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Child Custody Disputes Between Biological Parents and Third Parties

by Harry C. Storm

"There can be no binding, and very little helpful precedent found in the decisions of the courts on this subject, because essentially each case must depend upon its peculiar circumstances . . ." So saying, the Maryland Court of Appeals in *Barnard v. Godfrey*, 157 Md. 264, 267-268, 145 A. 614, 616 (1929), expressed the difficulty of applying the relevant legal standard in child custody cases. That standard, the "best interests of the child," applies both to disputes between the biological parents, *Hall v. Triche*, 258 Md. 385, 266 A.2d 20 (1970), and those between a biological parent and a third party. *De-Grange v. Kline*, 254 Md. 240, 254 A.2d 353 (1969); *Ross v. Pick*, 199 Md. 341, 86 A.2d 463 (1952).

Historical Background

The "best interests of the child," although currently well-embedded in Maryland law as being the court's "paramount consideration" in child custody cases, *Glick v. Glick*, 232 Md. 244, 248, 192 A.2d 791, 794 (1963), is a doctrine of relatively recent vintage. Historically speaking, the "best interest of the child" standard is the result of a legal and sociological evolution brought about by continually changing attitudes concerning the relationship of father, mother, child and state. Beginning with the Roman civil law, which was guided by the quasi-legal doctrine of *patria potestas*, and continuing through the decline of the Roman Empire, it was recognized that the father had an absolute right to the custody and services of his children. Shepherd, *Soloman's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 151, 158 (1974)(hereinafter *Shepherd*); Comment, *Best Interests of the Child: Maryland Child Custody Disputes*, 37 MD. L. REV. 641, (1978) (hereinafter *Maryland Child Custody Disputes*). This special interest of the father was later subtly incorporated into feudal English law, which recognized that child custody belonged to the parent entitled to convey and bequeath property. Since that parent was almost exclusively the father, his absolute right to custody remained virtually unimpaired.¹ Brosky and Alford, *Sharpening Soloman's Sword: Current Con-*

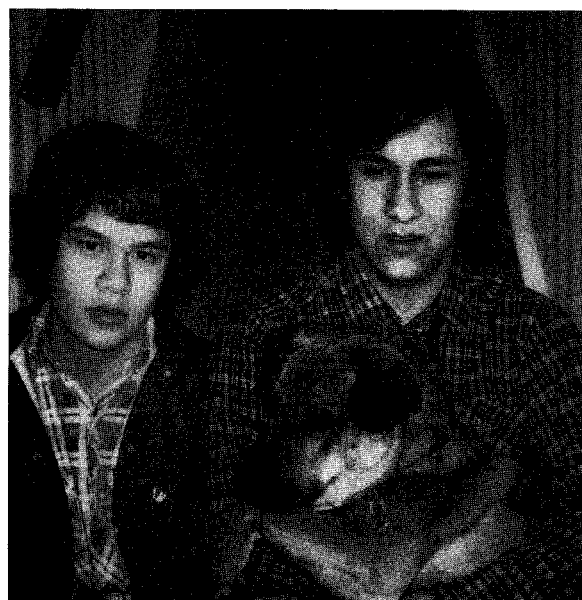
siderations in Child Custody Cases, 81 DICK. L. REV. 683, 684 (1977)(hereinafter *Brosky and Alford*).

By the end of the Seventeenth Century, however, as child custody jurisdiction became vested in the English chancery courts, the developing doctrine of *parens patriae* crystallized to protect persons under a disability. *Shepherd*, *supra* at 159; *Brosky and Alford*, *supra* at 684. This doctrine became part of the law of the various states in this country, and eventually became the basis upon which the states could exercise authority to affect child custody.² *Turner v. Melton*, 194 Kan. 732, 735, 402 P.2d 126, 128 (1965); *Maryland Child Custody Disputes*, *supra* at 642 n. 4. Thus, with the advent of *parens patriae*, courts rejected the notion that children were merely "chattels" of their fathers, and instead shifted their attention to the interests and well-being of the child. See, *Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. at 416, 381 A.2d at 1161; *Maryland Child Custody Disputes*, *supra* at 641.

