Maryland Law Review

Volume 19 | Issue 1 Article 8

Custody of Minor Children Awarded to Third Party or Guilty Parent over Innocent and Fit Parent - Oliver v. Oliver and Trenton v. Christ

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Custody Of Minor Children Awarded To Third Party Or Guilty Parent Over Innocent And Fit Parent†

Oliver v. Oliver[1] and *Trenton v. Christ*[2]

Mr. Oliver filed a bill against his wife for a divorce *a vinculo matrimonii* on the grounds of abandonment and adultery, and for the custody of their three year old daughter. The Chancellor granted the husband an absolute divorce for abandonment, but not for adultery, and awarded custody of the child to the wife. The husband appealed both the custody decree and the lower court's denial of a divorce on grounds of adultery. The Court of Appeals, in affirming the lower court's decree, *held* that, while there might have been sufficient evidence to warrant a granting of the divorce on grounds of adultery, custody was properly awarded to the appellee.

The parties were married in 1950 and separated in 1954, at which time the appellee took her infant daughter with her. During that period, the appellee had become friendly with a fellow employee, Taylor Potter. In 1955, upon taking an apartment in Wheaton, Maryland, "the wife and Potter became involved in a companionship not consistent with a normal friendship between a virtuous woman and a continent man."[3] A private detective, hired by the appellant and testifying in the lower court, described his observations of appellee's intimate conduct with Potter at her apartment, and further averred that on several occasions Potter had visited the appellee at various hours during the evening, not leaving for some period thereafter.

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† *Editor's Note.* After the above casenote was written, the Court of Appeals decided Melton v. Connolly, No. 145, September Term, 1958, ... Md. ..., ... A. 2d ... (1959), in which, in awarding custody of a 5 year old girl to foster parents, as against the father, the Court reaffirmed its stand that the welfare of the child is the consideration of transcendent importance.

[1] 217 Md. 222, 140 A. 2d 908 (1958), *dis. op.* 230.

[2] 216 Md. 418, 140 A. 2d 660 (1958).

[3] *Supra*, n. 1, 225-6.

There was also testimony given by appellee's maid, suggestive of immoral conduct, and alleging that the Oliver child, still in her mother's company at the Wheaton apartment, began to refer to Potter as "Daddy Taylor," often speaking of "Daddy Taylor's pillow" on appellee's bed, and "Daddy Taylor's toothbrush."[4]

On the basis of the testimony below, the Court of Appeals *held,* by a three to two decision, that the Chancellor had not abused his discretion in awarding custody to appellee. The Court said that while custody of a child is ordinarily not given to the guilty party in a divorce complaint, especially where the divorce is granted on grounds of adultery, nevertheless, the best interests of the child are the paramount criteria in determining custody; that although appellant was a fit and competent parent, so was appellee, having repented her indiscretions.

Judge Prescott, joined by Judge Macgill, specially assigned, dissented on the ground that this is the first case where, in the absence of exceptional circumstances and parental unfitness of the innocent party, the Court of Appeals has awarded custody of a child to an adulterous spouse, and that the best interests of the child were not, therefore, served by awarding custody to the appellee, whose moral aberrations are, *per se,* evidence of unfitness.

Trenton v. Christ[5] also involved a custody award against an innocent, fit, and competent parent, and to third persons (in this case, to maternal grandparents) when the child's mother, having had custody, died. Trenton (appellant) and his wife were divorced in 1951, whereupon she and her daughter went to live with her parents (the appellees). Subsequently, the appellant remarried, and in 1956, he moved to Wisconsin, as a result of his employer's having transferred him to a job in neighboring Michigan. He had a son by the second marriage, who, at the time of this case, was three and one-half years old, blind and asthmatic. In 1957, three and one-half months before appellant's suit for custody, appellant's former wife was killed in an automobile accident. Shortly thereafter, appellant asked his daughter, then ten years old, to come to Wisconsin with him, and she acceded; on a later occasion, she refused to accompany him, and as a result of that conversation with her father, the child became ill.

