美國離婚後子女監護制度之發展及簡評

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中文摘要：

近年來，由於經濟的發展和社會的變遷，中外家庭結構均有明顯的變化，當面對越來越多的離婚案件，法律究應如何制作以保護當事人之權益呢？遠自古希伯來時期，西方國家有關子女監護權之法律發展，係由「父權絕對制」、「幼兒不離母親原則」，而致「子女最大權益考量」，目前又發展出「兒童主要照顧人標準」及「子女之共同監護法」。反觀台灣現行有關法律，似仍存有監護權以夫爲主之傳統思想，有謂「他山之石，可以攻玉」，在此，謹以本文簡介美國離婚後子女監護制度之歷史淵源，立法精神和最近的法律發展；希盼能提供美國有關經驗作爲我國立法和修法時之參考，並喚起台灣各界對於離婚時子女權益之最大考量。

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CHILD CUSTODY IN THE UNITED STATES -EVOLUTION OF LEGAL STANDARDS

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ABSTRACT-Today, both Western society and Taiwanese society not only have significant changes in their family system, but also dramatic increase in the amount of divorce. As a result of the increasing divorce rate, the future of many children of both societies is being decided in courtrooms. This study was supported by 1991 grants from the Chiang-Ching-Kuo Foundation of International Scholarly Exchange. With the advice of Professor Harvey C. Couch of Tulane Law School, the evolution of child custody laws in the United States was introduced in an attempt to understand what the law has done to protect and improve the well-being of the child in child cusdtody disputes. It is hoped that the information gained by this study will aid in understanding child custody, so that professionals and families will be better informed when deciding among child custody altenatives.

SECTION I FORWARD

Child custody laws in the United States initially reflected Engilsh common law. That is, the father was the natural guardian of his childrdn; the mother was entitled only to reverence and respect.[1] Justice Bronson, in Mercein v. The People ex rel. Barry, a 1840 New York case, wrote that "The law regards the father as the head of

(註 一) WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 373-74 (19th ed. London 1857).

the family; obliges him to provide for its wants; and commits the children to his charge, in preference to the claims of the mother or any other person."[2] Earlier, in 1824, while facing the custody dispute between a father and a maternal grandfathar, a Rhode Island judge doubted the father's exclusive right to custody by arguing that "It is entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody."[3] Justice Story also noted down that "This is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his naturral protector, both for maintenance and education."[4] The Chancellor in Mecein v. The People ex rel. Barry commented that court decisions on the father's absolute right in child custody "appeared to have gone back to the principles of a semi-barbarous age, when the wife was the slave of the husband, because he had the physical power to control her, and when the will of the strongest party constituted the rule of right."[5]

SECTION II TENDER YEARS DOCTRINE.

Since the turn of the century, some courts gradually came to give legal recogni-

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(註 二) Mercein v. The People ex rel. Barry, 25 Wend. 64, 71 (N.Y. 1840). Even though Justice Bronson further stated that "Whatever sympathy we may feel for this lady, or however strongly we may wish that the father had relinquished his claim to one of the two children, we have no choice but to administer the law as we find it." It seemed that the court wondered whether the mother would be entitled to the custody of her children, or at least one of her children.

(註 三) United States v. Green, 26 Fed. Cas. 30, 32 (RI. 1824).

(註 四) United States v. Green, 26 Fed. Cas. 30, 32 (RI. 1824).

(註 五) See Mercein v. The People ex. rel. Barry, 25 Wend. 64, 93 (N.Y. 1840). The history of Mercein case was very complex. Between 1839 to 1842, the Mercein case was debated through the court of chancery, New York Supreme Court, New York Court of Error, and finally modified at the Supreme Court. Most importantly the Mercein case had examined the issues on father's absolute right, tender years doctrine, and best interests of the child. One of the valuable discussions and comments on the Mercein case could be found at an report by Julia A. Stiles, *Nineteenth-Century Child Custody Reform: Matenal authority and the Davelopment of the "Best Interests of the Child" Standard,* 6 PROBATE LAW JOURNAL 5, 14-15 (1984).

tion to the special child-rearing abilities of womem.[6] When it was argued that: "In accordance with the dictates of natrue and humanity, the mother is regarded as the guardian, by nature, of young children,…… and as better calculated than the father to nurse and protect them, both in sickness and in health, in the years of infancy,"[7] the New York Court of errors in Mercein csae affirmed that:

> the mother is the most proper person to be entrusted with the custody of a child of this tender age…… the law of nature has given to her an attachment for her infant offspring which no other relative will likely to possess in an equal degree. And where no sufficient reasons exist for depriving her of the care and nature of her child.[8]

Generally this presumption was based on the rational that the father was unable to provide "that tender care which nature requires, and which it is the peculiar province of a mother to supply."[9] In contrast with the common law rule that "all else being equal the custody should be awarded to the father,"[10] the court established a presumption in favor of the mother as custodian to children of tender years. In other words, if the judge detemined the divorcing parents were equally fit, the presumtion would cause the chuld of tender years to be awarded to the mother.[11]

(註 六) See Jenkins v. Jenkins, 181 N.W. 826, 827, (Wis. 1921). The Wisconsin Supreme Court argued that "Mother alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental, and the law should recognize it……"

(註 七) Mercein v. The People ex rel. Barry, 25 Wend. 64, 89 (N.Y. 1840).

(註 八) Mercein v. The People ex rel. Barry, 25 Wend. 64, 105-06 (N.Y. 1840). The Court stated that despite the man's traditional right to custody, the child in question would be placed with the mother because of the child's "tender age," that it, twenty-one months.

(註 九) Wells v. Wells, 117 S. W.2d 700, 704 (Mo. Ct. App. 1938). The court quoted the holding of Ellis v. Johnson, 260 S.W. 1010, 1012 (Mo. Ct. App. 1926) as follows:
The child is of tendyer years, being but eight years of age, and it is well known by all men that no other love is quite so tender, no other solicitude quite so deep, no other devotion quite so enduring as that of a mother. Generally, the love, solicitude, and devotion of a mother cannot be replaced by another, and is worth more to a child of tender years than all other things combined and it should not be deprived of the necessary and wholesome influences which spring from these characteristics of a mother if it can reasonably be avoided.

(註一〇) Wells v. Wells, 117 S.W.2d 700, 704 (Mo. Ct. App. 1938).

About the 1930s, most courts or state legislation had adopted the rule of a presumption in favor of the mother. For example, in 1933, the Supreme Court of Oregon held that, "Generally, custody of a child of tender years should be awarded to the mother thereof, unless she is grossly immoral or subjects the child to abuse or gross neglect, if she is at least a fairly good parent in other respects,"[12] The Oregon Supreme Court in Sachs v. Sachs also noted that "improvement in divorced husband's physical and financial condition and wife's remarriage to sober, industrious and capable business man of good family after entry of divorce decree held not to justify modification thereof as to custody of minor child awarded wife."[13] The Kentucky appellate court, in 1942, further mentioned that "In determining who shall have custody of a child of divorced parents, the coruts recognize that the well being of the young child requires that he be kept and controlled by his mother, notwithstanding that a normal father is as devoted to his child as is a normal mother."[14]

The Louisiana Supreme Court, in 1944, declared that "the right of a divorced mother to curstody of her minor child is paramount to that of the father, unless the trial judge, in his discretion, concludes it is for the greater advantage of the child that he or she be entrusted to the care of its father, which conclusion is subject to review by the Supreme Court."[15] The Louisiana Supreme Court further stated that " The court has consistently awarded the custody of a minor child to the mother

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(註一一) Abel v. Ingram, 24 S.W.2d 1048, 1050 (Mo. Ct. App. 1930). The Missouri Appellate Court held that the "mother will be given custody of child of tenday years as against father if all else be equal."

