Osgoode Hall Law Journal

Volume 12, Number 1 (May 1974) Article 6

May 1974

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Commentary

Citation Information
Weiler, Karen. "Re Moores and Feldstein: A Case Comment and Discussion of Custody Principles." *Osgoode Hall Law Journal* 12.1 (1974) : 207-221.
DOI: https://doi.org/10.60082/2817-5069.2600
https://digitalcommons.osgoode.yorku.ca/ohlj/vol12/iss1/6

Re Moores and Feldstein: A Case Comment and Discussion of Custody Principles

RE MOORES AND FELDSTEIN: A CASE COMMENT AND DISCUSSION OF CUSTODY PRINCIPLES

By KAREN WEILER*

Recently, a custody contest between foster parents of a little girl named Carrie and her natural mother attracted a great deal of publicity. When the Ontario Court of Appeal handed down its decision on August 24, 1973, awarding custody to the Feldsteins, the child's foster parents, front page headlines in the *Toronto Star* the next day proclaimed "Couple can keep Carrie, say, 'God Answered our Prayers' ". The second page stated, "Appeal Court Judge: Carrie's natural mother a stranger to her". The lead-in after the headline began, "A care-free child named Carrie turned to a joy-filled woman in her Metro home yesterday and uttered the most precious words a parent can ever hear: 'I love you Mommy' ".

Litigation of custody disputes, like many other court actions, has dramatic and far reaching consequences for the people involved. However, it differs from ordinary litigation in that the person whose life is most deeply and often irrevocably affected by the outcome of the dispute is without legal representation. We are speaking of the child, the subject of the dispute.

Perhaps in partial recognition of the fact that the child is not represented, our law places a duty on the judge to ascertain the best interests of the child and to give paramount consideration to the welfare of the child in awarding custody.[1] This was not always the case. Initially at common law the father of a child had an almost absolute right to custody, although in extreme cases, where the father was unfit, the Courts of Equity would intervene. Later the primary right to custody of a child of tender years was given to the mother.[2] At present, in cases where the dispute as to custody arises out of divorce or separation of persons who have been married, neither parent has a primary right to custody.[3] In this situation an attempt can be made to ascertain as objectively as possible with whom the welfare of the child may best be safeguarded. By way of contrast, in cases in which the dispute as to custody is between a biological mother and another party, considerable weight has been given to what are, in effect, the ownership rights of the biological mother. The "natural" mother of the child is said to have a "primary right" to the custody of the child unless she has abandoned

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[1] C. Davies, *Custody and Adoption: Some Interrelated Problems* (1973), 23 U. of T. L. J. 88 at 91-92.

[2] 18 Vict. (Can.), c. 126, s. 1.

[3] *The Infants Act*, R.S.O. 1970, c. 222, s. 2(1).

the child or so misconducted herself as to forfeit that right.[4] Trying to reconcile these two conflicting principles has led to an interpretation of the law that the welfare of the child is best served by awarding custody to the biological parent, unless there are very serious and important considerations which militate against it.

The recent case of *Re Moores and Feldstein*[5] is of particular interest therefore, because, for the first time in Ontario, the welfare of the child was regarded as being separate from the biological mother's wishes and was objectively given paramount consideration.

In commenting on this case, we seek to develop psychoanalytic guidelines and legal principles which will constitute a framework for decision-making in determining the best interests of the child in situations involving a dispute between a biological parent and a person who has assumed the role of a parent. We propose first to outline the facts of the case and then to discuss the decision of the High Court which gave priority to the rights of the natural mother as opposed to the decision of the Court of Appeal which gives priority to the welfare of the child. We will then articulate what we believe to have been the factors leading the Court of Appeal to reach its conclusion that custody of the child should be awarded to the Feldsteins. Finally, we will outline a general approach which we believe will lead to more realistic consideration being given to the best interests of the child and discuss some implications of our approach.

Mrs. Moores, a nurse who had been married for ten years and who had one son, was living in Newfoundland in 1968 when she separated from her husband because of his drinking. Mr. Moores came to Toronto for treatment at a clinic specializing in the treatment of alcoholism and began boarding with the Feldsteins. In January of 1969 Mrs. Moores followed her husband to Toronto, determined to reconcile with him, although there had been one previous unsuccessful attempt at reconciliation in the interim. Shortly after the couple took up residence together Mrs. Moores discovered she was pregnant by another man. The pregnancy was a source of further discord in the marriage and as a result Mrs. Moores obtained permission for a therapeutic abortion. Her husband, however, withheld his consent which, at that time, was required for abortion. In June of 1969 the couple separated and Mr. Moores again boarded with the Feldsteins.