Affirming the lower court's award of the child's custody to the maternal grandparents, the Court of Appeals deter-

[4] *Ibid.,* 226.
[5] 216 Md. 418, 140 A. 2d 660 (1958).

mined that her best interests would be realized by leaving her in a community where she was well adjusted and had benefited from wise upbringing. Without impugning the appellant's fitness, the Court surmised that a transfer of custody would probably result in additional emotional upheaval to the child, especially since her half-brother's incapacity would necessitate a disproportionate showing of parental love, care and attention to him. Moreover, because she would have had no prior opportunity to have developed profound attachments for new surroundings and associations, it was feared that she might become antagonistic to both, thereby overwhelming the fondest efforts of appellant and step-mother to reorient her, and to win her affection.

Both of the subject cases uphold the theory that the overriding consideration in the disposition of custody cases is the best interests, or the general welfare of the child.[6] There is no precise legal application of the best interests test; indeed, its efficacy results from determining the best interests of a child on the peculiar factual circumstances of any given case.[7] For that reason, the Chancellor, who has opportunity to observe the witnesses and parties in court, and who therefore might better evaluate the testimony in its natural context, is usually accorded respect in his findings when the appellate court reviews a custody case (a principle also recognized in both of the subject cases), unless the upper court discerns an abuse of discretion by the Chancellor, or, perhaps, after reviewing the findings, entertains grave doubts as to his decision.[8]

In deciding what constitutes the best interests of the child, the courts consider a number of component factors, which affect the child's welfare. A major consideration, for example, in *Oliver v. Oliver*[9] was that the child was a three and on-half year old girl. Normally, where a child is of tender years, it is best placed in the custody of its mother, who is better endowed to provide care and devoted

[6] Swoyer v. Swoyer, 157 Md. 18, 145 A. 190 (1929); Dietrich v. Anderson, 185 Md. 103, 43 A. 2d 186 (1945); Trudeau v. Trudeau, 204 Md. 214, 103 A. 2d 563 (1954); See also MADDEN, PERSONS AND DOMESTIC RELATIONS (1931), §107.

[7] Barnard v. Godfrey, 157 Md. 264, 272, 145 A. 614 (1929), in which the court said: "A recital and analysis of the testimony in this case is wholly unnecessary, in that no general principles can be laid down in this class of cases which would govern in the future. . . ."

[8] Singewald v. Singewald, 165 Md. 136, 166 A. 441 (1933); Sibley v. Sibley, 187 Md. 358, 50 A. 2d 128 (1946); Miller v. Miller, 191 Md. 396, 62 A. 2d 293 (1948); Casey v. Casey, 210 Md. 464, 124 A. 2d 254 (1956).

[9] 217 Md. 222, 140 A. 2d 908 (1958), *dis. op.* 230.

attention.[10] However, what constitutes "tender years" is not altogether clear.[11] Another, correlative factor often recognized is the sex of the child — girls are more likely to be awarded to their mothers.[12]

Custody awarded in divorce proceedings is more often than not given to the innocent party, provided that he is fit and competent,[13] especially where the guilty party has been grossly immoral or adulterous.[14] The typical rationale of the award, where the parent has been guilty of grossly immoral conduct, is that the child's association with the parent would be inimical to its own best interests.[15] Judge

[10] Barnett v. Barnett, 144 Md. 184, 125 A. 51 (1923); *cf.* Miller v. Miller, 191 Md. 396, 62 A. 2d 293 (1948) and McCabe v. McCabe, ... Md. ..., 146 A. 2d 768 (1958) (custody given to father in both cases). Bronson, *Custody on Appeal*, 10 Law and Contemp. Prob. 737 (1944), is particularly appropriate to the subject case. There, at page 742, the author says:

> "One of the most often used 'presumptions' is that the child of tender years should be awarded to his mother. If the custody of such a child is in controversy the door is open for an easy way to dispose of the issue. Following the above 'rule' the courts often look no farther than to see if the mother has been deemed a fit person, *and sometimes only to see that she has not been affirmativley dclared unfit.* Perhaps human experience supports the policy that young children should not be deprived of the care of their mothers . . . . However, it is this writer's opinion that even such 'sound general rules', as this one is said to be, should be used with caution in custody cases." [Emphasis supplied.]