(註一二) Sachs v. Sachs, 25 P.2d 159, 161 (Or. 1933). Additionally, Minnesota in 1934 could talk about child custody as a right of the mother: "If a divorced mother is a fit and proper person and is able to and does properly care for bear young child, she is entitled to its custody." Alabama, in 1944, provides another example of the presumptive superiority of maternal love for young children: "The mother, rather than father, of divorced parties" minor child of such tender age as to require care and attention which mother is especially fitted to bestow thereon, is the proper custodian of the child, unless the mother is unfit for such trust." See Jay Einhorn, *Child Custody in Historical Perspective: A Study of Changing Social Perceptions of Divorec and Child Custody in Anglo-American Law*, 4 BEHAVIORAL SCIENCE & THE LAW 119, 129-130 (1986).

(註一三) Sachs v. Sach, 25 P.2d 159, 161 (Or. 1933).

(註一四) Davis v. Davis, 159 S.W.2d 999, 1001. (Ky. Ct. App. 1942).

(註一五) White v. Broussard, 18 So.2d 641, 642 (La. 1944).

unless she is found to be morally unfit or unless, as has been the occasion in very exceptional cases, the mother is incapable of taking care of the child."[16] A New Jersey court, in 1958, wrote that "the courts, in recognition of an inexorable natural force, customarily award the custody of a child of tender years to its mother unless she is so physically or normally deficient that its welfare would not be served by doing so."[17]

Under the "tender years" doctrine, the courts seemed to have established a variety of opinions when considering the age of the child. For example, the New York Courts of Errors in the 1840 Mercein case noted that "the infant was under three years of age; was delicate and sickly, requiring peculiarly a mother's care and attention……"[18] The Missouri Appellant court in Ellis v. Johnson stated that "the child is of tender years, being but eight years of age……"[19] In the Abel case, another Missouri appellant court held that a five-year-old child was of tender years and in need of the tender love and affection of a mother.[20] In the Wells case, a Missouri appellant court said that a twelve-year-old child was of tender years.[21] Also the Supreme Court of Louisiana in the White case pointed out that a eleven-year-old child was a child of tender years.[22] Ths West Virginia Supreme Court in Garska v. McCoy declared that "Obviously an infant in the suckling stage is of tender years, while an adolescent fourteen years of age or older is not, as he has an absolute right to nominate his own guardian."[23] In sum, courts' definitions of the concept of "child of ten-

(註一六) White v. Broussard, 18 So.2d 641, 642-645 (La. 1944). While examining the fitness of the mother, Justice Fournet argued that evidence showed that mother's departure from the matrimonial domicile was caused solely by the treatment accorded her by her husband, culminating in the severe beating administered to her. The court further asserted that mother was of good character and was earning an average of $23 weekly, and her lover for child was attested by all witnesses.

(註一七) Wojnarowicz v. Wojnarowicz, 137 A.2d 618, 619 (N.J. Super. Ct. 1958).

(註一八) Mercien v. The People ex rel. Barry, 25 Wend. 64, 105 (N.Y. 1840). At Page 103 the Court listed out the civil code of Austria, where husband and wife are separated, and cannot agree which shall have the charge of the education of the children, the mother has the custody of males, until they arrive at the full age of four years, and of males, until the full age of seven years.

(註一九) Ellis v. Johnson, 260 S.W. 1010, 1012 (Mo. App. Ct. 1926).

(註二〇) Abel v. Ingram, 24 S.W.2d 1048, 1050 (Mo. App. Ct. 1930).

(註二一) Wells v. Wells, 117 S.W.2d 700, 705 (Mo. App. Ct. 1938).

(註二二) White v. Broussard, 18 So.2d 641, 642 (La 1944).

der years" has been somewhat elastic and inconclusive.

As there were more divorces throughout the 1970s, and more psychologists declared that the quality of the relationship with each parent is vitally important for the children, courts in child custody cases became increasingly concerned about the nature of men, women, and children. In 1973 Judge Sybil Hart Kooper in State ex rel. Watts v. Watts criticized the tender years presumption by holding that any presumption that the mother should have custody of children of tender years would deprive the father of "his right to equal protection of the law under Fourteenth Amendment to the United States Constitution."[24] Judge Kooper argued that "studies of maternal deprivation have shown that the essential experience for the child is that of mothering-the warmth, consistency and continuity of the relationship rather then the sex of the individual who is performing the mothering function."[25] A National Conference Commissioner's note on the Uniform Marriage and Divorce Act in 1970 enjoined judges to adopt the tender years doctrine because "it is simply a short hand method of expressing the best interest of children."[26]

However, the preference for mothers persisted as the dominant rule into the 1970s. For example, the West Virginia Supreme Court in J.B. v. A.B., a 1978 case, still estabished a strong maternal presumption with regard to children of tender

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(註二三) Garska v. McCoy, 278 S.E.2d 357, 363 (W.Va. 1981).

(註二四) State ex rel. Watts, 350 N.Y.S.2d 285, 290 (N.Y. Fam. Ct. 1973). In addition, the court commented at page 287 as that "the tender years presumption is actually a blanket judicial finding of fact, a statement by a court that, until proven otherwise by the weight of substantial evidence, mothers are always better suited to care for young children than father."

(註二五) See State ex rel. Watts, 350 N.Y.S.2d 285, 290 (N.Y. Fam. Ct. 1973). The court listed two studies which supported its opinion. Such as, R. A. Spitz and Katherine Wolf, *Anaclitic Depression, Psychoanalytic Study of the Child* 313-342 (1946); Leon J. Yarrow, *Maternal Deprivation: Toward an Empirical and Conceptual Reevaluation,* PSYCHOLOGICAL BULLETIN 58 (1961). The court explained that rules of law should not treat people differently on the basis of sexual stereotypes. Also legislative classifications may take account of need or ability, but "not be premised on unalterable sex characteristics that bear no necessary relationship to the individual's need, ability or life situation."

(註二六) Uniform Marriage and Divorce Act, 9A U.L.A. §402, Commissioner's Note at 198 (Master ed. 1979); quoted by JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE 224 (1986).

years. The court stated that "The Court must determine in the first instance whether the mother is a fit parent, and whether the mother achieves the minimum objective standard of behavior which qualifies her as a fit parent, the trial court must award the child to the mother."[27] Figures from the National Center of Health Statistics, for the years 1970 through 1976, indicate that the percentage of American fathers keeping custody of their children under eighteen remained just over one percent of all family living arrangements.[28]

Arguments against the "tender years" doctrine pointed out that the "tender years" presumption tends to reinforce women's social role as housewife and mother.[29] It also reinforces women's dependency on their husbands for support. Under the prevailing value that the mother is more important than the father in a child's development, however, women often feel that the mother without custody declares themselves as immoral and unfit parents.[30] To avoid that social stigma the mother usually fights with father for the custody of the child eved thought she does not want it.

(註二七) See J.B. v. A.B., 242 S.E.2d 248, 249 (W.Va. 1978).

(註二八) MELVIN ROMAN AND WILLIAM HADDED, THE DISPOSABLE PARENT 119 (1978). Also see LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMAN AND CHILDREN 222 (1985).

(註二九) Margaret Mead, *Some Theoretical Considerations of the Problems of Mother-Child Separation*, 24 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 24 (1954). The concepe of mother-child's continuing relationship was commented as "a mere and subtle form of anti-feminism which men are tying women more tightly to their children than has been thought necessary since the invention of bottle feeding and baby carriages." Also see Andre P. Derdeyn, *Child Custody Contests in Historical Perspective*, 133(12) AMERICAN JUORNAL OF PSYCHIATRY 1369, 1373 (1976). Howard Dubowitz, Carolyn M. Newberger, Lord H. Melnicoe, and Eli H. Newberger, *The Changing American Family*, 35(6) THE PEDIATRIC CLINICS OF NORTH AMERICA 1291, 1305 (1988).

(註三〇) Some remarkable researches regarding the myth of mother's love and women's rights in the evolution of child custody laws could be found in Daniel A. Calvin, *Joint Custody: As Family and Social Policy*, in CHILDREN OF SEPARATION AND DIVORCE 99, 108-109 (Stuart, I. and Abt, L. eds. Van Nostrand Reinhold 1981); Sheila F. G. Schwartz, *Toward a Presumption of Joint Custody*, XVIII(2) FAMILY LAW QUARTERLY 225, 233 (Summer/1984); Katharine T. Bartlett and Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKERLEY WOMEN'S LAW JOURNAL 9, 16-17 (1986).