On July 1st, 1969, the child, Lisa Moores, was born. While lying in at the hospital Mrs. Moores arranged for the Children's Aid Society to take the child into care until she could look after her. Subsequently, as a result of a conversation with Mrs. Feldstein, Mrs. Moores decided to leave the child in Mrs. Feldstein's care. The two women signed a Consent to Adoption which a solicitor had prepared on Mr. Carl Feldstein's instructions. Later, in August both parties returned with their spouses to the same solicitor's

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[4] *Re Baby Duffell*, [1950] S.C.R. 737; *Martin* v. *Duffell*, [1950] 4 D.L.R. 1; reaffirmed in *Hepton* v. *Maat*, [1957] S.C.R. 606 at 617.

[5] [1973] 2 O.R. 497 (H.C.); [1973] 3 O.R. 921 (C.A.).

office. At this meeting the child's first name was changed from Lisa to Carrie. Mr. Robert Moores signed a document stating he was not the father of the child. Carl Feldstein signed a document stating that he was the putative father.

The purpose of this manoeuvre appears to have escaped both courts. At this time, the Feldsteins were not married to each other. Carl Feldstein was divorced, but Mary Feldstein (then Mary Hartley), although separated from her second husband, was not yet divorced. Even with Mrs. Moores' signed Consent to Adoption, the Feldsteins were not in a position to seek an Adoption Order, since under Section 72 (1) of *The Child Welfare Act*[6] the court cannot make an adoption order if the applicant is an unmarried or divorced person unless there are special circumstances which justify, as an exceptional measure, the making of an order. If Mrs. Moores chose to revoke her consent and give the child to someone else to adopt or to the Children's Aid Society for adoption, the Feldsteins could do nothing. However, under Section 73(2) of *The Child Welfare Act*,[7] when a child born out of wedlock is residing with the putative father and being maintained by him, an order for adoption cannot be made without the consent of the putative father as well as the mother. Although the Feldsteins could not at that time adopt the child, by acknowledging that he was the putative father, Carl Feldstein attempted to ensure that no one else could adopt Carrie without his consent.

During the month of August, 1969, Mrs. Moores once again became reconciled with her husband, this time for about a year. Notwithstanding her husband's attitude towards the child, Mrs. Moores endeavoured to maintain contact with the child by weekly visits to her and in September, 1969, she found a private boarding house for the child and told the Feldsteins she wanted the child back. The Feldsteins moved. Mrs. Moores got in touch with a lawyer who told her the Feldsteins could not keep the child against her will. In December, she sent a registered letter to the Feldsteins telling them she would take legal action if necessary to get her child back. In February or March of 1970, Mrs. Moores called at Mr. Feldstein's place of business, but he refused to give up the child. Altogether, the Feldsteins moved seven times in the next two years. Mrs. Moores had problems with solicitors and it was not until January, 1973 that the issue of the custody came up for trial. The child was now 3½ years old.

In the High Court, Donohue, J., awarded custody of the child to Mrs. Moores.[8] In doing so, he based his decision on what he took to be a settled principle of law developed over three Supreme Court of Canada cases: *Re Baby Duffell*,[9] *Hepton* v. *Maat*,[10] and *Re Agar*.[11] In particular, the *Hepton* v.

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[6] R.S.O. 1970, c. 64.

[7] *Id.*

[8] *Re Moores and Feldstein*, [1973] 2 O.R. 497 (H.C.) at 502.

[9] [1950] S.C.R. 737.

[10] [1957] S.C.R. 606.

[11] [1958] S.C.R. 52.

Maat case was found to be similar and in his decision Donohue, J., quoted these words of Mr. Justice Cartwright from that case:

> . . . . I regard it as settled law that the natural parents of an infant have a right to its custody which, apart from statute, they can lose only by abandoning the child or so misconducting themselves that in the opinion of the Court it would be improper that the child should be allowed to remain with them and that effect must be given to their wishes unless "very serious and important reasons" require that, having regard to the child's welfare, they must be disregarded.[12]

Following these remarks, Donohue, J. concluded that Mrs. Moores was undergoing a very severe shock during pregnancy and for sometime afterwards. In this manner, he sloughed off the evidence put forward as to Mrs. Moores' indifference towards the child and subsequent behaviour. Donohue, J. concluded that while Mrs. Moores may have intended to give the child to the Feldsteins for adoption in July and August, by September she had made it clear she wanted the child back and from then on did all she could to resolve the situation.[13]

The Court of Appeal found the law not to be so settled in favour of the natural or biological mother. Instead, the Court boldly declared that the principle to be applied in custody disputes between a parent and non-parent was the same as in a custody dispute between the parents *inter se*. The principle is that the welfare of the child should take precedence over other considerations.

