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BEST INTERESTS OF THE CHILD: MARYLAND CHILD CUSTODY DISPUTES

As long ago as the reign of King Solomon, disputes have arisen over which of two or more contending persons should be entitled to the custody of a child.¹ Child custody cases continue to present complex problems, not because of any dissatisfaction with the accepted principle that the best interests and welfare of the child should control custody,² but because of the

1. Solomon demonstrated his legendary wisdom by resolving a child custody dispute:

Then the king said, "The one says, 'This is my son that is alive, and your son is dead'; the other says, 'No; but your son is dead, and my son is the living one.'" And the king said, "Bring me a sword." So a sword was brought before the king. And the king said, "Divide the living child in two, and give half to the one, and half to the other." Then the woman whose son was alive said to the king, because her heart yearned for her son, "Oh, my lord, give her the living child, and by no means slay it." But the other said, "It shall be neither mine nor yours; divide it." Then the king answered and said, "Give the living child to the first woman, and by no means slay it; she is its mother." And all Israel heard of the judgment which the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice.

1 *Kings* 3:23 (Revised Standard Version).

2. *Ross v. Hoffman*, 280 Md. 172, 174-75, 372 A.2d 582, 585 (1977); 2 W. NELSON, *DIVORCE AND ANNULMENT* §§ 15.01-.02 (2d ed. 1961) [hereinafter cited as W. NELSON]. That the best interests of the child should be the paramount concern in child custody cases is taken for granted today. However, until the nineteenth century, the controlling factor was the *patria potestas* doctrine — the right of the father to the custody and services of his children. See Brosky & Alford, *Sharpening Solomon's Sword: Current Considerations in Child Custody Cases*, 81 DICK. L. REV. 683, 684-85 (1977) [hereinafter cited as Brosky & Alford]; Shepherd, *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 151, 158-59 (1974) [hereinafter cited as Shepherd]. The *patria potestas* doctrine lost strength during the nineteenth century as American courts accepted the idea that children are not chattels owned by their fathers. See Brosky & Alford, *supra* at 685. Under the *parens patriae* doctrine (see discussion at note 4 *infra*) the courts began to realize that the child's rights and interests should be protected. In a frequently cited opinion, Judge Brewer (later a United States Supreme Court Justice) stated that "whether the courts will enforce the father's right to the custody of the child will depend mainly upon the question whether such custody will promote the welfare and interest of such child." *Chapsky v. Wood*, 26 Kan. 650, 653 (1881).

The Maryland Court of Appeals recognized the child's interests as the paramount concern at least as early as 1878. In *Hill v. Hill*, 49 Md. 450 (1878), the court stated that "the welfare of the child is certainly the primary object to be attained, and is not to be sacrificed or placed in jeopardy . . ." *Id.* at 458. Despite the enlightened approach taken by nineteenth century courts, subsequent Court of Appeals cases continued to recognize the father as having a special interest in the custody of his children. See, e.g., *Carter v. Carter*, 156 Md. 500, 505, 144 A. 490, 492 (1929); *Boggs v. Boggs*, 138 Md. 422, 429, 114 A. 474, 477 (1921) (support case discussing the interrelationship between father's duty to support and right to custody). The special interest of the father was based upon the theory that because he alone had a duty to support his children, he had a correlative right to their custody and services. *Id.* In 1929, however, the General Assembly enacted a statute that

difficulty in applying the principle to specific situations.³ In limited circumstances American courts have wide discretion, under the doctrine of *parens patriae*,⁴ to interfere with the family relationship and protect the welfare of a child. This Comment will examine the discretion exercised by

provided that between parents, neither had a superior right to the custody of their children:

The father and mother are the joint natural guardians of their minor child and are equally charged with its 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. . . . Where the parents live apart, the court may award the guardianship of the child to either of them.

1929 Md. Laws, ch. 561, § 1 (codified as MD. ANN. CODE art. 72A, § 1 (Cum. Supp. 1929) (current version at (Cum. Supp. 1977)). Although the clear import of the statute was that the father's custody rights were not to be deemed superior to those of the mother, the Court of Appeals continued in several cases to speak of the father's "natural right" to the custody of his children. *See, e.g.*, *Sibley v. Sibley*, 187 Md. 358, 362, 50 A.2d 128, 130 (1946); *Piotrowski v. State*, 179 Md. 377, 381, 18 A.2d 199, 200 (1941). In 1943, the court implicitly recognized that the remnants of the *patria potestas* doctrine had been legislatively eliminated in Maryland. *See Dunnigan v. Dunnigan*, 182 Md. 47, 52-53, 31 A.2d 634, 636 (1943). In light of *Dunnigan* and article 72A, § 1, the court's reference in *Sibley v. Sibley*, 187 Md. at 362, 50 A.2d at 130, to the father's natural right to custody of his children cannot be justified.

3. *See*, W. NELSON, *supra* note 2, at § 15.01. For a discussion of the best interests of the child principle, *see* note 2 *supra* and notes 50 to 69 and accompanying text *infra*.

4. BLACK'S LAW DICTIONARY 1269 (4th ed. 1951) defines *parens patriae* as: "[f]ather of his country; parent of the country. . . . In the United States, the state, as a sovereign — referring to the sovereign power of guardianship over persons under disability" *Parens patriae* is the basis for the power of the state to affect the custody of children. *See Turner v. Melton*, 194 Kan. 732, 735, 402 P.2d 126, 128 (1965). *See generally* L. HOCHHEIMER, CUSTODY OF INFANTS § 2 (1899) [hereinafter cited as L. HOCHHEIMER]; Brosky & Alford, *supra* note 2, at 684-85; Shepherd, *supra* note 2, at 159. *See also* Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733, 734 & n.2 (1977) [hereinafter cited as *Child Custody*]. The power, which English courts first articulated in the seventeenth century, rests upon the theory that while natural law gives parents the right to the custody of their children, a child, from the time of its birth, owes an allegiance to the state, and the state has a reciprocal obligation to regulate the custody of the child whenever necessary to protect the child's welfare. *See Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952).

By statute, Maryland equity courts have jurisdiction in child custody cases. The statute reflects broad *parens patriae* powers:

(a) *Jurisdiction of courts of equity.* — A court of equity has jurisdiction over the custody, guardianship, legitimation, maintenance, visitation and support of a child. In exercising its jurisdiction, the court may:

- (1) Direct who shall have the custody or guardianship of a child;
- (2) Determine the legitimacy of a child
- (3) Decide who shall be charged with the support and maintenance of a child, *pendente lite* or permanently;
- (4) Determine who shall have visitation rights to a child; or
- (5) From time to time set aside or modify its decree or order concerning the child.

MD. CTS. & JUD. PROC. CODE ANN. § 3-602 (Cum. Supp. 1977).

Maryland courts in custody disputes incident to divorce and between parents and third parties, focusing in both situations on the factors utilized by the courts to ascertain the best interests of the child.⁵

CUSTODY DISPUTES ACCOMPANYING DIVORCE

In *Davis v. Davis*,⁶ the Maryland Court of Appeals examined two areas that had been in a state of considerable confusion: the standard for appellate review in child custody cases and the importance of adultery in a custody award.⁷ In *Davis*, a husband was granted a divorce on the ground of his wife's adultery.⁸ The trial court, however, awarded the wife custody of the couple's six-year-old daughter because the child had lived alone with her mother for almost two years prior to the decree, had adjusted to that arrangement, had progressed well in school, and because the mother had not engaged in extramarital sexual affairs for many months.⁹ The trial court apparently concluded that the wife's past affairs had not adversely affected the little girl. The Court of Special Appeals reversed and awarded custody to the father.¹⁰ Relying on two of its earlier decisions,¹¹ the court determined that in child custody cases

an appellate court is not bound by the clearly erroneous rule, Md. Rule 1086, but must exercise its own good judgment as to whether the conclusion of the chancellor is the best one. In making this determination we, of course, accept the chancellor's factual findings but not necessarily his conclusions.¹²

5. This Comment will not analyze adoption or custody matters incident to neglect and abuse cases, although many of the considerations discussed are invoked in those cases. See generally Shepherd, *supra* note 2, at 163-66 & 171-76. Also, the Comment will not discuss the Uniform Child Custody Jurisdiction Act, MD. ANN. CODE art. 16, §§ 184-207 (Cum. Supp. 1977), an important device for discouraging continuing controversies over the custody of a child, deterring abductions for the purpose of obtaining custody awards, and avoiding relitigation in one state of the custody decision of another state.

6. 280 Md. 119, 372 A.2d 231, *cert. denied*, 434 U.S. 939 (1977).

7. See notes 16 to 36 and accompanying text *infra*.

8. John and Mary Davis married in 1958. When they separated in January, 1974, they had a fifteen-year-old son, a thirteen-year-old daughter, and another daughter who was six. At that time, Mrs. Davis moved into an apartment and took the youngest child, Leigh, with her. The two older children apparently preferred to remain with Mr. Davis. In September, 1974, Mr. Davis filed for divorce *a vinculo matrimonii* on the ground of Mrs. Davis' adultery, see MD. ANN. CODE art. 16, § 24 (Cum. Supp. 1977), and requested custody of all three children. In her answer and cross-bill, Mrs. Davis also sought custody of the three children. The trial court granted Mr. Davis a divorce *a vinculo matrimonii* and awarded him custody of the two older children. Custody of Leigh was awarded to Mrs. Davis. 280 Md. at 120-21, 372 A.2d at 231-32.

9. *Id.* at 130-31, 372 A.2d at 237.

10. *Davis v. Davis*, 33 Md. App. 295, 364 A.2d 130 (1976).

11. See *Sartoph v. Sartoph*, 31 Md. App. 58, 64, 354 A.2d 467, 471 (1976); *Sullivan v. Auslaender*, 12 Md. App. 1, 3-5, 276 A.2d 698, 700-01 (1971).

12. 33 Md. App. at 301, 364 A.2d at 133. A Maryland circuit court judge presiding over a domestic relations case is called a chancellor.