Further, the judicial preference may coerce women to accept custody even if they do not wish to do so.[31]

At the end of the 1960s. the feminist movement began to articulate the dissatisfaction of many women with their social role as housewife and mother. Fathers started to assert their equal rights to custody. They challenged the tender years doctrine which had given women supremacy regarding custody in the courtroom. In addition, by the 1980s, with almost half of all marriages ending in divorce and more than a third of all children living in a divorced family, psychologists, social workers, and family therapists emphasized the importance of the father in the child's development, [32] A substantial majority of states, by case law or by statute, had diminished the maternal preference.[33] A statistical study showed that fifty-one percent of all cases gave custody to the father and only forty-nine of cases gave custody to the mother in the years of 1982 and 1983.[34]

(註三一) Lenore J. Weitzman and Ruth Dixon, *child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation after Divorce,* 12 UNIVERSITY OF CALIFORNIA AT DAVIS LAW REVIEW 471, 478 (1979).

(註三二) Some authors asserted that removing the father from a child's life had two consequences. One was that a very large number of children would grow up without knowing their father for much of their childhood, because more than half of all fathers of divorced children almost never saw their children. The other was that fathers by the thousands, feeling deprived of the companionship of their children, might refuse to pay child support. With divorce becoming the norm, the failrue of fathers to pay created a national scandal. Melissa M. Myer, Shelley J. Gaylord, and Elizaberth, T. Grove, *The Legal Ccontext of Child Custody Evaluations,* in MOTHER AND DIVORCE-PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS; KNOWLEDGE, ROLES, AND EXPERTS 3, 27-29 (Cois A. Weithorn ed. University of Nebraska Press 1987).

(註三三) JEFT ATKISON, MODERN CHILD CUSTODY PRACTICE 224-225 (1986). Scholar Atkinson said that "such as, Ababama, Florida, Louisiana, Mississippi, Utah, Virginia, Maryland, Michigan, Missouri, New Mexico, Rhode Island, South Carolina, Vermont, and Washington."

(註三四) JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE 224-226 (1986). Mother and fathers received custody with approximately equal frequency in both initial custody deteminations and modification proceedings. The statistical result seemed reflecting courts' attitudes toward equal rights for father and mothers.

SECTION III BEST INTEREST OF THE CHILD.

In general, parental rights have dominated decision making in awarding custody. For centuries the child as property belonged to the father. Then the mother was deemed the proper natural custodian. Gradually it was redognized that society's best interests were served by focusing on the child and the needs of the child. As law placed more emplasis on the child's well being, the "best interests of the child" became the guiding light in awardind custody.[35] In other words, the courts seemed to shift their focus from the issue of who had the right to custody to what kind of custody award would serve the best interests of the child.

The right of the child in Anglo-American law gradually evolved in the late 1700s. In 1763, Lord Mansfield in Rex v. Francis Blake Delaval held that upon issuance of a writ of habeas corpus, courts could set an infant free from improper restraint. The courts were not bound to deliver the child to anyone in particular.[36] Under the Delaval principle, when the writ of habeas corpus was obeyed, and the party brought up was capable of using discretion, the individual who had been under the restraint was declared at liberty. But, where the child was too young to have a choice, the court had to refer to legal principles to see who was entitled to the custody. Eventhough this doctrine appeared to respect the will of the children who

(註三五) In 1963, the Family Law Section of the American Bar Association stated that " custody shall be awarded……according to the best interests of the child." The revised Uniform Marriage and Divorce Act, written as a model for state legislation, stipulates that the court "shall determine custody in accordance with the best interests of the child." See JOSEPH GOLDSTEIN, ANNA FREUD, AND ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 37-38, (1973); Elissa Benedek and Benedek, R., *New Child Custody Laws: Making Them Do What They Say,* 42 AMERICAN JOURANL OF ORHTOPSYCHIATYR 826 (1972).

(註三六) Rex v. Sir Francis Blake Delaval, 97 Eng. Rge. 913 (K.B. 1763); quoted in The King v. Greenhill, 4 AD. & E. 624, 631 (K.B. 1836). In the Delaval case, Lord Mansfield stated the law to be, that, "the Court is bound, ex debito justitia, to set the infant free from an improper restraint; but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." Also see Julie A. Stiles, *Nineteenth Century Custody: Maternal Authority and the Development of the "Best Interest of the Child" Standard,* 6 PROBATE LAW JOURNAL 5, 8 (1984).

were old enough to exercise theri discretion, it was of little aid if the children were too young to choose their custodian.

In 1824, Justice Story in United States v. Green noted that the court had to consider all the circumstances while judging a custody dispute by stating that "the court will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavor, as far as possible, to administer a conscientious, parental duty with reference to its welfare."[37]

In 1836, New York enacted a custody statute which authorized an application for the writ of habeas corpus by a woman who had separated from her husband, and recognized the courts' discretionary power to decide what was "necessary and proper" for the child in divorce or separation cases.[38] While asserting the state's interests in custody cases, the New York Court of Errors in Mercein v. People ex. rel. Barry argued that "The moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to the protection of that government. And such government is obligated by its duty of protection, to consult the welfare, comfort and interests of such child in regulating its custody……"[39] Further-

(註三七) United States v. Green, 26 F. Cas. 30, 31-32 (RL. 1834)

(註三八) The N.Y. REV. STAT. ch. 8, tit. II, §§1-2, tit. I, §57 (1836) were as follows:

§1. When any husband and wife shall live in a state of separation, without being divorced, and shall have minor child of the marriage, the wife, if she be an inhabitant of this state, may apply to the supreme court for a writ of habeas corpus, to have such minor child brought before it. §2. On the return of such writ, the court on due consideration, may award the charge and custody of the child, so brought before it, to the mother, for such time, under such regulations and restictions, and with such provisions and directions, as the case may require.

Title I, 57. In any suit brought by a married woman for a divorce, or for a separation from her husband, the court in which the same shall be pending, may, suing the tendency of the cause, or at its final hearing, or afterwards, as occasion may require, make such order as between the parties, for the custody, care and education of the children of the children of the marriage, as may seen necessary and proper, and may at any time thereafter, annul, very or modify such order.

See Julie A. Stiles, *Nineteenth Century Child Custody: Maternal Authority and the Development of the "Best Interest of the Child" Standard,* 6 PROBATE LAW JOURNAL 5, 13-14 (1984).

more, the court acknowledged that parental rights must yield to the child's interest by concluding that child custody "is referable to the child's interest and welfare, and is to be selected by the court in the exercise of a sound judicial discretion, irrespective of the claims of either parent."[40]

By 1859, at least one state-Kansas-had constutionally provided that the mother and father had equal rights to the custody of their children.[41] In the same year, the Missouri Supreme Court in Lusk v. Lusk reversed a father's right to custody by holding that "the leading principle is to consult the good of the children rather than the gratification of the parents."[42] In 1881, Chief Justice Brewer of the Kansas Supreme Court in Chapsky v. Wood ordered that a five year old girl remain with the maternal grandmother by whom she had been raised rather than being placed in the custody of her father. He declared that "the father had the natural right to custody but that the paramount consideration was the welfare and interest of the child."[43]

(註三九) Mercein v. The People ex rel. Barry, 25 Wend. 64, 103 (N.Y. 1840). Monumentally, the Court of Errors defined the relarionships among the child, mother, and father as that "By the law of nature, the wife and child are equal to the husband and father, but inferior and subject to their sovereign…… There is no parental authority independent of the supreme power of the state. But the former is derived altogether from the latter, In the civil state there is no inequality between the father and mother."

(註四〇) Mercein v. The People ex rel. Barry, 25 Wend, 64, 105 (1840).