The Court of Appeal, although reluctant to disturb the judgment of Donohue, J., decided to allow the appeal on the basis that there had been error with respect to both the principles of law which were applied and the conclusions that were drawn from the facts.

Dubin, J. A., in a written decision on behalf of the Court found that the trial judge had treated the statement of Mr. Justice Cartwright, in the case of *Hepton* v. *Maat*,[14] as a formula, and having found that the child was not abandoned nor the mother unfit, he felt it inevitably followed that the child must be returned to its mother. It was held that the trial judge did not consider the effect of such a change in custody on the child. The Court also held that the assumption could not be made that the child would automatically benefit from being returned to the affection of its natural mother. This was a question of fact to be determined in each case. The paramount consideration was the welfare of the child.

Such a consideration, as we shall later discuss, is of the utmost importance. The relative merits of the competing parties in the custody dispute must not detract from the fact that it is the welfare of the child with which the court is concerned. Hence we believe any decision as to custody must be the

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[12] *Hepton* v. *Maat*, cited in *Re Moores and Feldstein*, [1973] 2 O.R. 497 (H.C.) at 501.

[13] *Id.*, at 502.

[14] See text, *supra*, at note 12.

one which will have the least detrimental effect on the child. This view is reflective of current thinking in social psychiatry.[15]

The Court of Appeal also felt that Donohue, J. erred because he had attached no importance to the evidence given by Mrs. Hanlon, a neighbour of the Feldsteins, that indifference and lack of feeling was shown by Mrs. Moores on the occasions she visited the child subsequent to having given up custody. On the contrary, the Court of Appeal found that Mrs. Moores was primarily interested in reconciling with her husband and that his antagonistic attitude towards the child made it impossible for her to keep it. Only after reconciliation had finally failed were more vigorous steps taken by Mrs. Moores for the return of her child. The Court discounted Mrs. Moores' efforts to regain custody and place the child in a suitable boarding home. It was felt such an arrangement would not have been in the best interests of the child. Although it was acknowledged that some of the delay in the proceedings may have been due to the lack of diligence on the part of the solicitors retained by Mrs. Moores before her latest counsel, the responsibility was placed on her to see that more effective steps were taken in pursuit of her objective.[16]

The Court of Appeal felt that the child's welfare was best served by remaining in the custody of the Feldsteins because the little girl would have a stable family unit and both a loving father and mother to care for her during her formative years. Although Mrs. Moores was financially capable of caring for the child, she would not be available actually to do so herself but would have to engage someone while she worked. There was therefore uncertainty as to who actually would be caring for the child during most of its waking hours. There was also uncertainly as to how the child's older half brother would react towards her. Mr. Moores still visited his estranged spouse occasionally and it might be that his antagonistic attitude towards the child would cause family quarrels. The child would not have a father. The Court therefore concluded that it would be unfair to the child and not in her interests to expose her to the risk of being uprooted from her present happy surroundings where she was being well cared for.

A motion was brought by counsel for Mrs. Moores for leave to appeal to the Supreme Court of Canada which was denied on November 22nd, 1973. It is worthwhile mentioning that the jurisdiction of the Court of Appeal to award custody under *The Infants Act* to a person who was neither the natural father or mother of the child was not called into question.

This particular point had been decided by the Court of Appeal in an earlier case, *Re Fulford and Townsend.*[17] There, the custody dispute involved the mother of an illegitimate child who sought to regain custody of her child from the putative father. Cudney, Surrogate Court Judge, found that the mother was not a fit person to have custody of the child, and she

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[15] *Re Moores and Feldstein,* [1973] 3 O.R. 921 (C.A.) at 927-929. See, also, note 40, *infra.*

[16] *Id.,* at 932.

[17] [1971] 3 O.R. 142 (C.A.).

therefore lost her primary right to custody. As the father was unable to care for the child, custody was awarded to the father's sister, with whom the child had been residing. In deciding to uphold the decision to award custody to a non-parent under *The Infants Act*, the Court of Appeal laid the groundwork for the decision in *Re Moores and Feldstein*.[18] There are several aspects of this latter decision which warrant comment.