In addition, the court noted the familiar presumption in Maryland law that an adulterous parent is unfit to have custody.¹³ The Court of Special Appeals, using its own best judgment, concluded that the trial court's award of custody to the mother was erroneous; she had not sustained the mandatory burden of proving her repentance and the unlikelihood of a recurrence of the "promiscuous" conduct.¹⁴

Disagreeing with the Court of Special Appeals on the proper standard of appellate review in child custody cases and on the importance to be attached to the mother's previous acts of adultery, the Court of Appeals reversed.¹⁵ As to the standard of review, the court admitted its decisions gave some support to the notion that Maryland appellate courts could use their own sound judgment in determining whether the chancellor awarded custody to the appropriate party.¹⁶ In fact, pre-*Davis* decisions reveal that the court utilized a variety of appellate review standards. Some cases suggested that the appellate court could reverse the award of custody if it determined that the chancellor, in applying the law to the facts, did not reach the "best"¹⁷ or "correct"¹⁸ conclusion as to who was entitled to custody.¹⁹ Other cases recognized the chancellor's ability to observe the demeanor and appearance of the parties and witnesses and to judge their characters and influences on the child. Those cases stated that the lower court's determination of custody would not be disturbed unless "some reason,"²⁰ "some sound reason,"²¹ or "compelling reasons"²² required reversal or the trial judge "abused his discretion."²³ In several cases, the Court of Appeals applied the "clearly

13. *Id.* See *Shanbarker v. Dalton*, 251 Md. 252, 257, 247 A.2d 278, 281 (1968); *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); *Bray v. Bray*, 225 Md. 476, 482-83, 171 A.2d 500, 504 (1961); *Hild v. Hild*, 221 Md. 349, 358-59, 157 A.2d 442, 447 (1960).

14. 33 Md. App. at 302-03, 364 A.2d at 133-34; *accord*, *Hild v. Hild*, 221 Md. 349, 358, 157 A.2d 442, 447 (1960).

15. The Court of Appeals remanded the case to the Court of Special Appeals with directions to affirm the decision of the trial court. 280 Md. at 132, 372 A.2d at 237.

16. *Id.* at 124-25, 372 A.2d at 234.

17. See, e.g., *Melton v. Connolly*, 219 Md. 184, 188, 148 A.2d 387, 389 (1959); *Butler v. Perry*, 210 Md. 332, 339-40, 123 A.2d 453, 456 (1956); cf. *Ex parte Frantum*, 214 Md. 100, 105, 133 A.2d 408, 411, *cert. denied sub nom.* *Frantum v. Department of Pub. Welfare*, 355 U.S. 882 (1957) (adoption).

18. See *Hild v. Hild*, 221 Md. 349, 359, 157 A.2d 442, 448 (1960).

19. Cf. *Bray v. Bray*, 225 Md. 476, 484, 171 A.2d 500, 505 (1961) (award of custody to father not disturbed because the court was "unable to say [the trial judge's] ruling was erroneous"); *Burns v. Bines*, 189 Md. 157, 164, 55 A.2d 487, 490 (1947) (reversal of lower court since Court of Appeals "unable to concur in [the trial court's] conclusion").

20. *Andrews v. Andrews*, 242 Md. 143, 154, 218 A.2d 194, 201 (1966); *Sibley v. Sibley*, 187 Md. 358, 362, 50 A.2d 128, 130 (1946).

21. *Kartman v. Kartman*, 163 Md. 19, 23, 161 A. 269, 270 (1932).

22. *Trudeau v. Trudeau*, 204 Md. 214, 218, 103 A.2d 563, 564 (1954).

23. *Pontorno v. Pontorno*, 257 Md. 576, 581, 263 A.2d 820, 822 (1970); *Kauten v. Kauten*, 257 Md. 10, 12-13, 261 A.2d 759, 761 (1970); *Wood v. Wood*, 227 Md. 112, 115, 175 A.2d 573, 575 (1961); *Oliver v. Oliver*, 217 Md. 222, 230, 140 A.2d 908, 912 (1958).

erroneous" standard²⁴ to review the chancellor's ultimate custody decision as well as his findings of fact.²⁵ Finally, some cases that appeared to apply a "clearly erroneous" standard may in fact have applied a standard requiring the appellate court only to find "error." Although the opinions referred to the "clearly erroneous standard," in each case the court merely held that "the trial court did not err."²⁶

In *Davis*, the Court of Appeals acknowledged the confusion in its prior decisions and sought to define clearly the proper standard of appellate review. The court for the first time delineated the three aspects of appellate review of child custody cases: review of the trial court's findings of fact, its statement of the law, and its application of the law to the facts. The *Davis* court emphasized that the "clearly erroneous" standard²⁷ applies only to factual findings. If the trial court erred on the law, further proceedings are required unless the error was harmless. In reviewing the ultimate decision of the trial court as to which party is entitled to custody, an appellate court cannot reverse unless the chancellor clearly abused his discretion.²⁸ The court repudiated the language of previous cases suggesting an appellate "best judgment" rule;²⁹ when judging from the facts who is entitled to custody, the chancellor, not the appellate court, should have the ultimate exercise of judgment unless it is abused,

because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better

24. See Md. R. P. 886 (Court of Appeals); Md. R. P. 1086 (Court of Special Appeals). The rules are identical:

When an action has been tried by the lower court without a jury, this Court will review the case upon both the law and the evidence, but the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses.

25. See *Spencer v. Spencer*, 258 Md. 281, 284, 265 A.2d 755, 756 (1970); *DeGrange v. Kline*, 254 Md. 240, 243, 254 A.2d 353, 355 (1969); *Cornwell v. Cornwell*, 244 Md. 674, 678, 224 A.2d 870, 873 (1966); *Winter v. Crowley*, 231 Md. 323, 329, 190 A.2d 87, 91 (1963).

26. See, e.g., *Hall v. Triche*, 258 Md. 385, 386-87, 266 A.2d 20 (1970); *Goldschmiedt v. Goldschmiedt*, 258 Md. 22, 26, 265 A.2d 264, 266 (1970). One Court of Special Appeals case so interpreted *Hall* and *Goldschmiedt*. *Sullivan v. Auslaender*, 12 Md. App. 1, 5, 276 A.2d 698, 700 (1971).

27. See note 24 *supra*.

28. 280 Md. at 125-26, 372 A.2d at 234.

29. *Id.* at 124-25, 372 A.2d at 234. In *Sullivan v. Auslaender*, 12 Md. App. 1, 3-5, 276 A.2d 698, 700-01 (1971), the Court of Special Appeals reviewed the Court of Appeals cases and determined that it could exercise its own "best judgment" in custody cases; the court concluded that because the ultimate award of custody is not a purely factual determination, it was not subject to the clearly erroneous rule. The court relied upon the language in *Melton v. Connolly*, 219 Md. 184, 188, 148 A.2d 387, 389 (1959); *Ex parte Frantum*, 214 Md. 100, 105, 133 A.2d 408, 411, *cert. denied sub nom. Frantum v. Department of Pub. Welfare*, 355 U.S. 882 (1957); *Butler v. Perry*, 210 Md. 332, 339-40, 123 A.2d 453, 456 (1956). The court observed that *Hall v. Triche*, 258 Md. 385, 386, 266 A.2d 20 (1970) and *Goldschmiedt v. Goldschmiedt*, 258 Md. 22, 26, 265 A.2d 264, 266 (1970) were not inconsistent with its conclusion.

position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.³⁰

The appellate cases using a "best judgment" rule to review a custody case simply failed to take into account the obviously superior opportunity of the chancellor to determine where the best interests of the child lay. The *Davis* court properly rejected the reasoning of such cases and arrived at a rational and amply supported standard of appellate review.³¹

The court then considered whether a parent who has committed adultery should be presumed unfit to have custody of his or her child. A long line of Maryland cases held that a presumption of unfitness arose from adultery and that the adulterous parent had to make a "strong showing" to overcome the presumption.³² The reasoning of the earlier cases is reflected in *Hild v. Hild*.³³

when a divorce is granted on the ground of adultery, the custody of the child is usually awarded to the innocent party, 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. . . . We think the past decisions of this Court require a strong showing to be made to overcome the usual rule against awarding custody to an adulterous mother. The fact that she subsequently marries the paramour has not been regarded as meeting the requirements of such a showing.³⁴

The presumption of unfitness, however, may be criticized on the ground that it inhibits inquiry into the best interests of the child;³⁵ if acts of a potential custodian do not affect the well-being of a child, they should be irrelevant to a custody determination.³⁶ An act of adultery may or may not have an impact on a child or the relationship between the child and the parent. The time, place, and circumstances surrounding the adultery determine the effect, if any, on the parent's ability to raise the child. Only after the

30. 280 Md. at 125, 372 A.2d at 234.

31. See *id.*; W. NELSON, *supra* note 2, at § 15.50. See generally Weinman, *The Trial Judge Awards Custody*, 10 LAW AND CONTEMP. PROB. 721, 724 (1944); see also Kay & Philips, *Poverty and the Law of Child Custody*, 54 CAL. L. REV. 717, 721-22 (1966) [hereinafter cited as Kay & Philips] ("abuse of discretion" described as the most widely applied standard of appellate review in custody cases).

32. See, e.g., *Shanbarker v. Dalton*, 251 Md. 252, 257, 247 A.2d 278, 281 (1968); *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); *Bray v. Bray*, 225 Md. 476, 482-83, 171 A.2d 500, 504 (1961); *Hild v. Hild*, 221 Md. 349, 358-59, 157 A.2d 442, 447 (1960).

33. 221 Md. 349, 157 A.2d 442 (1960).

34. *Id.* at 358, 157 A.2d at 447.

35. See Foster & Freed, *Child Custody* (pts. I & II), 39 N.Y.U. L. REV. 423, 429-31, 615, 626-27 (1964) [hereinafter cited as Foster & Freed].

36. See Podell, Peck & First, *Custody — To Which Parent?* 56 MARQ. L. REV. 51, 66 (1972) [hereinafter cited as Podell, Peck & First]; *Child Custody*, *supra* note 4, at 739-42.

chancellor fully explores the facts can he ascertain this effect. No basis exists for presuming unfitness.