(註四一) Kan. Const. art. 15 §6 (Ky. 1859). See Allen Roth, *Tender Years Presumption in Child Custody Disputes*, 15 JOURNAL OF FAMILY LAW 423, 429 (1976-77); Laurance M. Hyde and Fort Lauderdale, *Child Custody in Divorce*, JUVENILE AND FAMILY COURT JOURNAL 1, 3 (Spring/1984).

(註四二) Luck v. Luck, 28 Mo. 91, 93 (Mo. 1859); which was quoted by Justice Cox in Abel v. Ingram, 24 S.W.2d 1048, 1049 (Mo. Ct. App. 1930).

(註四三) Chapsky v. Wood, 26 Kan 650, 652 (Kan 1881). See Perrenoud v. Perrenoud, 480 P. 2d 749, 762 (Kan. 1971), in which the Kansas Suqreme Court reviewed the Chapsky case as an early and important rule for the judgment on child custody by stating that:

Without question, the paramount concen of courts in child custody proceedings is the welfare of the child. Beginning with the early cases written by Mr. Justice Brewer [including] ……Chapsky v. Wood……this court has consistently adhered to the rule that when a controversy arises as to the custody of a minor child, the primary qrestion to be determined by the court is what is for the best interest of the child.

By the turn of the centruy, as indicated earlier, the maternal preference was recognized as meeting the best interests of the child and women increasingly were given custody of their children. With the rise of the Industrial Revolution, the new economy divided the male world of wage labor from the female domestic world. In addition, the concept of childhood changed from the Victorian emphasis on the child' s need for discipline and moral guidance to the modern emphasis on the child's need for love and affection.

This concept was reaffirmed by Justice Cardozo in 1925. He wrote that in a custody case the court "does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts parens patriae to do what is best for the interests of the child. He is to put himself in the position of a wise, affectionate, and careful parent."[44] It seemed that Justice Cardozo wanted to shift the focus from the desires of the embattled parents to the welfare of the child. In 1933, Justice Campbell in Sachs v. Sachs emphasized that the child in custody "is not a chattel like pigs, chickens, or furniture, to be divided between the divorce litigants on the basis of monetary value; neither is its custody to be made the vehicle for a continuation of their antagonisms and resentments toward each other." Similarly the court in Davis v. Davis, a 1942 case, held that "the true guide for the court in determining who shall have custody of child of divorced parents is the welfare of the child and the dominant thought is that a child is not a chattel to be disposed of according to the wishes of either or both of his parents but is a human being and personality and is to be treated as such."[45]

Even before the 1970s there were a few cases which purported to treat the parents equally.[46] However, under the shadow of "best interests of the child," most courts seemed to limit the mechanical rule to the custody of children who were too young to formulate an opinion concerning their own custody and, further, the courts

(註四四) Finlay v. Finlay, 148 NE 624 (N.Y. Ct. App. 1925).

(註四五) Davis v. Davis, 159 S.W.2d 999, 1001 (Ky. Ct. App. 1942).

(註四六) See Well v. Well, 117 S.W.2d 700, 704 (Mo. Ct. App. 1938); in which the court noted down R.S. 1929, Mo. St. Ann. §1364, p.1580 as follows:

In all proceeding for divorce in which shall be involved the right to the custody of the children,……the rights of the parents shall be equal, and neither parent as such shall have any right paramount to that of the other parent, but in each case the court shall decide only as the best interests of the child inself may seem to require.

limited it to cases where an initial determination had been made that the mother was a fit parent. Around the 1970s social norms were once again changing.[47] Normatively, in 1973, the Uniform Marriage and Divorce Act set a national guideline for the court in determining the best interests of the child.

Compared with judicial evolution of some other countries, America might be the leading country which not only upheld the importance of the "best interests of the child" but also specified and reformed the criteria of "best interests of the child." For example, 1975 French Divorce Reform Law indefinably introduced that the sole criterion in custody decisions was the best interests of the child.[48] In Norway, it was not until the 1982 Children / Parent Act that removed the preference given to the mother for deciding custody conflicts.[49] In the East, like Taiwan, it was the article

(註四七) Around 1970s, Judges noted that mothers increasingly took jobs. Mothers were at home less to care for their children. The feminist movement challenged the presumption that only women could do housework and rear children. Feminist ideas encouraged men to contribute to household work. An increasing number of fathers began to take a more active role at home. In addition, the philosophy of the gender equality movement on child custody legislation might be well illustrated by a 1977 Norway Committee on Children and Parent Act. The Committee stated that " There was a general wish to involve men more in the child care work,…… The demand for equality was a demand to improve the position of women, and raising her from her historic oppression. If men's position with regard to custody wsa to be improved, they must first do something to deserve it."

(註四八) Irene Thery, *The Interest of the Child' and the Regulation of the Post-Divore Family, in* CHILD CUSTODY AND THE POLITICS OF GENDER 78, 81-82 (Carol Smart and Selma Sevenhuijsen eds. Routledge 1989).

(註四九) see Kirsten Sandberg, *Best Interests and Justice, in* CHILD CUSTODY AND THE POLITICS OF GENDER 100, 101-103 (Carol Smart and Selma sevehuijsen eds. Routledge 1989). The legislators gave a few guiding principles as to the best imterests of the child. The main one was the importance that should be attached to who has the strongest emotional contact with, and has had the actual care of, the child. Also the legislation noted the situation as that fathers increasingly took part in the daily care of the child from the birth onwards. In addition, several factors also had to considered, such as, the risk that goes with moving the child; the gender and age of the child; the contact between child and each of the parents; the child's own wishes; the likelihood that the contact with both parents and all siblings will be kept up; and the housing conditions. It was also mentioned that court tended to give great weight to the views of the court-appointed expert. The legislators emphasized that each case must be decided on its own merits and that the weight of the different factors will vary from case to case. In addition, according to Cumes,

1055 of 1984 Civil Code declaring the court's discretion of appointing the custodian for the child under the best intetrests of the child.[50] However, in 1989, article III of the United Nations Convention on the right of the Child in 1989 internationally recognized the importance of the "best interests of the child" by stating that "Whether an action is undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best intetrests of the child shall be a primary consideration."[51]

Under Section 402 of the 1973 Uniform Marriage and Divorce Act in the United States, the court were directed to consider all relevant factors including:

> the wishes of the child's parent or parents as to his custody; the wishes of the child as to his custodian; the interaction and interrelationship of

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j. and Lambiase, E., *Legal and Psychological Criteria for the Determination of Custody in South Africa: Review,* 17(4) THE SOUTH AFRICAN JOURNA OF PSYCHOLOGY 119 (1987), the authors still recognized that the importance of an ongoing relationship between the mother and children who are still extremely young, particularly in the case of young girls as one of the factors of the best interests of the child. However, the other points are including that: tht child's cultural and religious environment; the importance of the custodial parent being able to support the child and provide him with a home; the morality of the custodial parent, (values and belief systems); the value of an adequate support-system, (family, friends, interests and activities); the importance of not subjecting the child to unnecessary moves; the importance of a loving environment; the importance of not separating saiblings; the importance of not undermining the image a child has of either one or both parents; the importance of a child knowing that there is only one parent who is responsible for the administration of its day to day activities; the importance of considering the wishes of the older child; the importance of effective discipline; the importance of the parent taking easily to advice and not frustrating access.

(註五〇) In Taiwan, even though the article 7 of Constitution claims that "All citizens, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law," yet, article 1051 and 1055 of the Civil Code still possess gender-biased norms in deciding child custody. They are as follows:

Article 1051: After divorce by mutual consent, the guardianship of the children rests with the husband; but where it has been otherwise agreed upon, such agreement shall be followed.

Article 1055: In the case of a divorce by judicial decree, the provisions of Article 1051 shall apply in regard to guardianship of the children. But the Court may, in the interest of the children, appoint a guardian.