The Infants Act provides that the judge in making a custody order shall consider the welfare of the child, the conduct of the parties, and the wishes of the father as well as of the mother.[19] The Act does not place any emphasis on the welfare of the child as opposed to the other two considerations which the judge must take into account.

In custody cases between parents *inter se* the welfare of the infant has been judicially interpreted as being the paramount consideration. Dubin, J.A. mentions the *obiter dicta* by the Judicial Committee in *McKee* v. *McKee*[20] as authority for this proposition. The Ontario decisions of *Gauci* v. *Gauci*,[21] *Nielsen* and *Nielsen*,[22] and *Re Pittman*[23] also place the welfare of the infant as the paramount consideration in applications under *The Infants Act*. However, in these cases the conflicting principle of the possessory right of a biological mother to custody unless she is shown to be unfit or has abandoned the child was not in issue. The direction in *The Infants Act* to take into consideration "the wishes of the parent" favours neither party, since both parents are equally entitled under the Act to custody.

On the other hand, the Court of Appeal adhered to the wishes of the natural mother and recognized her possessory right to the child in *Logue* v. *Burrell*.[24] In that case the appellant under *The Infants Act* was the putative father of a little boy. From birth until he was three years old the child resided with his mother. Thereafter for a period of about five years the child resided with and was looked after by his putative father. Dispute as to access by the natural mother of the child arose and a motion for custody was launched by the father, who was successful at trial. The main ground of appeal was that the trial judge had treated the application as if the parties were married persons with equal rights to custody and had failed to consider or recognize the *prima facie* right of the mother of an illegitimate child to the custody of such child. The appeal was allowed on this basis and a new trial was ordered. Schroeder, J.A. felt that in order to abrogate the law which gives the mother of an illegitimate child the *prima facie* right to its custody, legislation would have to be passed which left no doubt as to the intent to

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[18] *Re Moores and Feldstein*, [1973] 3 O.R. 921 (C.A.).

[19] *The Infants Act*, R.S.O. 1970, c. 222, s. 1(1).

[20] [1951] A.C. 352 (P.C.).

[21] (1973), 9 R.F.L. 189 (Ont. H.C.).

[22] [1971] 1 O.R. 541 (H.C.).

[23] (1972), 5 R.F.L. 377 (Ont. Surr. Ct.).

[24] (1971), 3 R.F.L. 63 (Ont. C.A.).

interfere with "well settled principles" governing that right.[25] Arnup, J.A. said much the same thing:

> . . . If one has regard only to the welfare of the child and to no other principle, it is not only impossible to say that the trial judge was clearly wrong, but . . . his decision [to award custody to the putative father] is one with which I would agree. However I do not feel we are at liberty to disregard . . . the comparatively recent pronouncement of the Supreme Court of Canada in *Re Baby Duffell*; *Martin* v. *Duffell* . . . . In the light of those cases, if the prima facie right of the mother is to be abrogated in favour of the single criterion, the welfare of the child, the Legislature and not the courts must do so.[26]

McGillivray, J.A. dealt with Section 3 of *The Infants Act* which was one of the bases on which Dubin, J.A. in *Re Moores and Feldstein* concluded that primary consideration was to be given to the welfare of the child.[27] He stated:

> Upon the authorities at common law the right of the mother to custody of an illegitimate child was unquestioned though later modified by the equitable rule that the welfare of the child should be the primary consideration. This rule was only applied however, as the following cases show where, through some deficiency on the mother's part, she was deprived of custody . . . .
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> While Section 3 of The Infants Act provides that: "In question relating to the custody and education of infants, the rules of equity prevail,' the extracts from the judgments to which I have referred [*Re Baby Duffell*] emphasize that where an illegitimate child is concerned the prima facie right of the mother to custody must not only be considered but, as was said by Cartwright J., her wishes must be given effect unless very serious and important reasons require that, having regard to the child's welfare, they must be disregarded.[28]

These judges of the Court of Appeal, while regretting their decision, felt bound to interpret the law in the traditional manner and a new trial was ordered on this basis. Two years later, Dubin, Estey and Kelly, J.J.A. decided it was time to reinterpret the law. The distinction as to the principles applicable when a dispute was between parents of a legitimate child in the one instance and those where the dispute was between a mother of an illegitimate child and another party was abolished. The paramount consideration in all cases is now the welfare of the child.