The Court of Appeals in *Davis*, in abandoning the presumption, recognized that its decision was in accord with those of a majority of states.³⁷ Because of "rapid social and moral changes in our society," the act of adultery alone is no longer a "highly persuasive indicium" of unfitness.³⁸ The court held that "whereas the fact of adultery may be a relevant consideration in child custody awards, no presumption of unfitness on the part of the adulterous parent arises from it; rather it should be weighed, along with all other pertinent factors, only insofar as it affects the child's welfare."³⁹ Thus, *Davis* represents a step towards a case by case determination of the welfare of the child, unencumbered by reliance on a presumption. The inherent defect in the presumption was its tendency to discourage a full examination of the facts and circumstances of each case to reach a just award of custody.⁴⁰ *Davis* implicitly recognizes that "a person may be a bad spouse or citizen without necessarily being a bad parent."⁴¹

37. See 280 Md. at 127-28, 372 A.2d at 235.

38. *Id.* at 127, 372 A.2d at 235. Judge Digges cited the dissenting opinion of Judge Hammond in *Hild* for support. Judge Hammond, perhaps already aware of the "rapid social and moral changes" mentioned by the court seventeen years later, stated that: [t]he days of the rule of public and private vengeance, when an adulteress was stoned or made to wear the scarlet letter A in the pillory, have passed. It has even progressed, I believe, since the time when this Court engaged in solemn and serious discussion as to whether a mother who had committed adultery should be permitted even to see her children. *Hill v. Hill*, 49 Md. 450; *Kremelberg v. Kremelberg*, 52 Md. 553.

221 Md. at 363, 157 A.2d at 450.

Hild, Davis, and all other Maryland custody cases discussing the presumption of unfitness from adultery involved an adulterous mother. In no case has the adultery of a father been an issue. The only Maryland case indicating that the father might have been an adulterer is *Trudeau v. Trudeau*, 204 Md. 214, 103 A.2d 563 (1954). The court in *Trudeau* awarded custody to the mother over the father's claim that she was unfit primarily because of her past adultery. Almost as an afterthought, the court observed that "there is testimony in the record that would justify finding that the breaking point of his [the father's] moral stability was at least as low as that he claims of his former wife." *Id.* at 221, 103 A.2d at 566.

It is difficult to determine why custody cases in which the father was potentially unfit because of his adultery never reached the Court of Appeals. That such cases never arose in the lower courts seems highly unlikely. Arguably, the lower courts applied a sex-based double standard, giving far less weight to a father's adultery than to a mother's. Cf. *Foster & Freed*, *supra* note 29, at 431 (suggesting double standard at appellate level). Such a view implicates Maryland's Equal Rights Amendment, MD. CONST., Decl. of Rts., art. 46 (enacted 1972). Maryland's "ERA" provides: "Equality of rights under the law shall not be abridged or denied because of sex." The effects of the ERA on custody law are discussed at notes 86 to 103 and accompanying text *infra*.

39. 280 Md. at 127, 372 A.2d at 235. The Court of Special Appeals recently applied the *Davis* holding with respect to the adultery presumption in *Draper v. Draper*, No. 472, slip op. (Md. Ct. Sp. App., filed March 9, 1978).

40. See note 29 and accompanying text *supra*.

41. Podell, Peck & First, *supra* note 36, at 66.

Although the primacy of the child's welfare is no longer questioned in Maryland or other states,⁴² the factors a court should consider to determine which potential custodian is better able to promote the child's best interests is a difficult question. Generally, the factors discussed by courts affect a child's physical, intellectual, psychological, and moral well-being. Thus, the early common law rule that a father is entitled to the custody of his children is no longer considered,⁴³ and acts of adultery, while relevant, do not render a party presumptively unfit.⁴⁴ Some general areas for consideration were listed by the Court of Appeals in *Hild v. Hild*:⁴⁵

the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child.⁴⁶

Many commentators have formulated similar lists of considerations.⁴⁷ Increasingly, the formulations stress the psychological needs of the child. One writer, for example, suggests that courts consider the following: (1) school needs, (2) material needs, (3) need for adequate social stimulation, (4) possible need for special therapy, (5) the quantity and quality of "parenting," (6) the child's psychic status (individual psychological needs), (7) need for adult models, and (8) need for stability.⁴⁸ Section 402 of the Uniform Marriage and Divorce Act suggests the following guidelines for arriving at the best interests of the child:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;

42. See *Ross v. Hoffman*, 280 Md. 172, 174-75, 372 A.2d 582, 585-86 (1977); W. NELSON, *supra* note 2, at §§ 15.01 & .02.

43. See note 2 *supra*.

44. See notes 33 to 41 and accompanying text *supra*.

45. 221 Md. 349, 157 A.2d 442 (1960).

46. *Id.* at 357, 157 A.2d at 446.

47. See 5 A. FREUD, *THE WRITINGS OF ANNA FREUD* 455 (1969); W. NELSON, *supra* note 2, at §§ 15.01-.21; Brosky & Alford, *supra* note 2, at 686-91; Foster & Freed, *supra* note 35, at 438-43; Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child" Doctrine*, 65 MICH. L. REV. 145, 170 (1966); Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 25-38 (1965); Note, *Child Custody: Preference to the Mother*, 34 LA. L. REV. 881, 886-87 (1974). See generally, Shepherd, *supra* note 2, at 171-76.

48. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 67-72 (1969) [hereinafter cited as Watson].

- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.⁴⁹

In abandoning the presumption of unfitness arising from adultery, the *Davis* court adopted an approach similar to that of the last sentence of section 402. The court indicated that adultery and all other pertinent factors should be considered only insofar as they affect the child's welfare.⁵⁰ Indeed, if the best interest of the child is the guiding principle in custody cases, a court cannot justify inquiring into matters that have no bearing on the child's welfare.⁵¹

Most of the factors the Court of Appeals has considered in custody cases do have a direct bearing on the best interests of the child.⁵² For example, the court has often recognized that the child's preference as to his custodian is important to a just decision.⁵³ In *Ross v. Pick*,⁵⁴ the court noted:

[I]n determining in a contest for custody what will promote the best interests of the child, the child's own wishes may be consulted and given

49. UNIFORM MARRIAGE AND DIVORCE ACT § 402.

50. 280 Md. at 127, 372 A.2d at 235.

51. For an interesting criticism of the judicial consideration of such matters as the potential custodian's religion or lack of religion, his or her sexual habits and preferences, and his or her "lifestyle," see *Child Custody*, *supra* note 4, at 737-48. The writer argues that such matters are ordinarily constitutionally protected from state interference and thus should not be considered by courts in custody disputes since to do so violates the potential custodian's rights. *Id.*

A court should, of course, respect the potential custodian's rights in these areas and should not find a potential custodian unfit simply because his or her conduct varies from the norm. However, it is the physical, intellectual, psychological, and moral well-being of the child that is at stake in a custody dispute — not the parents' constitutional rights. The parents' constitutional rights may be outweighed by the state's compelling interest in protecting the welfare of the child.

52. See notes 131, 143 to 145, and accompanying text *infra* for a discussion of judicial consideration of the wishes of the biological parents in cases involving third parties. In such cases the welfare of the child is not necessarily served by judicial preference for a parent over a third party.

53. See *Franklin v. Franklin*, 257 Md. 678, 683, 264 A.2d 829, 831 (1970) (preference of 12-year-old considered); *Holcomb v. Holcomb*, 255 Md. 86, 88, 256 A.2d 886, 887 (1969) (per curiam) (preference of 11-year-old considered); *Wallis v. Wallis*, 235 Md. 33, 37, 200 A.2d 164, 166 (1964) (preferences of 9-year-old and 3-year-old not given weight because of coaching); *Wood v. Wood*, 227 Md. 112, 115, 175 A.2d 573, 575 (1961) (12-year-old mature enough to have wishes considered); *Parker v. Parker*, 222 Md. 69, 75, 158 A.2d 607, 609 (1960) (8-year-old too young and immature to have preferences considered); *Hild v. Hild*, 221 Md. 349, 359, 157 A.2d 442, 447 (1960) (7-year-old too young to have preferences considered); *Trenton v. Christ*, 216 Md. 418, 422-23, 140 A.2d 660, 662 (1958) (preference of 10-year-old entitled to consideration); *Wilhelm v. Wilhelm*, 214 Md. 80, 84-85, 133 A.2d 423, 425-26 (1957) (preference of 9-year-old should be ascertained).

weight if he is of sufficient age and capacity to form a rational judgment. . . . [T]here 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. . . . It is not the whim of the child that the court respects, but its feelings, attachments, reasonable preference and probable contentment.⁵⁵

The court has also stressed the desirability of keeping siblings together.⁵⁶ If two or more siblings are the objects of a custody dispute, courts prefer to award custody of all the children to one party on the theory that they should have each other's companionship and that raising siblings in potentially "hostile camps" would be harmful.⁵⁷ The physical conditions and environment that a custodian can furnish are important,⁵⁸ but mere ability to furnish a higher standard of living will not be considered.⁵⁹ The Court of Appeals has also emphasized the importance of whether a potential custodian will be able to spend enough time with the child to give proper guidance;⁶⁰ the court has noted, however, that the fact that a mother is employed will not be a controlling factor in a custody case.⁶¹ The court has also considered whether a child will receive religious training with a particular custodian⁶² and, if so, whether the training is in the same religion as that of other members of the child's family.⁶³ Another consideration has been whether the child will be removed from the court's jurisdiction.⁶⁴

54. 199 Md. 341, 86 A.2d 463 (1952).

55. *Id.* at 353, 86 A.2d at 469.

56. *See 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). The judicial preference for keeping siblings together was outweighed by other factors in *Daubert v. Daubert*, 239 Md. 303, 309, 211 A.2d 323, 326-27 (1965); *Hild v. Hild*, 221 Md. 349, 359, 157 A.2d 442, 447 (1960); *Melton v. Connolly*, 219 Md. 184, 190, 148 A.2d 387, 390 (1959).

57. *Roussey v. Roussey*, 210 Md. 261, 264, 123 A.2d 354, 355-56 (1956).

58. *See Cornwell v. Cornwell*, 244 Md. 674, 678, 224 A.2d 870, 872 (1966); *Daubert v. Daubert*, 239 Md. 303, 309, 211 A.2d 323, 327 (1965); *Melton v. Connolly*, 219 Md. 184, 189, 148 A.2d 387, 390 (1959).

59. *See Montgomery County Dep't of Social Serv. v. Sanders*, 38 Md. App. 406, 423-24, 381 A.2d 1154, 1165 (1978) (case involving parent and third party); *cf. Bray v. Bray*, 225 Md. 476, 484, 171 A.2d 500, 504-05 (1961) (mother's ability to provide slightly larger house than father deemed inconsequential). Logically, a custodian should be able to furnish some minimal facilities.

60. *See DeGrange v. Kline*, 254 Md. 240, 243, 254 A.2d 353, 355 (1969); *Daubert v. Daubert*, 239 Md. 303, 307, 211 A.2d 323, 325-26 (1965); *Dietrich v. Anderson*, 185 Md. 103, 115-16, 43 A.2d 186, 191 (1945).