(註五一) UNITED NATION CONVENTION ON THE RIGHTS OF THE CHILD IN 1989, ARTICLE 3.

the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; the child's adjustment to his home, school, and community; and the mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect this relationship to the child.[52]

The wishes of the parents are obviously important in child placement, as are the wishes of the child. Generally the court takes the child's expressed preference as a serious consideration. But, a child's espressed wishes are not determinative or controlling of best interest.[53] The court has established several factors to consider in weighing the child's custodial preference. It often depends upon the age and maturity of the child, the reason for the preference, a comparison of preferences between siblings; the hostility of the child to the non-preferred parent.[54] Sometimes it is very difficult for the court to determine what the "true preferences" of the child is. While children's preferences may be "induced, coaxed, or influenced" by parents,[55] or powered by loyalty or sympathy to the parent who has been identified by the child as the victim of the disputed marriage, the court would investigate with the support from the testimony of psychologist, school teachers, and other professional reports.[56]

(註五二) UNIFORM MARRIAGE AND DIVORCE ACT §402, 9A U.L.A. (Master ed. 1979).

(註五三) For example, Salk v. Salk, 393 N.Y.S.2D 841, 843 (N.Y. Sup. Term. 1975); In re Marriage of Rolfe, 699 P.2d 79, 89 (Mont. 1985); Marriage of Merriman, 807 P.2d, 1354, 1355 (Mont. 1991).

(註五四) Hansen v. Hansen, 327 N.W.2d 47, 49 (S.D. 1982); in which the Supreme court of South Dakota asserted that "Courts have relied on children's preferences in granting custody where they were found to be brig, communicative, understanding, and mature for their age, and the decision was well-reasoned……" Also see Roberts v. Vitos, 776 P.2d 216, 219 (Wyo. 1989); In re Marriage of Merriman, 807 P.2d 1351, 1354 (Mont. 1991); In re Marriage of Ulland, 823 P.2d 864, 869 (Mont. 1991); Fox v. Fox, 582 N.Y.S.2d 863, 865 (N.Y. 1992); Love v. Love, 851 P.2d 1283, 1286 (Wyo. 1993).

(註五五) Salk v. Salk , 393 N.Y.S.2d 841, 843 (N.Y. Sup. Term. 1975). Earlier in Well v. Well 117 S.W.2d 700, 701 (Mo. Ct. App. 1938), the court observed that "The preference of a twelve year old girl to be in the custody of father, was not to be used as a guide in determining to which of parents her custody slould be awarded, where father had pampered child and had from time to time attempted to embitter child against mother."

However, some family therapists or mediators suggest that adolescent children should be allowed to make choices concerning their custody arrangement.[57] Also some judges preferred to discuss custody issues with a child over seven. It seems that children under age seven would be too young to be knowledgeable.[58]

The child's relationship to each member of the family usually includes consideration of the child's age, sex, and existing emotional ties. In recent case, court in In re Marriage of Philips was concerned with an incident wherein a mother attempted to conceal the presence of a male visitor at the marital residence and this did upset one of her children and affected the mother's relationship with that child.[59] The issue of domestic violence also has been viewed as a negative factor in the relationships among the family members. A few jurisdictions have added statutory sections suggesting specific consideration of the potential for violence or threat of violence by the parent.[60] For example, the Montana Supreme Court in In re Marriage of Bolt found that the father had a history of violence when using alcohol and the children were afraid of him when he was drinking.[61] Another court, in A.F. v. N.F., asserted that the best interests of the child would not be served because the "ex-husband had acted violently towards ex-wife in presence of child, and ex-husband's habit of touching child's genital area may create confusion in child about her body and appropriate sexual behavior." [62]

(註五六) Fox v. Fox, 582 N.Y.S.2d 863, 865 (N.Y. App. Div. 1992); in which the court noted that "the trial court acted without the behefit of an investigative report and without the testimony of teachers, counselors, psychologists or other experts."

(註五七) Based on the comments by some helping professionals in East New Orlenad and Jefferson Parishes.

(註五八) Based on the response by interviewing two New Orleans civil courts judges, judge Shaws and Johns.

(註五九) In re Marriage of Philips, 615 N.E.2d 1165, 1171 (III. App. Div. 1993). The court also considered the incident as the fact that reflected on mother's credibility and intent to deceive.

(註六〇) For example, III. Rev, Stat. 1991 ch. 40, par. 602(a)(6); which declared that "the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person." Mont. Code. Ann. Section 40-4-212(f) alsp stated that "physical abuse or threat of physical abuse by one parent against the other parent or the child."

(註六一) In re Marriage of Bolt, 854 P.2d 322, 324 (Mont. 1993).

(註六二) A.F. v. N.F., 549 N.Y.S.2d 511, 512 (N.Y. App. Div. 1993).

Several factors relate to the child's existing adjustment within environments such as the school, peer, or relatives contexts. The court in In re Marriage of Lee found that "since the child has recently lost his sister, and since he has seen his parents fight through a hotly contested dissolution, he needs some love and attention at this time and does not need to be sent away from his parents to a private boarding school."[63] The court thus held that custody of the child could be awarded to the mother because the father intended to send the child to boarding school. To protect the best interests of the minor child, the courts usually focus on the importance for the child to remain in a stable and continuous environment.[64] However, in this highly mobile society, some concern has arisen when the custodial parent seeks to remove child to another state, or country. In general, the court would review two issues; whether there is good reason for the move, and whether the move is in the child's best interest.[65] For example, a move based on economic necessity is proper for the best interests of the child.[66] But a mere desire to move, or even to impair the

(註六三) In re Marriage of Lee, 615 N.E.2d 1314, 1324 (Ill. App. Div. 1993).

(註六四) Flanders v. Gabriel, 429 S.E.2d 611, 613 (N.C.Ct. App. 1993); in which the court concluded that "Wife and her present husband offered a stable and continuous environment to child; child had resided with his mother since parties separated four years previously, and had developed routine, and would be best served if routine was not disrupted."

(註六五) In re Marriage of Rosson, 224 Cal.Rptr. 250, 251 (Cal Ct. App. 1986); in which the court stated that "Evidence that former wife with whom children resided planned to move from community in which children had lived virtually all of their lives…… children's academic, athletic, social, and religious activities, all of which were centered in community, was sufficient to support trial court's modification of custody order providing that children's primary physical residence was with wife to provide that children would remain with husband when wife moved from community." Also see Stewart v. Stewart, 525 So.2d 218, 220 (La. Ct. App. 1988); Hertzsk v. Hertzsk, 616 So.2d 727, 729 (La. Ct. App. 1993).

(註六六) In re Marriage of Eckert, 518 N.E.2d 1040, 1045-1046 (Ill. 1988); in which the Supreme Court of Illinois stated several factors which may aid a court in determining the best intersts of the child as that "the proposed move in terms of likelihood for enhancing the general quality of life for both the custodial parent and the children; the motives of the custodial parent in seeking the move to detemine whether the removal is merely a ruse intended to defeat or frustrate visitation; the motives of the noncustodial parent in resisting the removal;……whether a realistic and reasonable visitation schedule can be reached if the move is allowed." Also see In re Marriage of Berk, 574 N.E.2d 1364, 1368 (Ill. Ct. App. 1991); In re Marriage of Deckard, 615 N.E.2d 1327, 1330-1331 (Ill. Ct. App. 1993).

other parent's right to visitation is insufficient to show that the move is in their best interests of the child.[67]

A parent's physical and emotional condition is considered relevant. The few cases involving parents with physical handicaps have held that a condition such as epilepsy, for example, should not be overemphasized in a determination. Paralysis has been held not to render a parent automatically unfit, but it was a basis for examination of the adjustment of the whole family. The emotional health of the parent is to be considered, although a clear definition of stability is lacking. For examply, evidence of suicide attempts and repeated hospitalization has been used to suggest instability.[68]

Althought the court shall not consider conduct of a proposed custodian that does not affect the relationship to the child, in making the custody decision the judge is free to consider almost any factor she or he deems to affect the child, Thus such factors as the parent's sexual behavior, life-style, community standing, or religious practice may be taken into account by a judge who finds them important to the custody decision.[69] For example, the court in In re Marriage of Harris found that " mother's alcohol abuse had directly affected her children, as they had to stay with relatives while their mother spent seven days in jail for operating while intoxicated (OWI) and mother's driver's license had been revoked as result of her OWI." [70] In

(註六七) In re Marriage of Davis, 594 N.E.2d 734, 740 (Ill. Ct. App. 1992). Also see Hertzak v. Hartzsk, 616 So.2d 727, 730 (La. Ct. App. 1993).