In order to find a precedent to substantiate the decision to extend the principles of the welfare of the child and override the primary right of the natural mother, the Court of Appeal looked to the decision of the House of Lords in the case of *J.* v. *C.*[29] In that case their Lordships decided that the desire of a parent to have his child must be subordinate to the welfare of the child. That meant putting an end to any presumption of law respecting rights.

The facts of the case were that a boy of Spanish nationality was raised for a time as an infant by foster parents and later, after some time with his

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[25] *Id.*, at 65.

[26] *Id.*

[27] *Re Moores and Feldstein*, [1973] 3 O.R. 921 (C.A.) at 924.

[28] *Logue* v. *Burrell* (1971), 3 R.F.L. 63 at 67, 69.

[29] [1969] 1 All E.R. 788 (H.L.).

own parents, was returned to live with the same foster family. The lad formed a close relationship with the son of his foster parents. After the foster mother wrote to the boy's parents that he had become very English in his ways, they requested that he return to Spain. The foster parents applied for custody under *The Guardianship of Infants Act.* It is worthwhile reproducing part of Section 1(1) of this Act for purposes of our discussion:

> Where in any proceeding before any court . . . the custody or upbringing of an infant . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration . . . .[30]

The issue in *J.* v. *C.*[31] was not so much whether paramount consideration should be given to the welfare of the infant. *The Guardianship of Infants Act* was quite explicit on that point. The issue was whether the section applied to custody disputes in which one of the parties is not a parent or only to disputes between parents *inter se.* Once the court decided that the section did apply to all custody disputes, the statute governed the rest. Nothing in the rest of the Act required a limited construction of Section 1.

Dubin, J.A. indicated that he did not regard the decision of *J.* v. *C.* as being dependent on the language of Section 1 of *The Guardianship of Infants Act,* but as an expression of what the law presently is and always has been.[32] In support of this conclusion he cited part of the decision of the House of Lords in *Ward* v. *Laverty*[33] as follows:

> It is the welfare of the children, which, according to rules which are now well accepted, forms the paramount considerations in these cases. Some of the earlier judgments contain sentences in which perhaps greater stress is laid upon the father's wishes than would be placed upon them now; but in the more recent decisions . . . greater stress is laid upon the welfare and happiness of the children.[34]

It is obvious that *Ward* v. *Laverty* was not a custody dispute between a parent and non-parent. It was a dispute as to whether a father could, by will, rule the religion in which his children were to be brought up. Both parents were deceased. The three children in question, although baptized Catholics, had since their mother's separation from their father, been raised as Presbyterians by her and by their maternal grandparents with whom they resided. After their mother's death they continued to reside with their grandparents and to be raised as Presbyterians.

A paternal great aunt brought a writ of *habeas corpus* for custody in order to have the children raised according to the rules of the Roman Catholic Church. It was decided that the eldest girl, age 11, had acquired strong Presbyterian convictions and that it would not be for the benefit of the eldest girl to remove her from a Protestant to a Roman Catholic house-

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[30] *Guardianship of Infants Act,* 1925 (15 and 16 Geo. 5 c. 45) s. 1; *Guardianship of Minors Act,* 1971 (19-20 Eliz. II c. 3).

[31] [1969] 1 All E.R. 788 (H.L.).

[32] *Re Moores and Feldstein,* [1973] 3 O.R. 921 (C.A.) at 925.

[33] [1925] A.C. 101 (H.L.).

[34] *Id.,* at 108.

hold, nor would it be for the benefit of the younger children to be separated from their older sister. The custody dispute, which was secondary to the religious issue, was between maternal and paternal relations. The case is therefore of no real assistance to the Court of Appeal in searching for a precedent.

An attempt was also made to reconcile the decision with the Supreme Court of Canada cases referred to by the trial judge. Dubin, J. A. had special knowledge to draw on. In *Hepton* v. *Maat*, a case with a fact situation similar to the instant case, he had acted as counsel on behalf of the persons having *de facto* custody of twins in a dispute against the natural parents. He had argued then that the paramount consideration in any custody dispute was the welfare of the child. While the Supreme Court had accepted this argument in vague lines of *obiter dicta*, it had not considered the welfare of the child apart from the wishes of the natural mother. Rand, J. stated:

> The controlling fact in the type of case we have here is that the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility.[35]

In *Re Baby Duffell*, an earlier decision of the Supreme Court of Canada, Rand, J. had also recognized the rights of the natural mother:

> In the settled formula, the welfare of the infant is the controlling consideration: that is, it is the welfare as the court declares it; but in determining welfare, we must keep in mind . . . "it must be the benefit to the infant having regard to the natural law . . .".[36]

The Court of Appeal noted that *J.* v. *C.* specifically rejected *Re Carrol*[37] and *Re Agar-Ellis*,[38] both cases strongly supporting the right of the natural mother which were cited with approval by the Supreme Court of Canada in the foregoing cases. However, a further attempt at reconciliation was made in Dubin, J.A.'s statement that all the Supreme Court of Canada cases decided was that:

> Where the welfare of the child was assured or the case was so evenly balanced . . . the demonstrated and unimpaired bond of affection should prevail.[39]

The concluding words of Locke, J., in *McNeilly* v. *Agar* do not bear this statement out:

> I have examined with care the evidence given in this case and, while of the opinion that the child would be more likely to have a successful and happy life if left in the custody of the appellants [foster parents], I have come, with regret, to the conclusion that, applying the rule as stated in the decisions of this Court in the cases of *Duffell* and *Hepton*, it has not been that the mother should be refused custody.[40]

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[35] *Hepton* v. *Maat*, [1957] S.C.R. 606 at 607.

[36] *Re Baby Duffell*, [1950] S.C.R. 737 at 747.

[37] [1931] 1 K.B. 317.

[38] (1883), 24 Ch.D. 317.

[39] *Re Moores and Feldstein*, [1973] 3 O.R. 921 (C.A.) at 927.

[40] *Re Agar*, [1958] S.C.R. 52 at 55-56.

Despite the valiant attempt of the Ontario Court of Appeal to make it seem otherwise, the decision in *Moores* v. *Feldstein* is a departure from precedent. It is a landmark decision in Ontario, not only because it extends the principle that the welfare of the child is the paramount consideration to be considered in custody disputes between parent and non-parent, but because it considers the welfare of the child apart from the wishes of the natural parent. The decision of the Court of Appeal is also remarkable because it has given effect to views respecting custody which have not hitherto been considered "legal" views. It is hoped that the decision will form the basis for a new, more realistic view of the best interests of the child by considering the effects of a resolution of a custody dispute on the child himself apart from the merits of the competing parents. However, the underlying policy factors for these views are not really articulated. What we propose to do is develop a framework for analysis of problems relating to child custody.

1. *The Blood Tie*

Although legal tradition has given the biological parents considerable power over their child, this has not been based on a consideration of the needs or interests of the child. There is no scientific basis for an assertion that any weight should be given to the blood tie in assessing the child's interests in the kind of situation under discussion.[41] In a consideration of the needs of a child, the parent is the person understood by the child to be fulfilling the parental role, irrespective of biological relationship. The effect on a child of separation from the person to whom such an attachment has been formed is not less catastrophic than the removal of any child from his intact family.

If we consider with due seriousness the settlement of custody disputes in the best interests of the child, then we must give lower priority to the blood tie. It is unwarranted to promote the fallacy that the biological parent will be better than a foster parent or an adoptive parent.

2. *Phase of Development and Separation*

The effects on a child of separation from the person taking the parental role depend on the child's phase of development. Ignoring the considerable range of variability between individuals, we may generalize that infants under three months of age show no measurable adverse effects from a change of parent; that children aged three to six months show appreciable distress following a change, but when tested at five years of age do not have measurable residual adverse affects; and that children aged six to twelve months not only

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[41] A. Freud, "The Child as a Person in His Own Right," in 27 *The Psychoanalytic Study of the Child,* (New York: Quadrangle Books, 1972) 621 at 624. A. Freud, "Guide to Adoption and Foster Care," in 5 *The Writings of Anna Freud,* (New York: International Universities Press, 1969) at 450-455.

show marked distress following a change, but also have measurable changes at five year follow up.[42] The data available on children older than one year indicate that prolonged psychological impairment may result from disruption of the established relationships.[43] Difficulties persist into adulthood and are not easy to treat. The situation most closely analagous to the breaking of the main personal attachment by removal to another home is that of a child whose mother dies. The bereaved child usually has the advantage of remaining in the familiar home without loss of the other familiar relationships, but psychoanalytic studies still show specific problems persisting into adulthood. There problems occur particularly in the area of personal relationships.[44] The problems resulting from loss not only of both parents, but also of all other relationships and the familiar environment are likely to be considerably greater than those of a child who simply loses one parent.