[11] In Cullotta v. Cullotta, 193 Md. 374, 66 A. 2d 919 (1949), the court treated a child of 10 as being of tender age; Casey v. Casey, 210 Md. 464, 474, 124 A. 2d 254 (1956) cited Cullotta v. Cullotta as holding that a child under ten years of age falls within the classification; however, *cf.* Carter v. Carter, 156 Md. 500, 144 A. 490 (1929), where a child who was eight years at the time of the appeal was not considered to be of such a tender age as to require a mother's care. Brune, C. J., further warned in Sewell v. Sewell, ... Md. ..., 145 A. 2d 422, 427 (1958), that "this is not an inflexible rule".

[12] Porter v. Porter, 168 Md. 296, 177 A. 464 (1935); Singewald v. Singewald, 165 Md. 136, 166 A. 441 (1933); McCann v. McCann, 167 Md. 167, 173 A. 7 (1934).

[13] Cullotta v. Cullotta, 193 Md. 374, 66 A. 2d 919 (1949) (divorce for cruelty); Dunnigan v. Dunnigan, 182 Md. 47, 31 A. 2d 634 (1942) (divorce for abandonment); Barnard v. Godfrey, 157 Md. 264, 145 A. 614 (1929); Vogts v. Vogts, 189 Md. 312, 55 A. 2d 711 (1947); *cf.* Wald v. Wald, 161 Md. 493, 159 A. 97 (1931).

[14] Chillemi v. Chillemi, 197 Md. 257, 78 A. 2d 750 (1951) (husband finding mother in bed with a stranger while child is in the home); See Pangle v. Pangle, 134 Md. 166, 170, 106 A. 337 (1919), where the Court warned:

> "But in a case where the custody of a female child is sought by a mother, after a separation caused by her adultery, the evidence should be very clear as to the propriety and wisdom of such a course before the child is removed from the care of the father to whom it has been judicially awarded and by whom its best interests are being properly protected."

Cf. Sheehan v. Sheehan, 51 N.J. Super. 276, 143 A. 2d 874, 882 (1958), where it is said that in case of the mother's adulterous misconduct, ". . . it must appear that in spite thereof it is for the best interests and welfare of the child to award custody to the mother". See also Swoyer v. Swoyer, 157 Md. 18, 145 A. 190 (1929).

[15] 2 NELSON, DIVORCE AND ANNULMENT (2d ed. 1945) §15.06; Swoyer v. Swoyer, *ibid.*

Horney speaking for the majority in the *Oliver* case, either manifested a subtle departure from that presumption or hinted at its inapplicability, advising:

> "While we do not agree that adultery must be proven 'beyond a reasonable doubt,' we are unable to say that the Chancellor was clearly wrong in granting the divorce on the ground of abandonment instead of adultery. *Moreover, we think the question is unimportant in this case. The real question here is the custody of the child, and a determination of that question does not necessarily depend on the ground for divorce which entitled the husband to a decree.*"[16]

There have been occasions where other considerations have prompted granting custody to the guilty party in a divorce suit, where the divorce was not decreed on grounds of adultery, or where the guilty party had not been grossly immoral.[17] However, even if the Court of Appeals meant to imply that Mrs. Oliver was guilty of adultery (in answering that moot divorce question, the husband already having obtained an *a vinculo* divorce), the majority opinion held, as have some cases, that custody may be awarded to a formerly adulterous parent where a reform in conduct has occurred which re-establishes the parent's fitness.[18] After declaring that in the court below Mrs. Oliver's un-

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[16] 217 Md. 222, 227, 140 A. 2d 908 (1958), *dis. op.* 230. [Emphasis supplied.] Judge Prescott's objection to the Court's decision is directed largely at this statement, because a decision for the mother founded on such circumstances would not deter moral aberrations in the future and because the father is humiliated by it. However, neither of these objections would concern the best interests of the child, which is the paramount consideration in custody cases. See the statement to this effect in Koger v. Koger, 217 Md. 372, 376, 142 A. 2d 599 (1958).