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

62. *Holcomb v. Holcomb*, 255 Md. 86, 89, 256 A.2d 886, 888 (1969) (*per curiam*); *Melton v. Connolly*, 219 Md. 184, 187, 148 A.2d 387, 388-89 (1959). For a critical view of judicial consideration of the religious practices of parties in custody cases, see *Child Custody*, *supra* note 4, at 737-39.

63. *Daubert v. Daubert*, 239 Md. 303, 309-10, 211 A.2d 323, 327 (1965).

64. *Dietrich v. Anderson*, 185 Md. 103, 116, 43 A.2d 186, 191 (1945). For criticism of judicial consideration of this factor on the ground that such consideration impedes a person's right to travel from one state to another, see *Child Custody*, *supra* note 4, at 746.

In addition to the presumption of unfitness arising from adultery, one of the most frequently mentioned presumptions in recent Maryland custody cases is the "tender years presumption" or "maternal preference" doctrine. Essentially, the doctrine favors the mother over the father when the children, especially girls, are of "tender years."⁶⁵ The Court of Appeals has explained the doctrine: "[s]ince the mother is the natural custodian 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."⁶⁶ The evolution of the presumption in Maryland is interesting in light of the history of the *patria potestas* doctrine and a statute negating any superior right of custody between parents.⁶⁷ Although as late as 1946 the Court of Appeals spoke of the father's "natural right" to the custody of his children,⁶⁸ within the next two years the court recognized the maternal preference doctrine.⁶⁹ The court never offered any reasoned explanation for its change in approach, even though some attempt would have seemed obligatory considering the significance of the change. Moreover, the court did not attempt to reconcile the tender years presumption with the express language of article 72A, section 1 that "neither parent has any right superior to the right of the other concerning the child's custody."⁷⁰ The court's failure in

65. See *Ouellette v. Ouellette*, 246 Md. 604, 608, 229 A.2d 129, 131 (1967); *Cornwell v. Cornwell*, 244 Md. 674, 678-79, 224 A.2d 870, 873 (1966). What constitutes "tender years" is not completely clear. One supporter of the doctrine suggests that girls of any age and boys under seven years old are better off with their mothers while boys over seven generally are better off with their fathers. Bradbrook, *The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes*, 11 J. FAM. L. 557, 586 (1972) [hereinafter cited as Bradbrook]. Another doctor has recommended a presumption that girls of any age should be with their mothers as should boys under ten. He suggests that most boys over fifteen should be placed with their fathers. Watson, *supra* note 48, at 82. A third writer merely advises that a child between three and six have both male and female parent figures in his or her environment, and that during adolescence, the parent of the same sex as the child is likely to be more capable of wielding constructive control over the child than is the parent of the opposite sex. ABA SECTION OF FAMILY LAW PROCEEDINGS 42-43 (1963) (remarks of Dr. Herbert Modlin) [hereinafter cited as PROCEEDINGS]. The differing psychological theories advanced by the respective writers indicate the difficulty a judge faces when deciding how much consideration to give to the age and sex of a child as factors affecting the custody issue.

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

67. See note 2 *supra*.

68. *Sibley v. Sibley*, 187 Md. 358, 362, 50 A.2d 128, 130 (1946).

69. See *Miller v. Miller*, 191 Md. 396, 408, 62 A.2d 293, 298-99 (1948); *accord*, *Cullotta v. Cullotta*, 193 Md. 374, 384, 66 A.2d 919, 924 (1949).

70. MD. ANN. CODE art. 72A, § 1 (Cum. Supp. 1929). See note 2 *supra*. The current version of article 72A, § 1 varies somewhat from the original:

The father and mother are the joint natural guardians of their child 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 Where the parents live apart, the court

this regard is especially surprising since it had only recently implicitly recognized that the paternal preference doctrine was incompatible with the same section.⁷¹

The Court of Appeals' approach to the presumption is unclear. The court has indicated that the presumption applies only as a "tie-breaker" when all other considerations are equal.⁷² Yet, the court has also indicated that a mother is the preferred custodian of children of tender years provided she is not unfit,⁷³ and a mother and her children should not be separated without "grave and weighty reasons."⁷⁴ Under the second approach, motherhood is a material factor in ascertaining the welfare of the child. Resolution of the inconsistency between the two standards awaits a Court of Appeals decision.

Whether treated as a "tie-breaker" or a material factor, prior to *Davis*, the tender years presumption was frequently of no aid to an adulterous mother.⁷⁵ In light of *Davis* and the demise of the presumption of unfitness arising from adultery, the maternal preference doctrine now may result in a

may award the guardianship of the child to either of them, but, in any custody proceeding, neither parent shall be given preference solely because of his or her sex.

MD. ANN. CODE art. 72A, § 1 (Cum. Supp. 1977).

71. See *Dunnigan v. Dunnigan*, 182 Md. 47, 52, 31 A.2d 634, 636 (1943).

72. See, e.g., *Palmer v. Palmer*, 238 Md. 327, 331, 207 A.2d 481, 483 (1965); *Hild v. Hild*, 221 Md. 349, 357, 157 A.2d 442, 446 (1960). Though not used by the Court of Appeals, the term "tie-breaker" was used by the Court of Special Appeals in *Cooke v. Cooke*, 21 Md. App. 376, 380, 319 A.2d 841, 843 (1974).

73. See *Oberlander v. Oberlander*, 256 Md. 672, 676, 261 A.2d 727, 729 (1970) ("general rule [is] that the custody of a child of tender years should ordinarily be awarded to the mother"); *Roussey v. Roussey*, 210 Md. 261, 264, 123 A.2d 354, 355 (1956) ("[u]nless the mother is an unfit person, she is usually preferred where the children are of tender years").

74. *Cullotta v. Cullotta*, 193 Md. 374, 384, 66 A.2d 919, 924 (1949). The tender years presumption was cited as a significant consideration when the mother was awarded custody in *Neuwiller v. Neuwiller*, 257 Md. 285, 286-87, 262 A.2d 736, 737 (1970); *Kauten v. Kauten*, 257 Md. 10, 11, 261 A.2d 759, 760 (1970); *Ouellette v. Ouellette*, 246 Md. 604, 608, 229 A.2d 129, 131 (1967); *Cornwell v. Cornwell*, 244 Md. 674, 678-79, 224 A.2d 870, 873 (1966); *Oliver v. Oliver*, 217 Md. 222, 228, 140 A.2d 908, 911 (1958); *Roussey v. Roussey*, 210 Md. 261, 264, 123 A.2d 354, 355 (1956).

75. When applied as a material factor, the presumption was overcome by the mother's adultery in, e.g., *Pontorno v. Pontorno*, 257 Md. 576, 581, 263 A.2d 820, 822 (1970); *Winter v. Crowley*, 231 Md. 323, 330-31, 190 A.2d 87, 91 (1963) (presumption overcome in part by adultery); *Parker v. Parker*, 222 Md. 69, 75-76, 158 A.2d 607, 610 (1960). When treated as a "tie-breaker," a mother's adultery prevented the use of the doctrine. See, e.g., *Palmer v. Palmer*, 238 Md. 327, 331-32, 207 A.2d 481, 483-84 (1965); *Wallis v. Wallis*, 235 Md. 33, 38, 200 A.2d 164, 165-66 (1964); *Hild v. Hild*, 221 Md. 349, 357-58, 157 A.2d 442, 446-47 (1960).

Other factors have also overcome the presumption. See, e.g., *Daubert v. Daubert*, 239 Md. 303, 308-09, 211 A.2d 323, 326-27 (1965) (material factor; father had more time and facilities); *Winter v. Crowley*, 231 Md. 323, 330-31, 190 A.2d 87, 91 (1963) (material factor; harm of changing custody); *Sewell v. Sewell*, 218 Md. 63, 71-73, 145 A.2d 422, 426-27 (1958) (material factor; child well adjusted in father's home); *Miller v. Miller*, 191 Md. 396, 408, 62 A.2d 293, 299 (1948) (material factor; mother too undependable).

greater number of custody awards to mothers. This will occur if the doctrine is treated as a material element in every custody dispute involving young children. If it is so treated, it is reasonable to assume that the greatly decreased emphasis placed upon adultery will result in more mothers benefiting from the tender years presumption. If, however, the presumption is viewed as a "tie-breaker," its influence will be slight since it would be utilized only when all other factors are equal — a rare situation.⁷⁶

The fate of the maternal preference doctrine is more aptly discussed, however, not in terms of its treatment as a material consideration or a "tie-breaker," but in terms of whether it will survive at all. In *McAndrew v. McAndrew*,⁷⁷ the Court of Special Appeals held that application of the tender years presumption was statutorily impermissible.⁷⁸ The chancellor had found the parties equally fit and applied the presumption as a "tie-breaker"; the Court of Special Appeals remanded the case for determination of custody without use of the presumption.⁷⁹ The court concluded that the 1974 amendment to section 1 of article 72A abolished the presumption by providing that "in any custody proceeding, neither parent shall be given preference solely because of his or her sex."⁸⁰ Noting that when the amendment was enacted the maternal preference was the only doctrine in custody proceedings favoring either spouse based on sex, the court reasoned that the General Assembly's sole intention was to abolish the preference.⁸¹ The court stated that absent such intention, the amendment was meaningless.⁸² By disposing of the case under section 1, the court concluded that it need not decide whether the maternal preference violated Maryland's Equal Rights Amendment (ERA).⁸³

In abolishing the tender years presumption, the court in *McAndrew* rejected the reasoning of *Cooke v. Cooke*.⁸⁴ In *Cooke*, the Court of Special

76. In *McAndrew v. McAndrew*, 39 Md. App. 1, 9, 382 A.2d 1081, 1086 (1978), the Court of Special Appeals stated that there should never be a tie.

77. 39 Md. App. 1, 382 A.2d 1081 (1978).

78. *Id.* at 8, 382 A.2d at 1085-86.

79. *Id.* at 9, 382 A.2d at 1086.

80. *Id.* at 8, 382 A.2d at 1086 (quoting ch. 181, 1974 Md. Laws). See note 70 *supra*.