The emergence of *parens patriae*, however, did not completely eliminate all traces of *patria potestas*, as courts continued to recognize special custodial rights in the father. In Maryland, for example, despite the Court of Appeals' recognition as early as 1878 that the "welfare of the child" was the "primary object" to be attained, *Hill v. Hill*, 49 Md. 450, 458 (1878), subsequent cases con-

² Speaking of the authority of the state to protect its children, the Court of Appeals stated in *Ross v. Pick*, 199 Md. at 351, 86 A.2d at 468 that "[t]his principle [*parens patriae*] is based upon the theory that, while the law of nature gives to parents the right to the custody of their own children, a child from the time of birth owes allegiance to the State, and the State in return is obligated to regulate the custody of the child whenever necessary for its welfare."

¹ It is interesting to note that "it was not until the Victorian Era that a father lost a custody dispute in England. The dubious award for 'first loser' was presented to the famous poet, Percy Bysshe Shelley (1792-1822) by Lord Eldon in *Shelley v. Westbrook*, 37 Eng. Rep. 850 (ch. 1817). Lord Eldon described Shelley's atheistic beliefs as 'vicious and immoral' and refused to give him custody of his children." *Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. at 415 n. 8, 381 A.2d 1160 n. 8.



tinued to speak of the father's "special interest." *Carter v. Carter*, 156 Md. 500, 505, 144 A. 490, 492 (1929). This "special interest" was based on the notion that the father, having the sole duty to support, protect and educate his children, was entitled to a correlative right to custody and services. *Boggs v. Boggs*, 138 Md. 422, 431, 114 A. 474, 477 (1921).

In 1929, however, the Maryland legislature statutorily eliminated the rationale upon which the father's "special interest" was based. It was provided that the father and mother were to be equally charged with the "care, nurture, welfare and education" of the child, and that neither parent would have a superior right to custody. 1929 Maryland Laws, ch. 561, §1 codified as MD. ANN. CODE, art. 72A, §1 (Cum. Supp. 1929) (current version at Cum. Supp. 1978). But while this statute was intended to eliminate any "natural right" of the father, as late as 1946 the Court of Appeals spoke of the father's "natural right" to the custody of his children. *Sibley v. Sibley*, 187 Md. 358, 362, 50 A.2d 128, 130 (1946) (dispute between biological father and grandfather).

More interesting than the continued recognition of the father's "natural right", however, was the emergence in 1948 of a *maternal preference*, expressed in the form of a presumption, which favored the mother over the father when the dispute concerned the custody of a child of "tender years." *Miller v. Miller*, 191 Md. 396, 408, 62 A.2d 293, 298 (1948). The Court of Appeals subsequently explained that "since the mother is the natural guardian of the young and immature, custody is ordinarily awarded to her at least temporarily, in legal contests between parents when other things are equal . . . provided the mother is a fit and proper person to have custody." *Hild v. Hild*, 221 Md. 349, 357, 157 A.2d 442, 446 (1960). In light of the court's implicit recognition in *Dunnigan* that the paternal preference doctrine was incompatible with Art. 72A §1, and the Court's recent reference to the "natural right" of the father, 187 Md. at 362, 50 A.2d at 130, adoption of the tender years presumption is surprising. *Maryland Child Custody Disputes*, *supra* at 651-52. The presumption was consistently applied, however, *see, e.g., Palmer v. Palmer*, 238 Md. 327, 331, 207 A.2d 481, 483 (1965); *Roussey v. Roussey*, 210 Md. 261, 264, 123 A.2d 354, 355 (1956), until the recent Court of Special Appeals decision in *McAndrews v. McAndrews*, 39 Md. App. 1, 382 A.2d 1081 (1978). That case sounded the death knell for the "tender years" presumption by holding that the legislature's 1974 amendment to Art. 72A, §1 provides that "in any custody proceeding, neither parent shall be given preference solely because of his or her sex."