[17] Trudeau v. Trudeau, 204 Md. 214, 103 A. 2d 563 (1954), where the appellant father was impliedly of questionable character, even though his wife had been found guilty of adultery. Judge Hammond in the Trudeau case, placed the award in the guilty party on the basis of precedent laid in Swoyer v. Swoyer, 157 Md. 18, 145 A. 190 (1929), and Pangle v. Pangle, 134 Md. 166, 106 A. 337 (1919), *in both of which cases custody was given to the innocent party*, despite dictum that where the best interests of the child justify it, the Chancellor could award custody to the adulterous spouse. See also Koger v. Koger, 217 Md. 372, 142 A. 2d 599 (1958) (custody given to the guilty party in divorce on grounds of desertion); and McCann v. McCann, 167 Md. 167, 173 A. 7 (1934), where the guilty party who was not adulterous received custody. See also 41 L.R.A. (N.S.) 564, 601.

[18] Hill v. Hill, Exr'x., 49 Md. 450, 33 Am. Rep. 271 (1878) (visiting privileges given to adulterous mother, now reformed); Trudeau v. Trudeau, 204 Md. 214, 103 A. 2d 563 (1954) (emphasizes that penitence is more readily accepted when the parent's moral aberrations occurred away from the child); Sibley v. Sibley, 187 Md. 358, 50 A. 2d 128 (1946) (father, once adulterous, now remarried and respectable). See also 41 L.R.A. (N.S.) 564, 601.

fitness had not been established, the Court, apparently with nothing more to support its conclusion than a showing that the adulterous relationship under consideration had in fact ended, also decided that she had reformed:

> "The adulterous relationship had ceased, and it is not likely that such illicit conduct will be revived since the former paramour has moved to Michigan and had become interested in marrying another woman out there. The mother having changed her way of life, the Chancellor was justified in overlooking her past indiscretions."[19]

The Court added that "the lower court 'may at any time * * * annul, vary or modify' the decree in relation to the child. Code (1957), Art. 16, sec. 25".[20]

It would appear the Court of Appeals is reluctant to deny that the best interests of a very young child lie with its mother, provided that she is maternally fit regardless of what fault or moral turpitude compelled a divorce decree against her.

In *Trenton v. Christ*,[21] the second case under examination, maternal grandparents were given, and the natural father denied, custody of a ten year old girl, when she had been in their exclusive custody for only three and one-half months. At common law the father had a natural right to the custody of his minor children.[22] Now, a prima facie presumption is raised by statute that parents are the best and preferred custodians of their children,[23] and neither parent has a right superior to that of the other.[24] The usual view is that the child's welfare will prevail if it is left with the parents,[25] as against a third person, assuming that the parent is not deemed unfit and incompetent.[26]

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[19] 217 Md. 222, 230, 140 A. 2d 908 (1958).

[20] *Ibid.*

[21] 216 Md. 418, 140 A. 2d 660 (1958).

[22] See Jones v. Stockett, 2 Bl. Ch. 409, *circa* 428 (Md. 1830), where there is dictum to the effect that the natural right of the father to custody might yield to the best interests of the child.

[23] 6 MD. CODE (1957) Art. 72A, §1.

[24] *Ibid.*; Miller v. Miller, 191 Md. 396, 62 A. 2d 293 (1948).