3. *The Child's Previous Experience*

The child who has formed a confident close relationship with the mother tends to show a greater overt upset when that bond is broken. Once a child has experienced loss of relationships, subsequent relationships tend to be more shallow and less confident with less visible distress at repeated changes. Emotional development and particularly the ability to relate to others in a stable and consistent way, are considerably impaired by multiple changes, and the shallowness of affection, with decrease of reaction at further loss, is an index of severe emotional disturbance. A child who has established a satisfactory relationship in one family is usually adversely affected by disruption of the relationship.[45]

4. *Management of a Child after Change of Parents*

It may be a bitter blow to parents, awarded custody of a child who has previously known others as his parents, to find that the love and care they are prepared to lavish are angrily rejected by an uncomprehending child removed from the parents *he* loves. Many a parent-child relationship has failed ever to recover from the parents' angry hurt at their rejection by a desperately grieving child, feeling, in effect, kidnapped by strangers. It takes immense skill by a person of unusual emotional endowment to cope with the problems

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[42] L.J. Yarrow, "The Crucial Nature of Early Experience," in David C. Glass ed., *Environmental Influences,* (New York: Rockefeller University Press, 1968).

[43] J. Bowlby, *Attachment and Loss, Vol. 2,* (New York: Basic Books, 1973) at 25-32.

[44] J. Fleming, *Early Object Deprivation and Transferrence Phenomena: The Working Alliance* (1972), 41 Psychoanalytic Quarterly at 23-49. M. Wolfenstein, "How is Mourning Possible?," in 21 *The Psychoanalytic Study of the Child,* (New York: International Universities Press, 1966) at 93-123.

[45] *Supra,* note 42.

of a grieving child.[46] That such a person would be initiating litigation of the type under discussion, with all its connotations of previous instability, incompetence, and lack of foresight, is improbable in the extreme.

The risk to the child can be minimized by ensuring that questions of custody are settled in the first few months of life. Thereafter, consideration of the interests of the child will demand a decision in favour of the established relationship. Delay brings the child to a phase of development at which change of parents constitutes an unacceptable interference with the child's wellbeing.

In arguing this position we are well aware of the suffering of a parent deprived of ownership of a child. We do not, however, accept the view that the blood tie should afford an adult's right to ease her own feelings at the expense of the child's welfare. This would be contrary to the dictates of enlightened humanity.

5. *Problems in Assessment of the Child's Interest*

An adversary process between the competing parents cannot be relied on to bring out evidence concerning the interests of an unrepresented third party, the child. This problem is well demonstrated in *Re Moores and Feldstein.* Counsel tried to show that their respective clients were good parents but did not produce evidence to show that the particular qualities of one home were more appropriate to the needs of this particular child than those of the other. By focusing on the qualities of the parents, and ignoring the specific needs of the child, a proper assessment of her best interests was not placed before the Court.

It was only on the initiative of the Court of Appeal that an attempt was made to reassess the decision, taking into consideration the real needs of the child. This decision was not based on evidence before the Court, but on the judge's extrinsic knowledge of the needs of children:

> I cannot help but feel in the circumstances of this case that serious harm need be occasioned by removing this bright, alert little girl from her present surroundings and placing her in the custody and care of some one who would now likely be quite a stranger to her. Unless the result of such a change is shown to be in the interests of the child, I would hesitate to risk the effect of such a disturbance . . . . In its present surroundings it [the child] will have the loving care of a father and a mother who will be able to devote her [*sic*] whole time to her formative years. There will be no risk of the uprooting of the child from its present happy surroundings having a serious effect on her. Without the benefit of omniscience the safest course, in my opinion, is to leave the little girl where she is and where, I have every reason to believe, she will be loved and well cared for.[47]

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[46] James and Joyce Robertson, "Young Children in Brief Separation: A Fresh Look," in 6 *The Psychoanalytic Study of the Child,* (New York: International Universities Press, 1961) at 264-315.

[47] *Re Moores and Feldstein,* [1973] 3 O.R. 921 (C.A.) at 929, 934.

6. *Guidelines for Determining the Best Interests of the Child*[48]

(a) *Physical Well-Being*

Clearly, basic standards of general physical care are essential. This guideline is self-explanatory.

(b) *Psychological Needs*

(i) *Affection*

The need for loving parents, sensitive to the feelings of the child, is by now well recognized. Less well recognized is the fact that the child also loves a person, and that removal of that person can have unfortunate consequences for the child. Both aspects must be considered in reaching a decision.