Thus, in light of *McAndrews*, Maryland law is currently neutral and "presumption free" when the custody dispute concerns the rights of the natural parents *inter sese*.

When the dispute concerns the rights of the natural parent vis-a-vis some third party, however, Maryland retains the common law presumption that the right of either natural parent is generally superior to that of the third party, 38 Md. App. at 416, 381 A.2d at 1161; *Ross v. Hoffman*, 280 Md. 172, 177, 372 A.2d 582, 586-87 (1977).

Parent-Third Party Custody Disputes

Parent-third party custody disputes arise in a variety of ways, although most frequently the dispute follows the death of a parent who had the sole custody of the child. Comment, *Alternative to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L. J. 151 (1963) (hereinafter *Alternatives*). Typically in these cases, the non-parent, usually a step-parent, grandparent or close relative, assumes custody following the custodial parent's death. *See, Melton v. Connolly*, 219 Md. 184, 148 A.2d 387 (1959). Later, often several years later, the non-custodial biological parent requests that the child be delivered to him. When the third party refuses, the biological parent seeks judicial relief. *Alternatives, supra* at 151 n.4.

As in disputes between the natural parents, the "best interests of the child" standard governs disputes between the natural parent and the third party, 254 Md. at 242-43, 254 A.2d at 354; 219 Md. at 188-89, 148 A.2d at 389; 199 Md. at 350-51, 86 A.2d at 468. Where the dispute centers on the rights of a parent versus a non-parent, however, the "best interest" standard takes on an added dimension, because of the presumption that the child's best interests will be served in the custody of the natural parent. Thus, while the parents no longer have an "absolute legal right" to the custody of their children, nevertheless, there persists that part of the common law that declares that the "rights of either parent is ordinarily superior to that of anyone else." 280 Md. at 177, 372 A.2d at 586. This superior right, however, is not based upon any "sympathetic concern for the parent, nor upon parental rights." *Powers v. Hadden*, 30 Md. App. 577, 583, 353 A.2d 641, 645 (1976). Instead, it is based upon the belief that normally the parent's affections for the child are "strong and potent", and that this leads to a desire to care for and raise the child which is greater than that ordinarily displayed by a third party. 219 Md. at 188, 148 A.2d at 389. The presumption, therefore, is merely "a judicial device which shifts the burden of proof to the non-parent seeking custody and recognizes that the child's best interest is usually served in the custody of its natural parents." 30 Md. App. at 583, 353 A.2d at 645. *See also, Alternatives, supra* at 154 n. 18.

To refute this "parental right" presumption, the non-parent must prove that the parent is unfit to have custody of the child, or that exceptional circumstances exist that would render parental custody deleterious to the child's

best interest. 38 Md. App. at 417, 381 A.2d at 1162. Absent such proof, the court need not inquire into the child's best interests, and custody will be awarded to the biological parent. The likelihood of the third party not producing evidence of "unfitness" or "exceptional circumstances", however, is remote. Thus, the child's best interests will in fact be determinative of the controversy's outcome.

The third party has proved "parental unfitness" by presenting evidence of the natural parent's abandonment of the child, *Schroeder v. Filbert*, 41 Neb. 745, 60 N.W. 89 (1894); the natural parent's unsatisfactory moral character, *Bradley v. Bennett*, 168 Ala. 240, 53 So. 262 (1910); 219 Md. at 187, 148 A.2d at 389; and, the natural parent's unsuitable home environment, *Id.* at 187, 148 A.2d at 389. But while the opinions repeatedly speak of "parental unfitness" as a basis for overcoming the presumption favoring the natural parent, cases involving *only* parental unfitness are rare. Rather, most of the Maryland cases turn on the existence *vel non* of "exceptional circumstances", see, e.g., 280 Md. 172, 372 A.2d 582 (1977); *Trenton v. Christ*, 216 Md. 418, 140 A.2d 660 (1958), or on a combination both of "parental unfitness" and "exceptional circumstances." See, e.g., *Dietrich v. Anderson*, 185 Md. 103, 43 A.2d 186 (1945).