[25] 2 NELSON, DIVORCE AND ANNULMENT (2d ed. 1945) §15.15; MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) §107; Edwards v. Engledorf, 192 S.W. 2d 31, 33 (Mo. 1946), where the court said:

> "The presumption is that the best interest of the child is to be in the custody of the parent and in this situation a showing against the parent overcoming such a presumption must be made or that there was some special and extraordinary reason why such custody should not be in the father."

[26] In DeAngelis v. Kelly, 184 Md. 183, 187, 40 A. 2d 332 (1944), the Court categorically declined to give custody to the great aunt of a child, who had

Judicial cognizance of the natural, instinctive affections of parents for their children is sometimes influential in custody awards, but precedent does not support a conclusive rule.[27]

Even conceding that the parent is the suitable custodian, another factor, evidently not present in either subject case, may supersede in establishing the child's best interests. Where a parent has voluntarily relinquished custody of his child to a third person, he may lose his natural rights as a parent, and to revive them, must meet the burden of proving that the child's welfare would be materially promoted by a reversion of custody.[28] The period of time during which a third person has had custody of children may be a consideration,[29] especially when the parent, at the

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cared for the child from the time she was three months old until she was four and one-half, in these words: "We cannot find from the testimony that her parents are not giving her the care to which she is entitled from those in their station of life, and we think she should be left with them." See Piatt v. Piatt, 32 Ida. 407, 184 P. 470 (1919), where the presumption of natural right is stringently applied, in the absence of the parent's unfitness. In Stout v. Stout, 166 Kan. 459, 201 P. 2d 637, 642 (1949), the court declared:

> "It will suffice to say that *if there is any language to be found in any of our decisions justifying the construction that the children of natural parents may be given to third persons without a finding such parent is an unfit person to have their custody it should be and is hereby disapproved.*" [Emphasis supplied.]

See also State v. Deaton, 93 Tex. 243, 54 S.W. 901 (1900); Jones v. Jones, 155 Kan. 213, 124 P. 2d 457 (1942); Wirth v. Wirth, 192 Md. 21, 63 A. 2d 312 (1949).

[27] Recognition of natural bonds of affection is apparent in Schneider v. Hasson, 161 Md. 547, 550, 157 A. 739 (1932) (aunt could not love child as much as mother did); Hill v. Hill, Exr'x., 49 Md. 450, 33 Am. Rep. 271 (1878); England v. Megear, 145 Md. 574, 579, 125 A. 731 (1924) (regard for tender relation of mother and child). But see Pitts v. Pitts, 181 Md. 182, 192, 29 A. 2d 300 (1942) (custody given to mother, but custody should not be given merely to gratify a mother's maternal love).

[28] State v. Joplin, 131 W. Va. 302, 47 S.E. 2d 221, 226 (1948) states:

> "'When a parent has transferred to another the custody of his infant child by fair agreement, which has been acted on by such other person to the manifest interests and welfare of the child, the parent will not be permitted to reclaim the custody of the child, unless he can show that a change of custody will materially promote his child's welfare, moral and physical'."

See Schneider v. Hasson, 161 Md. 547, 157 A. 739 (1932), where the Court held there had been no relinquishment, after the child had been exclusively with a great-aunt for two years. See also Beach v. LeRoy, 228 Ind. 122, 89 N.E. 2d 912 (1950); Sayre, Awarding Custody of Children, SELECTED ESSAYS ON FAMILY LAW (1950) 588, 591-592.