(註六八) With the assistance of hospital records and, expets' testimony, the court carefully examines the evidence that supports the mental instability of the parents. The court in In the Matter of La Shonda B., 157 Cal. Rept. 285, 287 (Cal. Ct. App. 1979) held that "where minor's mother was involuntarily detained at a state mental hospital…… 【did not alone make a】 sufficient showing that the father was a parent capable of exercising proper and effective parental care." Also see In re Kelvin. M., 143 Cal. Rptr. 561 (Cal. Ct. App. 1978).

(註六九) For example. in Leger v. Leger, 520 So.2d 857, 859 (La. Ct. App. 1987), the court did not award the custody to mother not because mother was an unfit parent, but because of her relationship with her boyfriend, who was a known pedophile. In Reeves v. Reeves, 617 So.2d 278, 281 (Ala. Civ. App. 1992). the court awarded custody of the child to the father because that "father was a high-school graduate with a full-time job and planned to live with his mother, who would care for child while he was at work, whereas child's mother quit school in ninth grade, had no job, and at time of divorce hearing was pregnant and unsure of baby's partenity."

comparison with father's cohabitation behavior, the court in In re Marriage of Harris held that "mother's alcohol problems, her disregard for law, and her lack or economic stability were far more serious threats to well-being of children."[71]

In general, marital misconduct does not necessarily render a parent unfit.[72] Moreover, a Louisiana appellate court in Rogers v. Rogers recognized the "reformation rule" providing that "when a parent terminates an adulterous relationship either by ceasing the immoral behavior or by marrying the paramour, that reformation obliterates that parent's prior indiscretion and can no longer be a factor in determining that parent's fitness for custody."[73] However, the dissenting Justice Henderson in Hanhart v. Hanhart found that "Mother not only committed adultery in this home, while Father worked, she also secretly discussed her relationship with the oldest girl."[74] Justice Henderson further asserted that the mother's adulterous relationship was obviously affecting "the children's development of what is right and wrong in this world."[75]

In judging the fitness of a homosexual parent, the courts are concerned with

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(註七〇) In re Marriage of Harris, 499 N.W.2d 329, 331 (Iowa Ct. App. 1993).

(註七一) In re Marriage of Harris, 499 N.W.2d 329, 331 (Iowa Ct. App. 1993). Also see Cooper v. Cooper, 579 So.2d 1159, 1163 (La. Ct. App. 1991), in which the court found that "wife's drug involvement had apparently continued and was actively and flagrantly conducted in presence of children," and held that "change in custody from wife to husband was in best interests of children, notwithstanding husband's previous history drug and alcohol abuse and his adulterous relationship with other woman."

(註七二) In Hearold v. Hearold, 620 So.2d 48, 50 (Ala. Civ. App. 1992), the court awarded custody of the child to the mother by asserting that "where acts of adultery that father contended mother had committed did not occur in presence of children and did not affect the children's welfare." Hanhart v. Hanhart, 501 N.W.2d 776, 778 (S. D. 1993); in which the Court found that even though mother committed adultery but the affair did not have any detrimental inpact on children.

(註七三) Rogers v. Rogers 577 So.2d 760, 764 (La. Ct. App. 1991).

(註七四) Hanhart v. Hanhart, 501 N.W.2d 776, 778 (S.D. 1993). The dissenting opinion also upheld the testimory of a child therapist as that "the conduct of the Mother, concerning her illicit relationship with the felon and the matters pertaining to the divorce, was very detrimental to the oldest girl and placed this young girl in the position of being a 'parentified child'.……this caused the young girl to take on an adult role, a role she was not equipped to handle."

(註七五) Hanhart v. Hanhart, 501 N.W.2d 776, 779 (S.D. 1993).

whether mere homosexuality alone renders a parent unfit, as well as situations involving the presence of a homosexual lover or other evidence of active homosexuality in the home which creates an environment which may not be in the best interests of the child.[76] For example, the court in Newsome v. Newsome stated that "the mother has in face been a good mother to the minor child……is a loving mother who cares for and is interested in the well-being of the said minor child."[77] Despite this finding, the decision went on to state that "the environment in which the minor child is now being raised is not conducive or beneficial to the raising of a minor child."[78] Conventionally, like the opinions of Missouri Court of Appeals in N.L.M. v. L.E.M., the court stated that "Allowing that homosexuality is a permissible lifestyle…… if voluntarily chosen, yet who would place child in a milieu where she may be inclined toward it? She may be condemned…… to sexual disorientation, to social ostracism, contempt and unhappiness."[79]

(註七六) See Doe v. Doe, 452 N.E.2d 293 (Mass. Ct. App. 1993), in which the court stated that "a parent's lifestyle must be evaluated in terms of the interpersonal relationships of the persons involved as they affect the well being of the child……" In Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985). The viginia supeme court recognized the father's homosexuality as a legitimate reason for losing custody of an eleven-year-old girl. The Virginia supreme court found that no conditions or precautions could remove the unfitness caused by the father's homosexuality. The court found that " The conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemntion attached them……The father's unfitness if manifested by his willingness to impose this burden upon her in exchange for his own gratification."

(註七七) Newsome v. Newsome, 256, S.E.2d 849, 853 (N.C. Ct. App. 1979).

(註七八) Newsome v. Newsome, 256, S.E.2d 849, 853 (N.C. Ct. App. 1979). In general, while judging the fitness of a homosexual parent, courts are often concerned about the presumed mental instability of the homesexual parent and the presumed adverse impact upon the development of the child. By contrast, the court in M.P. v. M.P., 404 A.2d 1256, 1259 (N.J. Super. Ct. 1979) held that the mother was permitted to retain custody provided that she "not share her lover's company" at any time when the children were present. Also see Woodruff V. Woodruff, 260 S.E.2d 775, 777 (N.C. Ct. App. 1979).

(註七九) N.K.M. v. L.E.M., 606 S.W.2d 179, 181 (Mo. Ct. App. 1980). Empirically the result of one study was against the presumption that children raised by the children raised by the homosexual parents will be teased of ostracized. In the study, the daughters of lesbian mothers rated themselves more popular, both with other girls and with other boys in the neighborhood and at school, than did the daughters of heterosex-

One alternative rule was adopted in West Virginia in 1981. That state's supreme court imposed a limitation on the trial judge's discretion in applying the "best interests of the child" test by adopting a "primary caretaker rule."[80] In the contested custody matters, the court in Garska v. McCoy presumed that it is in the best interest of a child of tender years to be plance with the primary caretaker by holding as follows:

> In a divorcr proceeding where custody of a child of tender years is sought by both the mother and father, the court must determine in the first instance whether the primary caretaker is a fit parent, and where the primary caretaker achieves the minimun, objective standard of behavior which qualifies him or her as a fit parent, the trial court must award the child to the primary caretaker.[81]

The primary caretaker was defined as a parent who has provided most of the day-to-day attention to the physical needs of the child: such as, feeding, bathing, driving to school and to see friends, taking responsibility for the child's health needs, and contact with the child's friends and teachers.[82] It seemed that the state of West

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ual mothers. There were no differences between the two groups of sons' self-ratings of popularity with other boys and girls. see Robert G. Bagnall, Patrick C. Gallagher, and Joni L. Goldstein, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVEW 497, 526 (1984).

(註八〇) Garska v. McCoy. 278 S.E.2d 357 (W.Va. 1981).