Ross, *supra*, presents the classic case of "exceptional circumstances."³ In that case the parent, Mrs. Ross, in order to work an all-night job, hired Mrs. Hoffman to babysit her three and one-half month old daughter, Melinda. Initially, Mrs. Ross would leave Melinda at the Hoffman residence late at night and would return for the child early in the morning. After several weeks, however, Mrs. Ross found herself unable to care for Melinda during the day, and as a result decided to leave the child with the Hoffmans throughout the week. Within one month Mrs. Ross stopped keeping the child even on weekends and holidays; instead, Melinda remained with the Hoffmans permanently. Over the next eight and one-half years, Mrs. Ross' visits and financial support for Melinda were sporadic. In fact, over this period of time, the most the mother ever contributed towards her child's support in any one year was \$540.00, and in at least one year contributed nothing. Upon her re-marriage and procurement of steady employment eight and one-half years later, however, Mrs. Ross sought to reclaim her daughter. The Hoffmans resisted by filing a petition for custody in the Circuit Court for Baltimore City.

The chancellor, relying heavily upon the testimony of the doctor who had examined the child, concluded that rather than risk placing Melinda in a new environment,

the stability of which was uncertain, it was better that the child remain in the loving atmosphere where she concededly performed well. See, *Ross, supra*.

Summarizing the factors to be evaluated in determining whether "exceptional circumstances" exist, the Court of Appeals noted that previous decisions had considered the length of time the child had been away from the biological parent; the age of the child when care was assumed by the third party; the possible emotional effect on the child of a change of custody;⁴ the period of time which elapsed before the parent sought to reclaim the child; the nature and strength of the ties between the child and the third party custodian; the intensity and genuineness of the parent's desire to have the child; and, the stability and certainty as to the child's future in the custody of the parent. 280 Md. at 191, 372 A.2d at 587.

Finding practically all of the above circumstances present, and that the chancellor did not clearly abuse his discretion in continuing custody of Melinda in the Hoffmans, the Court of Appeals affirmed the decisions of the chancellor and the Court of Special Appeals, stating that [i]n our prior decisions not all of the factors which were considered from time to time in determining the existence of exceptional circumstances have appeared in one case. Here, however, practically all of them were present . . . There being [such] exceptional circumstances rebutting the presumption that custody in the mother was in the best interest of the child, the chancellor properly considered who should be awarded custody in order to subserve the child's best interest. His conclusion, that custody in the Hoffmans was in the child's best interest was founded upon sound legal principles and was based upon factual findings that were not clearly erroneous.

280 Md. at 192, 372 A.2d at 594.

Although *Ross v. Hoffman* serves as a judicial checklist of exceptional circumstances, it should be noted that this list is in no way exclusive, as there are other factors that the chancellor may consider. For example, "the court may look to the auxiliary services of psychiatrists, psychologists, and trained social workers . . ."⁵ 280 Md. at 191,

³ There was no question respecting the "fitness of the parties to have custody of the child." *Ross v. Hoffman*, 280 Md. at 180, 372 A.2d at 588.

⁴ The "emotional attachments" that the child may develop for the third party as a result of the third party's attention to the child's needs for "physical care, nourishment, comfort, affection and stimulation", has been termed "psychological parenthood." See, Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* (1973). The judicial preference for the biological parents and the "influential and controversial" *Maryland Child Custody Disputes*, *supra* at 660 n. 113 "psychological parenthood" concept have recently clashed. Compare, *Powers v. Hadden*, 30 Md. App. at 589-93, 353 A.2d at 648-50 (Davidson, J., dissenting) (urging acceptance of "psychological parenthood" concept) with *Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1978) (rejecting the "psychological parenthood" concept as the sole consideration in child custody disputes).