[29] Piotrowski v. State, 179 Md. 377, 18 A. 2d 199 (1941) (father denied custody after a lapse of almost nine years); Ross v. Pick, 199 Md. 341, 86 A. 2d 463 (1952) (third-party custodians given permanent custody after boy had lived with them for ten years); Schneider v. Hasson, 161 Md. 547, 157 A. 739 (1932) (custody reconferred on mother two years after she had voluntarily, but not permanently, relinquished it); Stout v. Stout, 166 Kan. 459, 201 P. 2d 637 (1949) (custody awarded to father after an absence of eight and one-half years); MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 374.

same time, has remained aloof and indifferent to his children.[30]

Normally, the court will grant but scant acknowledgment to economic and social advantages offered by a third person in a custody contest between him and a natural parent, appearing reluctant to regard money or position available from a third party as counter-balancing the benefits to be conferred on the child by remaining with its natural parents.[31]

In the *Trenton* case,[32] the maternal grandparents freely conceded that the appellant father had a preferred right to custody of his daughter over third persons; furthermore, it was agreed that the father would be a suitable custodian. There is, in addition, legal authority to sustain the view that upon the death of his former wife, who had been the child's custodian, a presumption of a natural right to custody was revived in the father's favor.[33] The grandparents, by virtue of their lengthy and intimate association with the child, had no similar right.[34] In addition, their age and its relation to the child's best interests, was not considered.[35]

The question raised instead by the Court was whether such exceptional circumstances existed as would justify awarding the child to her grandparents.

The fact that she had, together with her mother, lived with the grandparents for nearly seven years, and had become ill on suggestion of removal from her surroundings, was influential in determining that her best interests would

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[30] Maddox v. Maddox, 174 Md. 470, 199 A. 507 (1938).

[31] See Sayre, Awarding Custody of Children, SELECTED ESSAYS ON FAMILY LAW (1950) 588, 599, where the author, criticizing the refusal of courts to consider the advantages which third persons can offer as a factor in determining custody when the natural parents are fit and proper, admonishes: "Platitudes that tend to glorify apple-faced mediocrity and to defeat the higher joys, excellencies, and achievements of life are particularly offensive when the future welfare of the child is involved."

[32] 216 Md. 418, 140 A. 2d 660 (1958).

[33] See 74 A.L.R. 1352. A few states have statutes giving the right of custody to the surviving spouse; for an example of how such statutes are construed in determining the right to custody of a surviving spouse as against that of a third person, see Edwards v. Engledorf, 192 S.W. 2d 31, 33 (Mo., 1946).

[34] In Burns v. Bines, 189 Md. 157, 164, 55 A. 2d 487 (1947), where the mother of several children was dead, and the father was in prison for her murder, the paternal grandparents of the children obtained custody of a grandson from the maternal grandparents, who were caring for all three grandchildren, on a writ of habeas corpus. In reversing the lower court, the Court of Appeals said that since "grandparents have no 'right' to custody", the paternal grandparents had invoked the wrong procedure.

[35] Schneider v. Hasson, 161 Md. 547, 550, 157 A. 739 (1932) (custody denied to a relative whose advanced age is contrary to the best interests of the child); Ex Parte Frantum, 214 Md. 100, 133 A. 2d 408 (1957) (adoption denied to appellants, partly by reason of their advanced age).

lie where she had developed profound and secure attachments. On grounds of promulgating the child's greatest welfare, the courts seek to avoid severance of deep-rooted and accustomed associations with friends and relatives by awarding custody to a party who would take the child out of the state;[36] in this case, the father would have taken the child to his home in Wisconsin. Certainly ties of affection engendered and strengthened by long associations with third persons will not be ignored.[37] Frequently, because associations have been formed, and deep affections have developed, a child will become emotionally or physically ill upon separation from his third-party custodians, and to preserve his best interests, the court will respect the status quo. In the *Trenton* case, the Court observed that "mere contemplation of [a] change produced a serious emotional upset," which presented "a genuine risk to [the] child's well-being."[38]

In establishing the best interests of the Trenton child, the Court also accorded some degree of deference to the child's own wishes. While the child's preference, when he or she has reached an "age of discretion,"[39] is ordinarily entitled to consideration,[40] it is not conclusively binding on the court, particularly where the child's preference is ill-founded.[41]

It is interesting to note that the child here had a brother, and that, although there is a tendency for courts, in up-

[36] Trudeau v. Trudeau, 204 Md. 214, 103 A. 2d 563 (1954); State v. Vorlicek, 229 Minn. 497, 40 N.W. 2d 350 (1949). Perhaps the underlying reason in many instances for the court's policy is the realization that, should the child be removed from the state by its custodian, it will obviously also be removed from the supervision of the court.

