Mark's maternal grandparents, the Bannisters, to care for the child temporarily. Two years later, after Mr. Painter had remarried, he asked the Bannisters for Mark's return, which they refused. An action was filed in the Iowa District Court to determine custody, which was granted to Mark's father. The Supreme Court of Iowa reversed the custody decree in favor of the Bannisters. The court found that the life Mark would be exposed to if custody was granted to his father would be "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating."[60] On the other hand, the Bannister farm provided Mark "with a stable, dependable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it."[61] The court concluded, "We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child."[62]

There were no issues of parental fitness[63] or parental right[64] deemed paramount in *Painter v. Bannister.* Rather, the court's determination rested on a choice between two different sociological environments, which it admittedly did not have a right to consider.[65]

If the child's best interests required a sociological examination of different environments, then an inquiry should have been made into the effects each might have on a child. Instead, the court considered the testimony of Dr. Hawks, a child psychologist, which concerned Mark's "father image" as now resting in Mr. Bannister rather than Mr. Painter. The testimony of Dr. Hawks is not to be entirely discounted here, but it does seem incomplete in terms of the sociological issue involved. Yet the court considered it as conclusive of Mark's best interests.[66]

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[60] Painter v. Bannister, 140 N.W.2d 152, 156 (Iowa), *cert. denied,* 87 Sup. Ct. 317 (1966).

[61] *Id.* at 154.

[62] *Id.* at 156.

[63] *Id.* at 154.

[64] *Id.* at 156.

[65] *Id.* at 154.

[66] *Id.* at 156-58.

The court's emphasis on security and stability in the home as opposed to intellectual stimulation seems to place an extremely high value on what might be called mediocrity as the desired ideal in a family relationship. The danger of such a notion has been ably pointed out:

> [I]t is of primary importance that the court should keep its eye on excellence, and seek to secure the very richest, finest life for the child, rather than fix its eye on mediocrity and feel that its duty is done when it has secured so-called normal home life.[67]

The court in *Painter v. Bannister* has determined a child's best interests on the basis of two assumptions of social behavior. First, by preferring stability in the home over intellectual stimulation, it would seem to assume that mediocrity in social activity is best for the individual. Secondly, the court concludes that middle class, middlewest rural society is the desired example of stability. Unfortunately, the court's notions find no basis in the facts of behavioral science. As eminent sociologists have stated:

> There would be little agreement, even among scholars, as to what constitutes . . . mediocrity, or debasement of culture. From a scientist's point of view there is too little precision in these conceptions to make them suitable for objective treatment. They fall within more speculative types of discourse.[68]

Elsewhere, they state:

> Nor does it (sociology) assume that the middle way is everywhere and always the right way: disparaging connotations of the word *mediocrity,* the condition of being intermediate between extremes, should be enough to ward us off that bland and simple-minded assumption.[69]

Not only is the assumption that mediocrity and stability are definable or attributable to a particular social class untenable from a sociological point of view, it is also in conflict with the constitutional rights of parents to raise their children, enunciated in *Pierce v. Society of Sisters.*[70] The Supreme Court in that case stated, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . ."[71]

The court's decision in *Painter v. Bannister* raises the question of whose best interests are really being inquired into, those of the child or those of society in terms of the kind of child it wants its

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[67] Sayre, *Awarding Custody of Children,* 9 U. CHI. L. REV. 672, 683 (1942).

[68] Nisbet, *The Study of Social Problems,* in CONTEMPORARY SOCIAL PROBLEMS 2 (2d ed. Merton & Nisbet ed. 1966).

[69] Merton, *Social Problems and Sociological Theory,* in CONTEMPORARY SOCIAL PROBLEMS 791 (2d ed. Merton & Nisbet ed. 1966).

[70] 268 U.S. 510 (1925).

[71] *Id.* at 535.

families to produce. It seems that if such importance has been placed on the value of the family as a primary force in the child's socialization process that this question is better left to the family itself.

Also, it must be realized that the family is but one of the socializing elements in the child's development. Educational institutions, peer groups, and to an increased extent in our age of technology, television and other mass media all contribute to the social development of the child. Were Mark Painter to be raised in the Bohemian environment of the Painter household, could it not be argued that through the socializing agencies of mass media he would receive an adequate awareness of middle class mediocrity, at the same time he would be benefitting from his richer experience of intellectual stimulation?

CONCLUSION

The best interests rule reflects an awareness on the part of the courts that the problem of child custody requires the examination of many non-legal issues. As one court has stated, "The difficulty of the custody problem lies not in the law, but in an analysis of the facts and in the application of the law."[72]

Due to the breadth of the best interests rule, the courts have been forced to employ various conceptual criteria such as age, sex and preference of the child, and parental fitness in their analysis of the facts. Traditional notions of motherhood, fatherhood and family unity permeate these considerations, serving as tacit assumptions of what is in the child's best interests.

A sociological examination of these conceptions demonstrates that as conclusive presumptions they are incomplete. The role of motherhood is an effective measure of the child's best interests only when it is considered in conjunction with other emerging roles of the modern wife.

Given the alternative responses with which the divorced or separated custodian is faced upon dissolution of the American family, a woman may be forced to shed her traditional role as mother in order to support her child. Under these circumstances the child in fact may or may not be deprived of the parental care he needs, and which the courts assume can only be provided by the traditional mother.

What is needed in the application of the best interests rule is a thorough acquaintance with the sociological tools available in custody matters. In a few cases this need has been recognized by the courts, suggesting a trend toward a greater awareness of the

[72] Hurly v. Hurly, 411 P.2d 359, 361 (Mont. 1966).

value of the behavioral sciences in the consideration of child custody disputes.

The final decision in a custody case still rests with the judge in his exercise of discretion for the child's best interests. The effective use of discretion in such matters requires an abandonment of the misconception that the traditional notion of motherhood alone is a conclusive test of the best interests of the child. Other considerations must enter into the analysis of the facts. Is the woman in a particular custody matter fulfilling the role of companion or partner? Can the mother, if awarded custody, continue to fulfill her role as a mother, or will she be forced by circumstance to assume a new role which may be inconsistent with the child's best interests? Has one of the parents remarried, thereby reconstructing a basic family unit which might provide a more beneficial atmosphere for the child?

By departing from traditional notions and addressing themselves to a broader sociological analysis of the issues in custody matters the courts will more fully serve both the best interests of the child and the interests of the society in which he lives.

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