⁵ It has been suggested that the increasing reliance upon the use of

372 A.2d at 593. And, "where the child is able to form a rational judgment," 199 Md. at 353, 86 A.2d at 469, its desire will also be given special consideration.⁶ In essence, the court considers all those factors affecting the "training, development, morals and happiness of the child," 199 Md. at 351, 86 A.2d at 468, and if based upon such evidence the court determines that the "best interest of the child" would be served in the custody of the non-parent, the court in its sound discretion will so decree.

Appellate Review

Once the chancellor makes a custodial determination, such determination will be subject to three distinct aspects of appellate review. 280 Md. at 185, 372 A.2d at 590. The first aspect relates to the factual findings. The reviewing court, whether it be the Court of Special Appeals or the Court of Appeals, will accept the chancellor's findings unless it determines that such findings were "clearly erroneous." Thus, when reviewing the facts as to which party should have custody, the chancellor, and not the appellate court, should, in the absence of abuse, have the ultimate exercise of judgment.

The second aspect of review relates to the chancellor's statement of the law. 280 Md. at 186, 372 A.2d at 591. If the reviewing court finds that the chancellor committed a legal error, "further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless." *Id.* at 186, 372 A.2d at 591; *Davis v. Davis*, 280 Md. 119, 126, 372 A.2d 231, 234 (1977).

Finally, the appellate court will examine the chancellor's ultimate conclusion. If the court determines that such conclusion was "founded upon sound legal principles and based upon factual findings that [were] not clearly erroneous, such findings should be disturbed only if there was a clear abuse of discretion." 280 Md. at 186, 372 A.2d at 591. The reviewing court is not free to "exercise its best judgment in determining whether the conclusion of the chancellor was the best one for the welfare, benefit and interest of the child." Rather, the court must examine the chancellor's ultimate conclusion, and if that conclusion is not the result of a "clear abuse of discretion," it should not be disturbed.

experts trained in the behavioral sciences indicates an increased awareness of the emotional and psychological ramifications of child custody decisions. *Maryland Child Custody Disputes*, *supra* at 667 n. 146.

⁶ On the issue of when a child's wishes should be consulted, the Court of Appeals has stated that

... we adopt the rule that there is no specific age of a child at which his wishes should be consulted and given weight by the court. The matter depends upon the extent of the child's mental development. The desires of the child are consulted, not because of any legal right to decide the question of custody, but because the court should know them in order to be better able to exercise its discretion wisely. *Ross v. Pick*, 199 Md. at 353, 86 A.2d at 459 (1952).

The World is So Full of A Number of Things . . .

by Lu Clark


When I first became a mother, my whole perception of the world underwent a radical change: the world was inhabited with dangerous instrumentalities ready to hurt my child; it was peopled with rapists and child molesters and around every corner lurked a serious illness, or at least a runny nose.

As frightening as the world was for me then, as vigilant as I had to be to maintain the well-being of my child, it was duck soup compared to what law school has done to me.

No more can I go through a day blithely unaware—now that my children have grown larger and stronger than I—of the dangers that just daily living expose. No more can I engage in the simplest activities without searching for ultimate conclusions or at least balancing the alternatives. No more can I read without trying to subdivide into 1., 2., 3. or (a), (b) and (c). No more can I see a child crying without wondering if it is being abused. No more can I see a drunk in a doorway without thinking "Rogue and Vagabond." No more can I see a river without pondering avulsion and accretion. I feel obligated to read the fine print—even on dinner menus.

Letter writing has become hazardous. Is that piece of gossip libelous? Bus riding is treacherous. Shouldn't both

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