[37] Dietrich v. Anderson, 185 Md. 103, 119, 43 A. 2d 186 (1945), where the Court states: ". . . the prosperity and welfare of the child depend on the number and strength of these ties. . . ." See MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 376.

[38] 216 Md. 418, 423, 140 A. 2d 660 (1958); Ross v. Pick, 199 Md. 341, 353, 86 A. 2d 463 (1952) (holding that the child's health would be jeopardized or its happiness marred by a change in custody); State v. Vorlicek, 229 Minn. 497, 40 N.W. 2d 350, 352 (1949) recognized this factor, but in doing so, stated the case was exceptional; *cf.* Sass v. Sass, 246 Wis. 272, 16 N.W. 2d 829 (1944), where the court felt that mere emotional disturbance as a normal consequence of a transfer from one environment to another was an insufficient factor to warrant denying the parents custody.

[39] "There is no fixed age when the discretion of a child begins, but mental capacity is the test." MADDEN, *op. cit. supra*, n. 37, 377. In the subject case the child was deemed by the court to be intelligent and well developed.

[40] Young v. Weaver, 185 Md. 328, 44 A. 2d 748 (1945); Brault v. Brault, 189 Md. 175, 55 A. 2d 497 (1947); Vogts v. Vogts, 189 Md. 312, 55 A. 2d 711 (1947); Sullivan v. Sullivan, 199 Md. 594, 87 A. 2d 604 (1952); Wilhelm v. Wilhelm, 214 Md. 80, 133 A. 2d 423 (1957); Cooley v. Washington, 136 A. 2d 583 (D.C. App. 1957).

[41] Casey v. Casey, 210 Md. 464, 124 A. 2d 254 (1956).

holding the best interests of the child, to prevent the separation of brothers and sisters by the custody decree,[42] nonetheless, the situation might well vary where they had never met. In fact, the Court apprehended in the subject case that the relationship might be detrimental, saying:

> "Instead of the love and devotion which might be expected to develop between herself and her handicapped brother, there might develop something quite different."[43]

While dicta stating that parental rights are subordinate to the child's best interests are plentiful, cases which actually award custody to a third party where the natural parent is a fit guardian and where there has been no relinquishment of natural rights are rare. Seldom do the best interests of a child require its retention by another while the parent is faultless, capable, and desirous of the companionship of his offspring.[44]

In *Ross v. Pick*,[45] for example, the Court of Appeals denied the petition of a divorced mother, now remarried, who, after an absence of ten years, sought to regain custody of her eleven year old son from his adoptive parents. The case is obviously distinguishable from the subject case, in that the adoption of the child would tend to indicate a final relinquishment by the mother, but the court employed language applicable to the *Trenton* case, declaring:

> ". . . the court should place the right of the parents subordinate to the right of those who performed the parental duties, for the ties of companionship strengthen by lapse of time, and upon the strength of these ties the welfare of the child largely depends."[46]

In *Piotrowski v. State*, the natural father of a nine year old girl had taken her to the home of her maternal grandparents shortly after birth and on the death of her mother.

[42] Kartman v. Kartman, 163 Md. 19, 161 A. 269 (1932); Burns v. Bines, 189 Md. 157, 55 A. 2d 487 (1947); Roussey v. Roussey, 210 Md. 261, 123 A. 2d 354 (1956); Young v. Weaver, 185 Md. 328, 44 A. 2d 748 (1945).

[43] Trenton v. Christ, 216 Md. 418, 423, 140 A. 2d 660 (1958).

[44] Although the courts generally declare that the best interests of the child will triumph over parental rights, even when the parent is fit and proper, the rule is somewhat nebulous and elusive, because in the vast majority of cases where custody is given to a third person, the parent is either found, on closer examination, to be tainted with one fault or another, or to have relinquished custody of his child.