81. One trial judge had so interpreted the amendment prior to *McAndrew*. See Levin, *Guardian Ad Litem in a Family Court*, 34 MD. L. REV. 341, 354 n.73 (1974) [hereinafter cited as Levin]. The fact that the amendment was passed a relatively short time (about one and one-half years) after adoption of the ERA may indicate that the legislature intended to bring article 72A, § 1 into line with the ERA by eliminating a major sex-based classification.

82. *McAndrew v. McAndrew*, 39 Md. App. at 8, 382 A.2d at 1086. The court stated that its decision did not preclude a consideration of the "biological and psychological" differences between the potential custodians; to the extent that such differences affect the best interests of the child, they may be considered. *Id.* at 8, 382 A.2d at 1086. The decision does mean that "[a] parent is no longer presumed to be clothed with or to lack a particular attribute merely because that parent is male or female." *Id.* at 9, 382 A.2d at 1086.

83. *Id.* at 8 n.9, 382 A.2d at 1086 n.9 The ERA is found in MD. CONST., Decl. of Rts., art. 46 (enacted 1972).

84. *McAndrew v. McAndrew*, 39 Md. App. at 7-9, 382 A.2d at 1085-86. The *Cooke* case is found at 21 Md. App. 376, 319 A.2d 841 (1974).

Appeals concluded that the presumption could be used as a "tie-breaker."⁸⁵ Unlike *McAndrew*, the *Cooke* court discussed the effect of the ERA on the presumption, though neither party had raised the issue.⁸⁶ Although at odds with the widespread view of commentators that a state ERA precludes application of the presumption,⁸⁷ the *Cooke* court, for two reasons, refused to say that Maryland's ERA made the maternal preference doctrine unconstitutional. First, the court noted that the concept that the "equality of creation of all persons was not meant to describe human congenital endowments, but rather their political and legal rights."⁸⁸ The reference to "human congenital endowments" may express the same idea as the *Hild* court's statement that a mother is the "natural" custodian of the young.⁸⁹ Thus, just as the ERA cannot change the physiological differences between the sexes, *Cooke* apparently argues that ERA cannot be read to regulate the basic natural phenomenon of "motherhood." The court's second reason was that the maternal preference doctrine is only a part of the larger determination of a child's best interest; it is the interests of the child, not parental rights, that are at issue in custody cases.⁹⁰ The preference is to be used only in the unusual case when "it would otherwise be impossible to decide upon the evidentiary facts."⁹¹

McAndrew properly rejected the *Cooke* reasoning. The *Cooke* court's assumption that because of "congenital endowments" women are more naturally suited to raising children than are men is no longer valid in modern society. Because of the common occurrence of employed mothers and the increasingly important role of women in all phases of business activity, the stereotype of the mother as homemaker and child-raiser is no longer viable.⁹² Moreover, substantial recent research indicates that the "mothering function" can be performed by either sex, because what a child needs is the satisfaction of his physical and emotional needs — a function which

85. 21 Md. App. at 380, 319 A.2d at 843.

86. See *id.* at 379, 319 A.2d at 843.

87. See Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 953 (1971); Gabler, *The Impact of the ERA on Domestic Relations Law: Specific Focus on California*, 8 FAM. L. Q. 51, 77-78 (1974); Levin, *supra* note 81, at 354-55 & n.73; 2 U. BALT. L. REV. 355, 358 (1973). See generally Comment, *The Effect of the Equal Rights Amendment on Kentucky's Domestic Relations Law*, 12 J. FAM. L. 151, 152-53 (1972-73). The *Cooke* court made no reference to the above commentaries.

88. 21 Md. App. at 379, 319 A.2d at 843 (footnote omitted).

89. 221 Md. at 357, 157 A.2d at 446.

90. 21 Md. App. at 379-80, 319 A.2d at 843.

91. *Id.* at 380, 319 A.2d at 844.

92. See PROCEEDINGS, *supra* note 65, at 30 (remarks of Harry M. Fain); Note, *Child Custody: Preference to the Mother*, 34 LA. L. REV. 881, 885-86 & n.22 (1974); Comment, *The Tender Years Presumption: Do the Children Bear the Burden?*, 21 S. DAK. L. REV. 332, 346 (1976).

fathers can perform as well as mothers.⁹³ With respect to the *Cooke* court's statement that the preference may be used as a "tie-breaker," it is illogical to imply that consideration of sex becomes lawful when limited to cases where both parties are equally fit. The ERA and section 1 of article 72A either apply or do not apply to child custody cases, and, if they apply, they prohibit consideration of sex in all cases. In criticizing the *Cooke* decision, one writer has pointed out that the United States Supreme Court has explicitly rejected the "tie-breaker concept."⁹⁴ The Pennsylvania Supreme Court recently held that whether the presumption is applied as a "tie-breaker" or as a material factor, the doctrine violates the Pennsylvania ERA's "concept of the equality of the sexes."⁹⁵ Moreover, as the *McAndrew* court noted:

There can be no tie-breaker in a custody case because, as we indicated in *Cooke, supra*, there should never be a tie. The determination of custody is an area in which discretion is vested in a judge and in which appellate review of his exercise of that discretion is limited. . . . He has at his command not only the evidence offered by the parties but a full panoply of social service and other extrajudicial agency resources. From all of that he is required to make a decision.⁹⁶

93. Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 449-57 (1976-77). See R. SCHAFER, *MOTHERING* (1977), in which the author observes:

What we can say with confidence, though, is that it is these personality attributes (whatever they may turn out to be) that are the essential adult contribution to bonding — and not kinship. Mother need not be the biological mother: *it can be any person of either sex*. The ability to rear a child, to love and cherish and care for him, is basically a matter of personality: the so-called blood bond is a complete myth. There is nothing to suggest that firm attachments cannot grow between children and unrelated adults who take over the parental role — by fostering or adoption, for instance. The notion that the biological mother, by virtue of being the biological mother, is uniquely capable of caring for her child is without foundation.

There is, for that matter, no reason why the mother role should not be filled as competently by males as by females.

Id. at 103-04 (emphasis in original). Accord, *PROCEEDINGS, supra* note 65, at 41-43 (remarks of Dr. Herbert Modlin). See also *PROCEEDINGS, supra* note 65, at 30-31 (remarks of Harry M. Fain). But see Bradbrook, *supra* note 65, at 586; Watson, *supra* note 48, at 82.

94. See Kurtz, *The State Equal Rights Amendments and Their Impact on Domestic Relations Law*, 11 FAM. L. Q. 101, 141 (1977). Kurtz questioned the constitutionality of *Cooke* on the basis of *Reed v. Reed*, 404 U.S. 71 (1971). In *Reed*, the Supreme Court held unconstitutional an Idaho statute that preferred males over equally qualified females seeking appointment as administrators of decedents' estates.

95. *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 300, 368 A.2d 635, 639-40 (1977). But cf. *Gordon v. Gordon*, 46 U.S.L.W. 2436 (Okla. S. Ct. Feb. 7, 1978) (equal protection not violated by state statute mandating tender years presumption); *J.B. v. A.B.*, 46 U.S.L.W. 2508 (W. Va. S. Ct. March 14, 1978) (tender years presumption does not violate equal protection).

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

Compelling reasons exist for believing that the Maryland Court of Appeals will agree with the *McAndrew* court and follow the lead of other states that have abandoned the tender years presumption.⁹⁷ Either section 1 of article 72A, the ERA, or a combination of both provides a basis for abandoning the presumption.

The Court of Appeals relied upon the combined effect of the ERA and section 1 in the recent child support case of *Rand v. Rand*.⁹⁸ In *Rand*, the court held that the responsibility for child support should be allocated according to each parent's financial resources and not the sex of the parent. Pre-*Rand* cases applied the common law rule that a father is primarily liable for the support of his minor children.⁹⁹ Such cases failed to consider the section 1 provision that "[t]he father and mother . . . are jointly and severally charged with [their child's] support. . . . They shall have equal powers and duties"¹⁰⁰ No case considered the effect of the statute on the common law rule. In *Rand*, however, the Court emphatically indicated that the ERA had altered the legal status of sex-based classifications:

[W]e believe that the "broad, sweeping, mandatory language" of the amendment is cogent evidence that the people of Maryland are fully committed to equal rights for men and women. The adoption of the E.R.A. in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications.

Applying the mandate of the E.R.A. to the case before us, we hold that the parental obligation for child support is not primarily an obligation of the father but is one shared by both parents. The clear import of the language of Art. 72A, § 1, standing alone, seemingly

97. The tender years presumption was abandoned on policy grounds in *In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974), and on statutory grounds in *Kockrow v. Kockrow*, 191 Neb. 657, 662-63, 217 N.W.2d 89, 92 (1974). In *Watts v. Watts*, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. 1973), a New York family court held that "application of the 'tender years presumption' would deprive [the father] of his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution." *Id.* at 183, 350 N.Y.S.2d at 290. Although the opinion is unclear, the tender years presumption may have been challenged on equal protection grounds in *Koger v. Koger*, 217 Md. 372, 142 A.2d 599 (1958); the Court of Appeals stated that "[a]n award of custody to the mother, in a proper case, does not violate any of the provisions of the Fourteenth Amendment of the United States Constitution." *Id.* at 376, 142 A.2d at 601. See *Gordon v. Gordon*, 46 U.S.L.W. 2436 (Okla. S. Ct. Feb. 17, 1978) (equal protection not violated by state statute mandating tender years presumption). Even if *Koger* is viewed as an unsuccessful equal protection attack on the presumption, the case would not bar an ERA-based challenge.

98. 280 Md. 508, 374 A.2d 900 (1977).

99. See, e.g., *Seltzer v. Seltzer*, 251 Md. 44, 45, 246 A.2d 264, 265 (1968); *Wagshal v. Wagshal*, 249 Md. 143, 147, 238 A.2d 903, 906 (1968); *Chalkley v. Chalkley*, 240 Md. 743, 744, 215 A.2d 807, 808 (1966); *Woodall v. Woodall*, 16 Md. App. 17, 27, 293 A.2d 839, 844-45 (1972).