(註八一) Garska v. McCoy. 278 S.E.2d 357 (W.Va. 1981). At pages 361-362, the court explained the rationale behind the presumption of "primary caretaker" as follows:
First, we are concerned to prevent the issue of custody from being used in an abusive way as a coerive weapon to affect the level of support payments and the outcome of other issues in the underling divorce proceeding.……Second, in the average divorce proceeding intelligent determination of relative degrees of fitness requires a precision of measurement which is not possible given the tools available to judges.……Third, there is an urgent need in contemporary divorce law for a legal structrue upon which a divorcing couple may rely in reaching a setttlement.

(註八二) Garska v. McCoy, 278 S.E.2d 357, 363 (W.Va. 1981); also see David M. v. Margreat M. 385 S.E.2d 912 (W.Va. 1989). The West Virginia Supreme Court listed a Variety of factors which defined the "primary caretaker." the court said that:
The "primary caretaker" is the parent who has taken primary resposibilty for, inter alia, the performance of the following caring and nurturing duties of a parent: (1)preparing and planning of meals; (2)bathing, rooming and dressing; (3)purchasing,

Virginia tried to eliminate the uncertainty of the custody disputing proceedings by establishing a presumption based on past conduct, and one that is free of sexual bias. In the Garska case, the court further noted that "the absolute presumption in favor of a fit primary caretaker parent applies only to children of tender years. Where a child is old enough to foumulate an opinion about his or her own custody the court is entitled to receive such opinion and accord it such weight as he feels appropriate."[83]

Some version of the primary-caretaker preference has been adopted by other state courts in determining the custody of the child. For example, a Louisiana appellate court in Carroll v. Carroll awarded sole custody of an infant child to the mother by reviewing the evidence that "Mother was the primary care giver during the brief two month period during which the parents remained together after the infant's birth ……mother fed, dressed, diapered and personally cared for the infant with little or no assistance from father."[84] An Iowa appellate court in In re Marriage of Riddle affirmed the trial court's finding that the best interests of child would be served by awarding physical custody to the father, since the father had become the primary caretaker for the child during the first five years of the child's life when the mother spent considerable time working at completing an academic degree.[85] In addition,

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cleaning, and care of clothes; (4)medical care, including nursing and trips to physicians; (5)arranging for social interaction among Peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6)arranging alternative care, i.e. baby-sitting, day-care, etc.; (7)putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8)disciplining, i.e. teaching general manners and toilet training; (9)education, i.e. religious, cultural, social, etc.; (10)teaching elementary skills, i.e., reading, writing and arithmetic.

(註八三) See Garska v. McCoy, 278 W.Va. S.E.2d 357, 363 (W.V. 1981). The Court argued that "While an adolescent fourteen years of age……has an absolute right under W. Va. Code, 44-10-4 【1923】 to nominate his own guardian. Where there is child under fourteen years of age, but sufficiently mature that he can intelligently express a voluntary preference for one parent even who is not the primary caretaker, the trial judge is entitled to conclude that the presumption in favor of the primary caretaker is rebutted."

(註八四) See Carroll v. Carroll, 577 So.2d 1140, 1145 (La. Ct. App. 1991).

(註八五) See In re Marriage of Riddle, 500 N.W.2d 718, 719 (Lowa Ct. App. 1993). The court recognized that father has done an excellent job as the primary care taker by the evidence that father, as a coach, takes the child to many of his practices and games. At trial, many witnesses testified to the close bond between father and the child.

under guidelines enacted by a joint committee of the Massachusetts Bar Association and the Massachusetts Psychiatric Society, children under the age of four in that state are supposed to be placed "with the person who has been primarily responsible for their rearing."[86]

"Primary caretaker" rule might bring a clearer standard for the judge to follow; on the other hand, it might create another dilemma for the court in having to define a primare caretaker. In many marriages today, both parents contribute to the care of a child; how can a court say one is primary caretaker? The Supreme Court of Appeals of West Virginia in Loudermilk v. Loudermilk affirmed the trial court's findings that "there was no single primary caretaker parent in family, that parenting duties were shared, and that both parents were fit custodians,"[87] and the court awarded legal custody to the father with very liberal visitation rights to mother.[88] Under the paramount concern with the best interests of the child, an Oregon Court of Appeals in Spurgeon and Spurgeon awarded custody to the mother, even though father had been the primary care giver for years, by stating that "Which parent is primary care giver to children is significant consideration in deciding custocy dispute; however, it is only one of a number of relevant considerations and is not itself dispositiove."[89] However, while examining which parent will do better raising a child, some courts tend to identify the primary caretaker as the child's primary psychological parent and parent with whom the child is emotionally attached ad award the primary caretaker child custody.[90]

(註八六) EDWARD M. GINSBURG. FAMILY LAW GUIDEBOOK: A HANDBOOK WITH FORMS 171 (1984); and see MARY ANN GLEDON, ABORTION AND DIVORCE IN WESTERN LAW 183 (1987).

(註八七) See Loudermilk v. Loudermilk, 397 S.E.2d 905, 906-07 (W.Va. 1990).

(註八八) Loudermilk v. Loudermilk, 397 S.E.2d 905, 906-07 (W.Va. 1990); the court stated that since both parents live in a small city and geographically close to one another, it is error to allow wife physical custody every other week of the year.

(註八九) Spurgeon and Spurgeon, 849 P.2d 1132, 1133 (Or. Ct. App. 1993). Also see Van Dyke and Van Dylce, 618 P.2d 465 (Or. Ct. App. 1980); Thompson v. Thompson, 797 P.2d 1077 (Or. Ct. App. 1990). The court in Spurgeon noted that "award of custody to mother was in best interests of children, ……mother adjusted her work obligations so that she would no longer be required to travel and could work out of home, both parents had strong emotional ties to children, father had some difficulties in his relationship with oldest child ……"

SECTION Ⅳ CONCLUSION

Since the standards of "best interest of the child" are so broad,[91] the greatest

(註九〇) As In re Marriage of Riddle, 500 N.W.2d 718, 720 (Iowa Ct. App. 1993), the court asserted that the mother, who was not awarded physical custody of the child, was not being punished for having assumed the traditional male duties of being the family breadweinner. The child's close relationship with father, who was identified as primary caretaker and primary psychological parent, would serve the long-term best interests of the child. also see In re Marriage of Oakes, 462 N.W.2d 730, 732 (Iowa Ct. App. 1990), and In re Marriage of Fennel, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992).

(註九一) In geneal, the statutory criteria to be considered in determining child custody are as follows: the age of the child-Alabama, Indiana, Maine, Texas, Virginia; the sex of the child- Alabama, Indiana; the safey and well-being of the child; including the child's health, safety, and welfare-Alabama, California, South Carolina, Utah; the moral character and prudence of the parents-Alabana, Florida, Michigan, North Dakota, Utah; the wishes of the child, the preference of the child, if the child is of sufficient age and capacity-Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Washington D.C., Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mesico, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia (A child of fourteen may select the parent with whom he or she desires to live.), Washington, Wisconsin, Wyoming, the capability and desire of each parent to meet the child's needs-Alaska, Florida, Louisiana, Maine, Michigan, Minnesota, North Dakota, Utah, Vermont, Wyoming; the physical, emotional, mental, religious, and social needs of the child-Alaska, Louisiana, Michigan, Minnesota, Nebraska, New Jersey, Vermont, Virginia; the love and affection between the child and each parent-Alaska, Florida, Louisiana, Michigan, North Dakota, Oregon, Virginia; the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity-Alaska, Florida, Louisiana, Maine, Michigan, Minnesota, North Dakota, Oregon; the desire and ability of each parent to allow an open and loving frequent relationship between the child and the other perent-Alaska, Arizona, California, Colorado, Florida, Kansas, Louisiana, Maine, Michigan, Missouri, Montana, Nevada, Pennsylvania, Utah, Vermont; the wishes of the parents- Arizona, Colorado, Delaware, DC., Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Missouri, Montana, Nevada, New Mexico, Ohio, Vermont, Washington, Wisconsin; the child's adjustment to his or her home, school, and community-Arizona, Colorado, Delaware, Washington DC., Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Montana, New Mexico, North Dakota, Ohio, Vermont, Wisconsin; the mental and physical health of the child and the parents-Arizona, Colorado, Delaware, Washington DC.,

Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Montana, New Mexico, North Dakota, Ohio, Wisconsin; the relationship between the child and the parents and any siblings, and other significant family members-Arizona, Colorado, Delaware, Idaho, Illinois, Indiana, Kansas, Kentuchy, Maine, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oregon, Vermont, Washington, Wisconsin; any evidence of spouse or child abuse (Any history of child abuse.)- Arizona, California, Colorado, Florida, Illinois, Maryland, Missouri, Montana, New Hampshire, North Dakota, Oregon, Texas, Washington, Wisconsin; all circumstances of the case, including the best intetest of the child and the health of the parents-Georgia, South Carolina; the nature and amount of contact with both parents; California, Virginia(the role each parent has played in the care of the child.); the cause for the dissolution of marriage if such causes are relevant to the best interests of the child-Connecticut; a need to promote continuity and stability in the life of the child-Idaho, Maine, Minnesota, Missouri; the distance between the potential residences-Louisiana; the parent's capacity and willingness to cooperate-Maine, Vermont, Washington; methods for dispute resolution-Maine; the effect on the child of one parent having sole arthority over his or her upbring-Maine; any other factors having a reasonable bearing on the child's upbringing-Maine; the child's cultrual background-Minnesota; the conduct of the proposed guardian only as it bears on his or her relationship with the child-Minnesota; both parents willingness and ability to perform parental obligations-Missouri; the intention of either parent to relocate his or her residence outside Missouri-Missouri; any chemical depencdency or abuse by a parent-Montana; the education of the child-New Hampshire; any findings or recommendations of a neutral mediator-New Hampshire, Ohio, Wisconsin; the religious faith of the parents and child-South Carolina; the best spiritual and other interests of the child-south Carolina; the quality of the child's relationship with the primary care provider, given the child's age and development-Vermont, West Virginia; whether the parents can agree on joint custody- Washington; the strength, nature, and stability of the child's relationship with each parent, including the parent's performance of daily parental functions-Washington (Prior Consideration); the history of participation of each parent in decision-making and child-rearing- Washington; any significant drug or alcohol abuse- Wisconsin; whether one parent is likely to unreasonably interfere with the child's relationship with the other parent-Wisconsin. A few special consideration can be found in the case laws. They are as follows: if the wife abandons the husband and the children are over seven years old the husband is granted custody if he is suitable- Alabama case law, marital misconduct that does not directly affect the parent's relationship with the child is not to be considered- Illinois; a presumption that the maximum involvement and cooperation of the parents is in the best interests of the child-Illinois; the court shall attempt to allow the child to live in the environment an community that are familiar to the child and will generally allow the use possession of the family home by the person with custody of the children-Maryland; the conduct, income, social environment, and life style of the proposed guardian is to be considered only if it is shown to cause emotional or physical damage to the child-Oregon.

difficulty is to determine what is actually the "best interest of the child." Consequently it takes time for the parties to prepare their most persuasive arguments, and also, for the courts to consider these innumerable factors in making a proper judgment.[92] Sometimes it takes three to four years for the crouts to reach the final decision.[93] Presumably the duration of the pending case might cause both parents and children a great amount of anxiety and pressure.[94] Even after the court's final judgment, however, the parents are entitled to a modification of custody if there is sufficient evidence showing the change of circumstances concerning the "best interests of the child." Again, both parents and children might have to face a few months or even years of uncertainty.

There has been criticism that the "best interests" standards might encourage individualized determinations based largely on a judge's subjective values and impressions of the parties. For example, although the Montana Supreme Court in In re Marriage of Ulland ackowledged the fact of the thirteen years old girl's expressed wish not to live with her father, the intimate interaction with her mother, stepfather, her community, and maternal grandparents, and excellent performance and adjustment to her present school and community, the court still awarded custody to the father and asserted that "Due to the child's age, the Court found that this would be

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(註九二) In Norway, an appellant court judge reviewed the length of time for the judgment. She found that it lasted from six months to one year and five months for the county court to review the cased. The duration of cases in the appellate court varied from five months well over a year. Furthermore the Supreme Court proceedings took at least eight months. See Kirsten Sandberg, *Best Interests and Justice, in* CHILD CUSTODY AND THE POLITICS OF GENDER 100, 105-106 (Carol Smart and Selma Sevenhuijsen eds. Routledge 1989).

(註九三) For example, the length of trial-In re Marriage of Bolt, 854 P.2d 322 (Mont. 1993) has lasted from 1990 to 1993. Hanhart v. Hanhart, 501 N.W.2d 776 (S.D. 1993) also was from 1990 to 1993. Schepens v. Schepens, 592 So.2d 108 (Miss. 1991) started from 1989 till 1991.

(註九四) Couples in divorce are usually eager to dissolve the issues on marriage, custody, property divisions as soon as possible. The longer the legal battle they fight, the stronger the emotional turmoil they have. Some scholars have point out children's sensitivity to the length of time when facing their parents' divorces. In other words, from the child's points of view, even a few months of uncertainty can be a long time of insecurity. see JOSEPH GOLDSTEIN, ANNA FREUD, and ALBERT J. SOLNIT, BEROND THE BEST INTERESTS OF THE CHILD 40-41 (1973).

the last opportunity for the child and father to develop a strong and lasting father/daughter relationship."[95] In addition, disregarding the counslor's evaluation that the child "was uncomfortable with and did not trust her father,"[96] the court simply noted that the father and stepmother had "a loving relationship with the daughter, and they get along well together."[97] In other words, judges can easily hide their vacillating opinions, laziness, and even prejudice.

Other arguments questioning the "best interest of the child" point out that child custody standards constitute a prime example of the vagueness characterizing divorce laws.[98] In 1928, the court in Cummins v. Bird had noted that the difficulty in determining child curstody was that "What may be best for the welfare of the child is often difficult to determine, involving, not only a consideration of present facts, but, in a large measure, a prophecy of future circumstances."[99] In other words, unlike other civil law conflicts which determine whether past conduct was wrongful, the main character of child custody cases is to predict what is to happen in the future for the "best interests of the child" On the one hand, with the investigation and suggestions of the social workers, family therapists, and mental health professionals, the true "best interests of the child" can be well-evaluated throught the adversary system in the courts. On the other hand, the "best interests of the child" after the divorce are unpredictable and uncertain, it is very common to find somewhat inconsistent or even controversial opinions regarding the child custody laws

(註九五) In re Marriage of Ulland, 823 P.2d 864, 870 (Mont. 1991).

(註九六) In re Marriage of Ulland, 823 P.2d 864, 871 (Mont. 1991).

(註九七) In re Marriage of Ulland, 823 P.2d 864, 869 (Mont. 1991).

(註九八) Some scholars criticize the "interests of the child" as a vague concept "overflowing with political and social objects which, further, have very little to do with the person of the child." Irene thery, "*The Interest of the Child" and the Regulation of the Post-Divorce Family, in* CHILD CUSTODY AND THE POLITICS OF GENDER 78, 82 (Carol Smart and Selma Sevenhuiksen eds. Routledge 1989).

(註九九) Cummins v. Bird, 195.W.2d 959, 962 (Ky. Ct. App. 1928); in which the court declared that "Great responsibilities and duties must be met and performed by the courts, and none of them are more delicate or difficult than the determination of questions respecting the custody of children. The ties of blood and the claims of love often struggle for supremacy……The child's vital interest may be affected by a decision changing its status, thus admonishing a court that caution in such cases should govern its steps." also see Davis v. Davis, 159 S.W.2d 999, 1001 (Ky. Ct. App. 1942).

among people in different professions or even in the same professions. Some scholars point out the impossibility of determining what is clearly in the best intersts of the child in such circumstances. Also some argue that law reform efforts should concentrate instead on the effect of custody law on private ordering, and suggest that almost any automatic rule would be an improvement over the present situation.