[45] 199 Md. 341, 86 A. 2d 463 (1952).

[46] *Ibid.*, 352.

He visited the child frequently until he remarried about three years later, thereafter visiting her less often. Reversing a lower court decree awarding him custody, the Court noted that the child had flourished in her grandparents' home, and did not "deem it advisable to remove her from this care, affection and attention."[47] This case might well appear in point, were it not that the father had commended his daughter to her grandparents' custody *after* his wife had died; *i.e.*, she was in their *exclusive* custody for almost nine years, while in the *Trenton*[48] case the father brought custody proceedings three and one-half months after the death of his wife, who had been given custody when she and Mr. Trenton were divorced.

In *Beach v. LeRoy*,[49] the Supreme Court of Indiana affirmed a decision of the lower court continuing the custody of an infant girl in her grandparents, to whose home the mother, upon the death of her husband, had taken the child. After six years, the mother, having in the meantime remarried, endeavored to reclaim the child from the grandparents. In a dictum, the Court stated that:

> "It does not follow that because the appellant mother is now a fit person, and that she is now financially able and naturally and materially equipped to have the care and custody of the infant child, that the judgment must be for her. There are many other things incident to the life-history and the disposition of the child in question . . . that the courts must consider in fixing the present care and custody of the child."[50]

However, here, too, the Court implied through other language that something in the nature of a voluntary relinquishment by the mother had occurred.

Although in the *Trenton* case, the father only saw his child on the average of four times per year, there is no intimation anywhere in the opinion that this amounted to relinquishment.

The *Trenton* case, then, would appear to hold that the best interests of a child supersede any natural rights of a fit parent who has not relinquished his prima facie right to custody by defeating or ignoring his child's best interests, just as the same general welfare test would subordi-

[47] 179 Md. 377, 383, 182 A. 199 (1941).
[48] 216 Md. 418, 140 A. 2d 660 (1958).
[49] 228 Ind. 122, 89 N.E. 2d 912 (1950).
[50] *Ibid.*, 914.

nate the claims of a faultless and innocent parent in a divorce suit, as was decided in *Oliver v. Oliver*.[51]

Maryland courts tend to follow the view suggested by Judge Hammond's dissent in *Ex Parte Frantum:*

> "Precedents and theories should never control the decision of a custody or adoption case since the answer to the question of what is for the best interests and welfare of the child necessarily depends on judgment applied to a set of facts and circumstances which, like the proverbial will, has no twin brother."[52]

Perhaps optimum results would obtain by combining the observations of trained social workers with the authority of the judiciary, either (1) in a single individual, the Friend of the Court, used in Michigan, who maintains constant vigilance over innumerable details affecting the child's best interests;[53] or (2) by establishing, either through judicial decision or statute, a power in the courts whereby, as *parens patriae,* they, on their own initiative, may order investigations by experienced welfare workers and probation officers in custody cases.[54]

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[51] 217 Md. 222, 140 A. 2d 908 (1958).

[52] 214 Md. 100, 133 A. 2d 408 (1957), *dis. op.* 107; *cf.* Edwards v. Engledorf, 192 S.W. 2d 31, 34 (Mo. 1946), where the court, taking custody from a grandmother with whom the child has spent most of his life, ". . . regrets to have to decide cases of this character. * * * In this situation sentiment makes a strong appeal, but courts cannot be governed by sentiment. Sympathy must give way to the cold facts and the law." See n. 33, *supra.*

[53] See Bronson, *Custody on Appeal,* 10 Law and Contemp. Prob. 737 (1944).

[54] See 35 A.L.R. 2d 629, 632, naming Louisiana, Michigan, Nebraska, New Hampshire, Mexico, Texas, and the District of Columbia as recognizing such procedures; see also Boone v. Boone, 150 F. 2d 153 (D.C. App. 1945).