100. Md. ANN. CODE art. 72A, § 1 (Cum. Supp. 1977). Ch. 678, 1951 Md. Laws extended the duty "for support of a minor child to both parents." See notes 2 & 70 for original and present versions, respectively, of § 1.

compels that result. Any doubt remaining from the past failure of the courts to so interpret that statutory provision is removed by the gloss impressed upon it by the E.R.A. The common law rule is a vestige of the past; it cannot be reconciled with our commitment to equality of the sexes. . . . Child support awards must be made on a sexless basis.¹⁰¹

Rand's discussion of the impact of the ERA and section 1 of article 72A of Maryland child support cases indicates how the court would view a challenge to the tender years presumption based upon the ERA and section 1. As in the case of child support, section 1 seemingly requires that no distinctions be drawn in child custody cases on the basis of sex.¹⁰² If, as *Rand* says, the ERA has impressed a "gloss" on that section, and removed all remaining doubt about its literal meaning, the Court of Appeals can no longer justify the retention of the tender years presumption. If the ERA and section 1 compel equal treatment of the sexes in child support matters, the same equal treatment should result in custody cases. The statutory language is unambiguous: "neither parent has any right superior to the right of the other concerning the child's custody. . . . [I]n any custody proceeding, neither parent shall be given preference solely because of his or her sex."¹⁰³

CUSTODY DISPUTES BETWEEN PARENTS AND THIRD PARTIES

In addition to the presumption of unfitness arising from adultery and the tender years presumption, a frequently stated maxim in child custody cases is that a parent normally has a right to the custody of his or her child superior to that of all other persons. Custody of one's child is viewed as a natural right incident to parenthood. This right is so important that custody will be granted to a third person only if both parents are unfit or there are other factors that substantially affect the best interests of the child.¹⁰⁴ The Maryland Court of Appeals recently dealt with the problem of third party-parent custody disputes in *Ross v. Hoffman*.¹⁰⁵ In *Ross*, the Court of Appeals stated that there is a rebuttable presumption that the child's best interests are served by granting custody to a biological parent rather than a third party.¹⁰⁶ The court indicated the presumption in favor of the biological

101. 280 Md. at 515-16, 374 A.2d at 904-05.

102. See note 70 *supra*.

103. MD. ANN. CODE art. 72A, §1 (Cum. Supp. 1977). Even before the 1974 amendment to §1, use of the tender years presumption by Maryland courts is difficult to rationalize in view of the statute's clear language that "neither parent has any right superior to the right of the other concerning the child's custody. . . ." See *McAndrew v. McAndrew*, 39 Md. App. 1, 5 n.7, 382 A.2d 1081, 1084 n.7 (1978).

104. See *W. NELSON*, *supra* note 2, at §15.15.

105. 280 Md. 172, 372 A.2d 582 (1977).

106. *Id.* at 178-79, 372 A.2d at 587. Although not specifically relied upon, there is statutory authority for the presumption and the standard for its rebuttal. The statute states:

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

parent is overcome by a showing that: "(a) the parent is unfit to have custody, or (b) . . . there are such exceptional circumstances as make such custody detrimental to the best interest of the child."¹⁰⁷

The parent in *Ross* had an all-night job. Therefore, a babysitter, Mrs. Hoffman, was hired to care for Melinda, Mrs. Ross' three and one-half month old daughter. After a few weeks of picking the child up in the morning and leaving her at the Hoffmans' late at night, Mrs. Ross found herself unable to take proper care of her daughter and get adequate rest during the days. As a result, she decided to let the child stay with the Hoffmans throughout the work week. After approximately one month, Mrs. Ross stopped keeping her daughter on weekends and days off; instead, her daughter lived with the Hoffmans on a full-time basis. Melinda remained with the Hoffmans for the next eight and one-half years, and Mrs. Ross' visits and financial support for the child were irregular. Even though her work shifts changed and apparently would have permitted her to spend more time with the child, the mother sometimes failed to visit her daughter for two or three months. The most she contributed towards Melinda's support in any one year was \$540, but in at least one year, she contributed nothing. After eight and one-half years, Mrs. Ross married, procured steady employment, and reclaimed her daughter.¹⁰⁸

In granting custody of Melinda to the Hoffmans,¹⁰⁹ the chancellor relied heavily upon the testimony of a doctor who had examined Melinda. The doctor noted the substantial emotional stress and confusion Melinda had experienced as a result of the dispute over her custody. The judge also indicated his approval of the concept of "psychological parenthood" and its applicability to the case.¹¹⁰ Both the Court of Special Appeals and the Court

adversely affected by remaining under the natural guardianship of its parent or parents.

MD. ANN. CODE art. 72A, § 1 (Cum. Supp. 1977) (emphasis added).

107. 280 Md. at 178-79, 372 A.2d at 587. The rationale for the presumption is:

Normally a parent is to be preferred to others in determining custody, largely because the affection of a parent for a child is as strong and potent as any that springs from human relations and leads to desire and efforts to care properly for and raise the child, which are greater than another would be likely to display.

Id. at 178 n.4, 372 A.2d at 587 n.4 (quoting *Melton v. Connolly*, 219 Md. 184, 188, 148 A.2d 387, 389 (1959)).

108. 280 Md. at 181-82, 372 A.2d at 588-89.

109. The trial judge stated that Mrs. Ross' only real argument for custody was her biological motherhood. The chancellor concluded that rather than risk placing her in a new environment, the stability of which was uncertain, it was better to keep the child in the loving atmosphere where she concededly performed well. *Ross v. Hoffman*, 33 Md. App. 333, 342-43, 364 A.2d 596, 602 (1976).

110. *Id.* at 36-37, 364 A.2d at 599. The term "psychological parent" is used in GOLDSTEIN, FREUD & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) [hereinafter cited as GOLDSTEIN, FREUD & SOLNIT]. The authors describe the concept as follows:

[D]ecisionmakers in law have recognized the necessity of protecting a child's physical well-being as a guide to placement. But they have been slow to

of Appeals affirmed the trial court's judgment.¹¹¹ The Court of Appeals concluded that the Hoffmans had overcome the presumption in favor of the biological parents by showing that "exceptional circumstances" existed which made custody with the biological mother "detrimental to the best interest of the child." The mother and child were separated for eight and one-half years; the child was strongly attached to the custodian and exhibited substantial emotional turmoil at the prospect of being separated from her; the stability of the mother's new marriage was uncertain; and the mother's motives and desire for custody were not sufficiently clear.¹¹²

Given the great number of "exceptional circumstances" present in the *Ross* case, the court's decision in favor of the third party is not surprising. Because of the psychological parenthood doctrine with its rejection of any presumption in favor of biological parents, however, *Ross* and similar cases

understand and to acknowledge the necessity of safeguarding a child's psychological well-being. While they make the interests of the child paramount over all other claims when his physical well-being is in jeopardy, they subordinate, often unintentionally, his psychological well-being to, for example, an adult's right to assert a biological tie. Yet both well-beings are equally important, and any sharp distinction between them is artificial.

....
[F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his "psychological parent" in whose care the child can feel valued and "wanted."

....
The [psychological parent] role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult — but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

Id. at 4, 17, 19. The authors also emphasize the importance of judicial consideration of a child's need for "continuity of relationships, surroundings, and environmental influence" in order to maximize his normal development. *Id.* at 31-32. Also, a child's "sense of time" is described as different from that of adults: the younger a child is, the more sensitive he is to periods of separation from a parent or other adult for whom he has developed an attachment:

The younger the child, the shorter is the interval before a leave-taking will be experienced as a permanent loss accompanied by feelings of helplessness and profound deprivation. Since a child's sense of time is directly related to his capacity to cope with breaches in continuity, it becomes a factor in determining if, when, and with what urgency the law should act.

Id. at 42.

111. The Court of Appeals, relying upon *Davis v. Davis*, 280 Md. 119, 372 A.2d 231 (1977), emphasized that its affirmance on the issue of custody was based on its conclusion that the trial judge had not clearly abused his discretion; it stated the Court of Special Appeals had applied an incorrect standard of review when it affirmed on the basis of its own "best judgment." 280 Md. at 185-87, 372 A.2d at 590-91. For a discussion of the standard of appellate review in custody cases, see notes 15 to 31 and accompanying text *supra*.

112. 280 Md. at 192, 372 A.2d at 594.

in other states raise important issues.¹¹³ The approval of the Court of Appeals in *Ross* of the trial court's reliance on the psychological parenthood doctrine casts considerable doubt on the present status of the biological parent presumption. However, constitutional limitations on abandoning or significantly weakening the presumption may exist. Indeed, the United States Supreme Court has recognized that parents have an interest in the custody of their children. In *Stanley v. Illinois*,¹¹⁴ the Court held that a state may not deprive a father of the custody of his illegitimate child without a hearing on his fitness as a parent. Noting that the father's due process challenge required weighing the governmental and private interests at stake, the Court emphasized:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," . . . "basic civil rights of man," . . . and "[r]ights far more precious . . . than property rights"¹¹⁵

113. The judicial preference for the biological parents and the influential and controversial "psychological parenthood" concept found in GOLDSTEIN, FREUD & SOLNIT, *supra* note 110, along with the earlier "psychological best interests" concept suggested in Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L. J. 151 (1963) [hereinafter cited as *Alternatives*], have frequently clashed in recent child custody cases. Compare *Powers v. Hadden*, 30 Md. App. 577, 589-93, 353 A.2d 641, 648-50 (1976) (Davidson, J., dissenting) (urging acceptance of psychological parent concept) and *New Jersey Div. of Youth and Family Serv. v. Huggins*, 148 N.J. Super 86, 93-94, 371 A.2d 841, 845-46 (1977) (accepting psychological parenthood concept) and *Bennett v. Jeffreys*, 40 N.Y.2d 543, 553, 356 N.E.2d 277, 286, 387 N.Y.S.2d 821, 829 (1976) (Fuchsberg, J., concurring) (accepting psychological parenthood concept) with *Montgomery County Dep't of Social Serv. v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1978) (rejecting the psychological parenthood concept as the sole consideration in custody disputes) and *In re J. & J.W.*, 134 Vt. 480, 483-84, 365 A.2d 521, 523-24 (1976) (psychological parenthood concept standing alone not enough to negate biological parents' rights). For critiques of the theory espoused by GOLDSTEIN, FREUD & SOLNIT, see generally Hammell, Littner, Nichtern & Polier, Book Review, 53 CHILD WELFARE 189 (1974); Read, Book Review, 13 J. FAM. L. 601 (1973-74); Schuman, Book Review, 8 FAM. L.Q. 343 (1974); Strauss & Strauss, Book Review, 74 COLUM. L. REV. 996 (1974).

114. 405 U.S. 645 (1972).