(ii) *Stimulation*

Children require stimulation of varying kinds, depending on the nature of the child and the stage of development. Ability of parents to provide appropriate intellectual and other stimulation should be taken into account.

(c) *Continuity of Relationships*

An overriding consideration in the case of a child in a reasonably satisfactory situation is the continuity of relationship with parents. No matter how much love another person is willing to lavish, or how much intellectual stimulation he will provide, the continuation of already established relationships should be the prior consideration.

(d) *Life-Style*

In the case discussed, counsel offered evidence of church attendance to bring favour to their respective clients. The appeal decision took into account

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[48] For extensive discussion of custody problems, from both legal and psychoanalytic viewpoints, the reader is referred to Joseph Goldstein and Jay Katz, *The Family and the Law*, (New York: The Free Press, 1965). Also a book entitled *Beyond the Best Interests of the Child* by Anna Freud, Joseph Goldstein and Albert Solnit, (New York: International Universities Press, 1973).

Anna Freud (at 456-459) discusses the best interests of the child in a case which, considered from the perspective of the child's interests, is identical to the present case. She stresses the importance of unbroken continuity of relationship with the person acting as parent to prevent damage, which she considers invariably to follow separation once a bond of affection has been formed.

Goldstein (in the second book, at 626-641) suggests a decision in accordance with psychoanalytic opinion and based on the principle that to rupture an established parent-child relationship is contrary to the best interests of the child.

The further problem of the law's delay is the subject of a paper by Solnit in the second book. He discusses a case in which a child's development was disturbed by a change of parent and points out that the best interests of the child would demand different decisions at different times. Thus, although the court decided contrary to the child's interests to award a change of parents, a subsequent appeal, if it reversed the decision which had already been put into action, would be further damaging the child by forcing another change of parents.

the fact that Mrs. Moores needed to continue working. It would be difficult to uphold the view that a strictly conventional life is of particular advantage to the child, although evidence of marked departure from community standards might reasonably shed doubts on a person's ability to raise a child satisfactorily in that community. Presence or absence of religious observance is, however, unlikely to be related to competence as a parent. The fact that Mrs. Moores proposed that while she worked, Carrie would be placed in day care, allows us to predict even greater difficulties for the child after removal from her present home. It should be noted, however, that if the work situation were reversed — if Mrs. Feldstein were working and Mrs. Moores able to spend full time at home — this would not constitute a valid argument for granting Mrs. Moores custody. The fact is that children adapt satisfactorily to regular absences of the mother, given reliability and continuity of the parental relationship. Removal to a new parent, even a full-time parent, would not offset the disadvantage of rupture of the initial affectional bond.

(e) *Other Factors*

(i) *Conduct of the Parties*

In the case under discussion, Mrs. Moores chose to give up custody of her child, not because of financial hardship or emotional instability, but because she wished to reconcile with her husband. In so doing she placed her own interests before those of the child. Later, in seeking to remove Carrie from the home of the Feldsteins at a time when she herself could not look after the child, Mrs. Moores demonstrated an insensitivity to the suffering such a disruption would cause. She was again placing her own desires before the welfare of her child. Where the breakup of the relationship between the biological mother and her child has been deliberately precipitated by her, it is submitted that such a mother most certainly ought not to receive any preferential consideration as to custody.[49]

(ii) *The Stability of the Home Situation*

The stability of the home situation, as opposed to the relative financial resources of each family, is an additional factor to be taken into account in determining the least detrimental alternative to the child. Money is but miserable compensation to a young child deprived of the familiar surroundings and family he has known. Nor will it be easy by treatment to repair the emotional damage wrought by so cruel a blow as an enforced permanent estrangement from those the child loves.

CONCLUSION

We have argued that the paramount consideration in determination of a custody case should be the welfare of the child and have outlined how these

[49] *Talsky* v. *Talsky* (1973), 11 R.F.L. 226 (Ont. C.A.).

interests might best be assessed. If the administration of the law is to deal seriously with the welfare of the child, it is imperative that rules be developed which will allow a speedy resolution of custody disputes rather than the present system where over a year elapses after action is commenced. In the case of young children such a lapse of time could be crucial. By virtue of the delay, the party having custody of the child will be in a favoured position. In order to achieve the most objective decision possible in the welfare of the child, it is essential that a speedy resolution of the dispute take place. The longer the delay in resolution of the dispute, the greater will be the harm to the child if a change of parents is necessary, and hence the more strongly will the child's interests demand a decision for the existing relationship.