115. *Id.* at 651. The Illinois statute held unconstitutional in *Stanley* allowed an unwed father to be deprived of the custody of his illegitimate children without a hearing on his fitness as a parent. In fact, an unwed father was not included in the statutory definition of "parent."

The Court concluded that, absent a showing of unfitness, the state's interest in interfering with a parent's right to custody is *de minimis*.¹¹⁶

Permitting the state to remove a child from the custody of his or her parents without a finding of unfitness would go far, as one student observer has noted, toward realizing the fear of many people that government has become too powerful in controlling the private lives of its citizens.¹¹⁷ As evidenced by *Stanley*, such a system would likely violate due process. It is fundamental in our society that people have a right to conceive and raise a family and that parents have a right to the custody of their children.¹¹⁸ If parental interests were completely subjugated to the welfare of the child, as determined by the state, nothing logically would prevent the state from deciding at a child's birth whether the parents or some other person could best promote the child's welfare.

However, when the biological parents relinquish custody of their child to another person for a substantial period of time, the state's interest in the welfare of the child may override the rights of the parents; indeed, there may be a waiver by the parents of their rights. The longer the child is in the custody of persons other than parents, the greater the likelihood that both the child and the custodian will come to view their relationship as familial; both the child and the third party will consequently feel a substantial loss if their relationship is terminated.¹¹⁹ More importantly, the child may sustain long-lasting emotional damage.¹²⁰ Even if a parent relinquishes custody for sound reasons and later seeks to regain custody, the sense of loss and confusion felt by the young child is keen, irrespective of the reason for the separation.¹²¹

116. The Court stated that:

The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

Id. at 657-58.

117. See Comment, *Proceedings to Terminate Parental Rights: Too Much or Too Little Protection for Parents?*, 16 SANTA CLARA L. REV. 337, 342-47 (1976).

118. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

119. GOLDSTEIN, FREUD & SOLNIT, *supra* note 110, at 80.

120. *Ross v. Hoffman*, 280 Md. 172, 191, 372 A.2d 582, 593-94 (1977).

121. The effects on a young child of separation from a parent-figure have been the subject of many studies. See, e.g., 2 J. BOWLBY, *ATTACHMENT AND LOSS* (1973); LITNER, *SOME TRAUMATIC EFFECTS OF SEPARATION AND PLACEMENT* 7, 13, 20-24 (1956). Anna Freud suggests that such separations affect the child regardless of their causes. Because the infant cannot grasp the reasons for the parent's disappearance, every separation constitutes a desertion for him. Before his sense of time develops, the pressure of his needs makes every waiting period seem agonizingly long; therefore, he does not distinguish between separations of short and long duration. Freud argues that because the young child views separations from his parent as rejections, a variety of emotional responses, from incessant crying to silent despair, may occur. A child has a need for a parent-figure; he may, upon separation, withdraw his feelings

A striking example of the problems faced in balancing the psychological and emotional welfare of the child against the desires of parents to regain custody is found in the predicament of the Jewish parents of Holland who returned from concentration camps at the end of World War II and sought to reclaim their children who had been entrusted to non-Jewish families.

Many of these children had become totally estranged from their biological parents and had grown intimately into the families of their foster parents. The choice in such tragic instances is between causing intolerable hardship to the child who is torn away from his psychological parents, or causing further intolerable hardship to already victimized adults who, after losing freedom, livelihood, and worldly possessions . . . now [face] los[ing] possession of their child.¹²²

Rather than leave this crisis to a case-by-case resolution, the Dutch legislature decreed that all the children would be returned to their biological parents.¹²³ In spite of emotion-filled cases like that of the Dutch Jews, several writers have argued the most appropriate way to deal with such problems is to eliminate the presumption in favor of biological parents and refocus attention on the welfare of the child.¹²⁴ The rationale for eliminating the presumption is that no basis exists for *presuming* that the best interests of the child will be served by precipitously removing him from the security and warmth he has known in a third party's home and returning him to a biological parent. On the contrary, it may be adverse to the child's psychological, developmental, and physical interests.¹²⁵

from the parent and search for a substitute. This need of the young child to form new ties obscures the seriousness of what occurs. The child's next attempt at "object-love" will not be of quite the same quality and will be more demanding for immediate wish-fulfillment. Repeated "rejection by separation," suggests Freud, intensifies the process of deterioration and produces individuals who are dissatisfied, shallow, and promiscuous in their relationships. A. FREUD, *SAFEGUARDING THE EMOTIONAL HEALTH OF OUR CHILDREN* 11, 12 (1955).

122. GOLDSTEIN, FREUD & SOLNIT, *supra* note 110, at 107.

123. *Id.* at 107-08.

124. See, e.g., GOLDSTEIN, FREUD, & SOLNIT, *supra* note 110, at 98; PROCEEDINGS, *supra* note 65, at 31-34 (remarks of Harry M. Fain); Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 350 (1972); Foster & Freed, *supra* note 35, at 436-37; *Alternatives*, *supra* note 113, at 157-58.

125. Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 350 (1972). In Maryland, MD. ANN. CODE art. 72A, § 1 (Cum. Supp. 1977) would appear to prevent elimination of the presumption in third party-parent custody cases. Without the statute, however, a recent Supreme Court case, *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), provides some basis for arguing that elimination of the parental presumption would not violate parents' due process liberty interests. This basis exists even though the Court has recognized the importance of the family relationship, see, e.g., *Smith v. Organization of Foster Families*, 431 U.S. 816, 842-47 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and even though the New York Court of Appeals has stated that under *Stanley*, courts are powerless to deny custody to a parent except "for grievous cause or necessity." *Bennett v. Jeffreys*, 40 N.Y.2d

The Maryland Court of Appeals has steadily relied upon the presumption favoring biological parents.¹²⁶ As stated by the *Ross* court, a parent is entitled to custody unless he or she is unfit or unless "exceptional circumstances" exist.¹²⁷ *Ross* listed seven factors to be evaluated in determining whether exceptional circumstances exist: the length of the child's separation from the biological parent, the age of the child when the third party assumed care, the possible emotional effect on the child of a custody change,¹²⁸ the amount of time elapsed before the parent sought to regain custody, the nature and strength of the ties between the child and third party, the intensity and genuineness of the parent's desire to have the child, and the stability and certainty of the child's future with the parent.¹²⁹

543, 545-46, 356 N.E.2d 277, 291, 387 N.Y.S.2d 821, 824 (1976). *Smith* involved a suit by foster parents against state and city officials. The foster parents alleged that the statutory and regulatory procedures for removal of foster children from foster homes violated the due process and equal protection clauses. The Court held that even if the foster parents had a constitutionally protected liberty interest, the state procedures did not violate such interest. *Id.* at 847. The Court implied that any constitutionally protected interest that existed was very weak. First, the biological parents had voluntarily placed their children with the state agency which, in turn, had transferred custody temporarily to the foster parents. Under state law, the parents retained the near-absolute right to the return of their children, and they had relinquished custody with this understanding. Moreover, each foster family had signed a contract with the state agency recognizing the rights of the biological parents. The Court stressed, however, that a biological relationship is not determinative of the existence of a family and that a deeply caring and interdependent relationship may exist between an adult and an unrelated child in his or her care. Thus, a foster family cannot be dismissed as "a mere collection of unrelated individuals." *Id.* at 844-45. The Court left open the possibility that a third party might acquire a substantive liberty interest in the custody of another's child, particularly where the contractual and state involvement aspects of *Smith* did not exist. Thus, the *Bennett* interpretation of the biological parent's constitutionally protected status may be too expansive. If the Supreme Court eventually recognizes a third party's interest, such action could have the effect of severely limiting any constitutionally mandated parental presumption. The result would be no presumption in favor of either party.

126. See, e.g., *DeGrange v. Kline*, 254 Md. 240, 242-43, 254 A.2d 353, 354 (1969); *McClary v. Follett*, 226 Md. 436, 441-42, 174 A.2d 66, 69 (1961); *Melton v. Connolly*, 219 Md. 184, 188, 148 A.2d 387, 389 (1959); *Trenton v. Christ*, 216 Md. 418, 420, 140 A.2d 660, 661 (1958); *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952); *Piotrowski v. State*, 179 Md. 377, 381-82, 18 A.2d 199, 200-01 (1941); *Kartman v. Kartman*, 163 Md. 19, 23, 161 A. 269, 270 (1932).

127. 280 Md. 172, 178-79, 372 A.2d 582, 587 (1977).

128. Maryland cases, e.g., *Melton v. Connolly*, 219 Md. 184, 188-89, 148 A.2d 387, 389-90 (1959), indicate, as does psychological literature, e.g., GOLDSTEIN, FREUD & SOLNIT, *supra* note 110, at 17-19, that if a child has become so attached to a third person through a long period of living with him or her, separating the child from the third party should be avoided because of the danger of emotional harm to the child. See notes 110 & 121 *supra*. The third party and child need not have lived together for any specific period, provided the time is sufficient in the particular case for "ties of blood [to] weaken, and ties of companionship [to] strengthen . . ." *Chapsky v. Wood*, 26 Kan. 650, 653, 40 Am. Rep. 321, 323 (1881). The Court of Special Appeals recently stated that no specific period can be prescribed for determining how long a child must live with a person in order for the person to become a psychological parent. See

Two of the seven factors — the lapse of time before the parent seeks to regain custody and the intensity and genuineness of the parent's desire to have the child — are factors that have little effect on the child's psychological state.¹³⁰

The other five factors reflect the court's usual sensitivity toward the psychological and emotional difficulties a child may face if he is taken from a third party with whom he has lived for a long period and to whom he has become attached.¹³¹ These five "exceptional circumstances" are simply factors which the "psychological parenthood" concept uses to ascertain the welfare of the child. In other words, the *Ross* court's "exceptional circumstances" equals (or nearly equals) factors affecting the child's best interests. Yet the *Ross* court failed to analyze how its formula for the parental preference doctrine works. The court's statement that the child's best interests need not be examined unless exceptional circumstances exist¹³² is illogical because, in effect, a court must examine the child's best interests to conclude that exceptional circumstances exist.

While invoking the biological parent presumption, several Court of Appeals decisions have, in effect, applied a pure "best interests of the child" test. For example, in *Piotrowski v. State*,¹³³ *Trenton v. Christ*,¹³⁴ and *Ross v. Hoffman*,¹³⁵ the court observed that in each case the child had been cared for by the third party from the time it was a baby, that the child had lived with the third party for approximately eight years, that the child preferred to stay with the third party, and that the child exhibited substantial emotional turmoil at the prospect of being separated from the third party. Such factors are not weighted in favor of the parent, and invoking the parental presumption in *Piotrowski* and *Trenton* was an empty gesture disguising a custody determination based solely upon the best interests of the child.¹³⁶ The increased willingness of the courts to protect the psychological best

Montgomery County Dep't of Social Serv. v. Sanders, 38 Md. App. 406, 422-23, 381 A.2d 1154, 1164 (1978).

129. 280 Md. 172, 191, 372 A.2d 582, 593 (1977).

130. These two factors are indicative of the courts' continued reluctance to deny custody to a parent who has not voluntarily abandoned his "parental rights." See *McClary v. Follett*, 226 Md. 436, 439-41, 174 A.2d 66, 68-69 (1961); GOLDSTEIN, FREUD & SOLNIT, *supra* note 110, at 107-08; cf. *Powers v. Hadden*, 30 Md. App. 577, 584-87, 353 A.2d 641, 645-47 (1976) (decision for mother over paternal grandparents based in part on fact that separation of child from mother resulted from "involuntary" divorce decree).

131. See, e.g., *Melton v. Connolly*, 219 Md. 184, 188-89, 148 A.2d 387, 389-90 (1959); *Trenton v. Christ*, 216 Md. 418, 422-23, 140 A.2d 660, 662 (1958); *Ross v. Pick*, 199 Md. 341, 350-52, 86 A.2d 463, 468-69 (1952); *Dietrich v. Anderson*, 185 Md. 103, 118-19, 43 A.2d 186, 192-93 (1945); *Piotrowski v. State*, 179 Md. 377, 381-83, 18 A.2d 199, 200-02 (1941).

132. 280 Md. at 178-79, 372 A.2d at 587.

133. 179 Md. 377, 18 A.2d 199 (1941).

134. 216 Md. 418, 120 A.2d 660 (1958).

135. 280 Md. 172, 372 A.2d 582 (1977).

136. As discussed at notes 129 to 131 and accompanying text *supra*, only five of the seven factors examined by the *Ross* court affected the child's best interests.

interests of the child is more apparent in cases in which both the third party and the biological parent are equally fit,¹³⁷ than in cases in which the parent seeking custody is either unfit or not as clearly fit as the third party.¹³⁸ If a parent is as capable of properly raising the child as is the third party, the judicial task is more difficult than if the court could merely point to the unfitness of the parent as a reason for awarding custody to the third party. Thus, in *Piotrowski* and *Trenton*, by finding the parties equally fit and yet still affirming an award of custody to the third party, the Court of Appeals has exhibited considerable willingness to protect the psychological well-being of the child.

A possible explanation for the weakness of the parental presumption, and its virtual non-existence in some cases, is the concern of the Court of Appeals that the best interests of the child be the paramount consideration in custody cases. The parental presumption is assailable for the same reason as the adultery presumption abandoned in *Davis*.¹³⁹ As no basis exists for presuming unfitness from the adultery of a parent, no basis exists in third party-parent cases for presuming that the welfare of the child is served by awarding custody to the biological parent.

Maryland's recently enacted legislation in the foster care/adoption field, article 16, section 75, is a further example of Maryland's trend away from the presumption favoring biological parents.¹⁴⁰ In effect, the General

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

138. See *DeGrange v. Kline*, 254 Md. 240, 254 A.2d 353 (1969); *Melton v. Connolly*, 219 Md. 184, 148 A.2d 387 (1959); *Ross v. Pick*, 199 Md. 341, 86 A.2d 463 (1952); *Dietrich v. Anderson*, 185 Md. 103, 43 A.2d 186 (1945).

139. See notes 32 to 41 and accompanying text *supra*.

140. MD. ANN. CODE art. 16, § 75 (Cum. Supp. 1977), enacted in 1973, provides:

(a) After a child has been under continuous foster care for a period of two consecutive years under the custody of an agency authorized by law to make placements, it shall be presumed by the court that it is in the best interests of the child to award to that agency a decree granting guardianship with the right to consent to adoption or long term care short of adoption, without the consent of the natural parent or parents; provided that notice otherwise required by law has been given.

(b) The court in considering evidence to rebut this presumption, among other factors, shall consider the following:

(1) The interaction and interrelationship of the child with his natural and foster parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(2) The child's adjustment to his home, school, and community; and

(3) The mental and physical health of all individuals referred to in subparagraph (1).

(c) Additionally, in order to rebut the presumption, the court shall require substantial proof that:

(1) The natural parent will be able to resume his or her parental duties within a reasonable period of time; or

(2) The natural parent has played a constructive role in the child's welfare during the time he has been in foster care.

In evaluating the parent's role, the court may consider, among other factors, (1) the frequency and regularity of personal contact with the child, (2)

Assembly created an exception to the heavy burden of proof placed on anyone seeking to adopt or to obtain guardianship of a child without the consent of the biological parents. Article 16, section 75 creates a presumption that if a child has been in continuous foster care for two years under the custody of an authorized agency, the best interest of the child requires granting guardianship to the agency with the right to consent to adoption or long-term care *without* the consent of the biological parents. When it applies, section 75 shifts the burden of proof from the agency to the parent.¹⁴¹ In order to rebut the presumption, the parent must demonstrate by "substantial proof" that he or she "will be able to resume his or her parental duties within a reasonable period of time" or that he or she "has played a constructive role [as defined in the statute] in the child's welfare during the time he has been in foster care."¹⁴²

The trend in custody proceedings toward greater emphasis on the psychological well-being of the child is not without exceptions. The courts give less weight to the child's welfare and place greater emphasis upon parental "rights" when the parent's relinquishment of custody was involuntary.¹⁴³ The decisions follow a similar pattern when the parent has permitted the state to place his or her child in a foster care home and later seeks to regain custody.¹⁴⁴ In such cases the courts have emphasized the

demonstrated love and affection, (3) parental arrangement for the child's future education and financial support, both in relation to the parent's means.

(d) Nothing herein shall prevent a child under foster care from being adopted pursuant to § 74 even if the period of continuous foster care is less than two consecutive years.

141. *Hicks v. Prince George's County Dep't of Social Serv.*, 281 Md. 93, 101-02, 375 A.2d 558, 563 (1977). Unfortunately, a presumption against biological parents in situations to which article 16, section 75 applies is no more likely to reflect the best interests of the child than is a presumption favoring biological parents in custody disputes in which a third party has had custody for a long period. Section 75 merely requires that a child be "under continuous foster care" for two years; apparently, the presumption against biological parents applies even if the child has been in several foster homes during the two years and has not had a chance to develop meaningful psychological ties with any of his foster families. Thus, at least as presently worded, section 75 is an inadequate tool for protecting a child's best interests. Also, the statute is an impediment to the commendable judicial trend away from the use of presumptions in ascertaining a child's welfare.

142. MD. ANN. CODE art. 16, § 75 (Cum. Supp. 1977). See note 140 *supra*.

143. See, e.g., *McClary v. Follett*, 226 Md. 436, 439-41, 174 A.2d 66, 68-69 (1961); *Montgomery County Dep't of Social Serv. v. Sanders*, 38 Md. App. 406, 422-23, 381 A.2d 1154, 1164 (1978); *Powers v. Hadden*, 30 Md. App. 577, 584-87, 353 A.2d 641, 645-47 (1976).

144. See, e.g., *Smith v. Organization of Foster Families*, 431 U.S. 816, 845-47 (1977). Reducing the weight given to the best interests of the child and increasing that given to the parent when the latter relinquished custody involuntarily or under an agreement with the state has been criticized in Note, *Foster Parent Standing in Custody Modification Proceedings: Eason v. Welfare Comm'r*, 9 CONN. L. REV. 496 (1977). See *Powers v. Hadden*, 30 Md. App. 577, 589-93, 353 A.2d 641, 648-50 (1976) (Davidson, J., dissenting).

contractual nature of the relationship between the parent and the state on the one hand and the state and the foster parents on the other.

Assuming, however, that the parent has not involuntarily relinquished custody and has not given up custody under an agreement with a social services organization, Maryland courts are likely to give little actual weight to the desires of the biological parents. The courts' primary concern is the welfare, particularly the psychological welfare, of the child,¹⁴⁵ even though the *Ross* test does not clearly reflect this concern.¹⁴⁶

CONCLUSION

Whether in the context of a divorce or a dispute between third parties and parents, a custody case is an emotional, often bitter struggle between adults. While it is settled that the best interest of the child, rather than that of any adult, is the paramount consideration, the courts tend to give less weight to the welfare of the child in two limited situations.¹⁴⁷ With the increasing influence of psychology on custody disputes and the decreasing reliance on or abandonment of some of the traditional presumptions, the future of custody law in Maryland is uncertain. Maryland's abandonment of the presumption of unfitness arising from adultery, and the decline and probable demise of the tender years presumption, are indicative of a shift to a case-by-case determination of a child's best interests. Indeed, the application of such presumptions has proven difficult in light of the subtle distinctions in facts and personalities from case to case. Although abandonment of the presumption in favor of biological parents is unlikely,¹⁴⁸ the courts, in practice if not by admission, will probably give little or no weight to the presumption in most cases where the welfare of the child requires placement with another party.

145. For discussion of why the child's interests should prevail over those of any adult involved in a custody dispute, see GOLDSTEIN, FREUD, & SOLNIT, *supra* note 110, at 105-11.

146. As a result of the increased awareness of the emotional and psychological ramifications of a custody decision, courts, as evidenced by *Ross v. Hoffman*, rely increasingly upon the advice of persons trained in the behavioral sciences. This development has received considerable support. See, e.g., PROCEEDINGS, *supra* note 65, at 34-36 (remarks of Harry W. Fain); Foster & Freed, *supra* note 35, at 615-22; Kay & Philips, *supra* note 31, at 722-26; Shepherd, *supra* note 2, at 171; Watson, *supra* note 48, at 74-76. In Levin, *supra* note 81, at 347, the author, a trial judge, observes:

While a judge may attempt to use common sense (and not all judges possess this admirable quality) in custody decisions, he is not trained in the behavioral or social sciences. A child's real needs may remain undetected by a judge who, although well meaning, may disregard what is actually best for a child by adopting a "common sense" approach (footnote omitted).

147. See notes 130, 143 & 144 and accompanying text *supra*.

148. See generally note 125 and accompanying text *supra*.