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In Re Custody of Christy Elizabeth Townsend - Applying the Best Interests Doctrine to Custody Disputes between a Biological Parent and a Third Party, 15 J. Marshall L. Rev. 213 (1982)

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CASENOTES

IN RE CUSTODY OF CHRISTY ELIZABETH TOWNSEND* APPLYING THE "BEST INTERESTS" DOCTRINE TO CUSTODY DISPUTES BETWEEN A BIOLOGICAL PARENT AND A THIRD PARTY

> I honestly believe that if I had to deal with these kinds of factors and this kind of evidence on a day to day basis I don't think I could survive it. This has been, in my opinion, the worse [sic] case involving custody of a three year old child that I have ever had to deal with and I hope I never have to deal with another.
>
> Honorable John L. Davis**

Invoking the story of Solomon[1] and his famous test, designed to separate the selfish concerns of contending women from the selfless ones and award custody on that basis, is a time honored custom in the field of child custody. It is one which is cherished by judges and authors[2] as a model of judicial wisdom

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* 90 Ill. App. 3d 292, 413 N.E.2d 428 (1980). This case was subsequently reversed and remanded by the Illinois Supreme Court, Nos. 54282, 54365 Cons. (Ill. Sup. Ct. Sept. 1981). *See* Epilogue, *infra*.

** Record, *In re* Custody of Christy Elizabeth Townsend, No. 79-F-149 (Cir. Ct. Macon County 1980).

1. A child custody dispute demonstrated Solomon's legendary wisdom:

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

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

2. *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d at 293, 413 N.E.2d at 423. *See* Schiller, *Child Custody: Evolution of Current Criteria*, 26 DE PAUL L. REV. 241 (1977) [hereinafter cited as Schiller]; Comment, *Psychological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution*, 17 J. FAM. L. 577 (1979) [hereinafter cited as *New Directions*]; Comment, *Best Interests of the Child: Maryland Child Custody Disputes*, 37 MD. L. REV. 641 (1978).

in determining what is best for the child. While not always epitomizing Solomon's wisdom, contemporary American law comes closer to demonstrating this concern than did our ancient English forebears and tribes who similarly inhabited the ancient world.[3] English law maintained a completely hands off policy regarding the parent-child relationship until the seventeenth century.[4] Even then, while infanticide was forbidden, it persisted and went virtually unpunished through the nineteenth century.[5] As long as a child was not a public burden,[6] society ignored, or at best, refused to inject itself into the child rearing

3. McGough & Shindell, *Coming of Age: The Best Interest of the Child Standard in Parent Third Party Custody Disputes*, 27 EMORY L.J. 209 (1978) [hereinafter cited as McGough & Shindell]. Parents belonging to tribes such as the Anglos, Saxons and Gauls practiced infanticide until the Norman Conquest in 1066. *See* G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 13-14 (1957). Infanticide for many of these ancient peoples had several advantages in controlling population. Unlike abortion and primitive contraception, the mother's life was not threatened. Further from a prudential standpoint, a parent would be unable to provide for the family already in existence if he were unable to control his family's expansion. Ethical considerations aside, it was possible to rationalize that the newborn was not a full human being as no ritualistic ceremony marking the event had yet occurred. *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 436-37 (2d ed. 1898). Throughout the seventh century and until 1066 the church sanctioned selling children under the age of seven into slavery if it was necessary.

4. BLACK'S LAW DICTIONARY 1269 (4th ed. 1968) defines *parens patriae* as "Father . . . parent of the country. In England, the King. In the United States, the state, as a sovereign-referring to the sovereign power of guardianship over persons under disability . . . such as minors, and insane and incompetent persons." The English Crown first articulated this concept during the seventeenth century. The theory espoused by the crown, while recognizing the natural right of the parents to the custody of their child, also recognized the reciprocal duty and obligation the child and the state owed to each other. The child from birth owed allegiance to the state. Likewise, the state in turn was obliged to regulate child custody whenever it became necessary to protect the welfare of the child. *See* Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733, 734 n.2 (1977). Eventually the Court of Chancery asserted its jurisdiction over these matters. *See* Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 401 (1978); Parker, *Some Historical Observations on the Juvenile Court*, 9 CRIM. L.Q. 478 (1967) [hereinafter cited as Parker]. In the United States the "spirit of *parens patriae* has been achieved in the establishment of probation, foster homes and institutions for juveniles." *Id.*

5. R. HELFER & C. KEMPE, THE BATTERED CHILD 8 (1968) [hereinafter cited as HELFER]. Greed was the cause of death for eighty per cent of the illegitimate children of the nineteenth century who were murdered after being put out to nurse. After the fee was paid, cold-blooded wet nurses quickly did away with their charges. Greedy midwives who arranged for the infant's death profited after the child was buried through the insurance system or so called burial clubs.

6. HELFER, *supra* note 5, at 11. While the pauper apprentice system was put to rest by a parliamentary act in 1802, traditional parental rights over their children remained intact. This humane act did not apply to children under their parent's supervision. These children worked unconsciona-

process,[7] deeming it as strictly within the domain of the parent.

American law was also tardy in identifying the interests of children and protecting them from parental abuse and neglect until nearly the twentieth century. At this time, reform movements headed by religious and voluntary organizations convinced state legislatures to recognize the need for establishing separate courts for juveniles.[8] At the same time, state legislatures began drafting criminal statutes proscribing child abuse.[9] These cruelty to children statutes were precipitated by the *Mary Ellen* child abuse case decided in 1874 by the New York Supreme Court.[10] Although there were statutes protecting animals, which the court could rely on to determine parental culpability, child abuse statutes were nonexistent. Ironically, the animal cruelty statutes were instrumental in the conviction of Mary Ellen's stepmother, thus clearly demonstrating the need for legislation protecting children.[11]

Today, while courts and legislatures working hand-in-hand are quick to remove a child from an abusive and detrimental liv-

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bly long hours and were often grossly maltreated. The Industrial Age exacted a heavy toll from these infant laborers.

7. *But see* 2 W. BLACKSTONE, COMMENTARIES 451 (1969). Poor parents incapable of supporting their offspring were directed to apprentice or indenture their children once past "the age of nurture." The rich could raise their children as they pleased. They could "breed up their children to be ornaments or disgraces to their family." *Id.* 426, n.5. *See also* J. EHRLICH, EHRLICH'S BLACKSTONE 87, 89 (1959). While a parent had the duty to maintain, protect and educate his children, he was not obliged to provide such maintenance unless the children were incapable of working either through illness, accident, or infancy. Even then he was only obliged to provide the necessaries.

8. In 1899, Illinois became the first jurisdiction to establish a juvenile court. Laws of Illinois, 1899, p. 131. *See* Parker, *supra* note 4, at 480; *See also* S. NAGI, CHILD MALTREATMENT IN THE UNITED STATES 1 (1977).

9. *See* McGough & Shindell, *supra* note 3, at 210; *see generally* Paulsen, *The Legal Framework for Child Protection* 66 COLUM. L. REV. 681 (1966); *see also* TALAN, DEFRANK, & GAMM, CHILD ABUSE AND NEGLECT LEGAL HANDBOOK (1978) [hereinafter cited as TALAN].

10. TALAN, *supra* note 9, at 3. Mary Ellen, a nine year old was found chained to a bed in her parents' apartment severely bruised and suffering from malnutrition. She was discovered accidentally by a church worker, who having no alternative, appealed to the ASPCA. Together they were able to remove her from this life threatening environment but only under laws preventing cruelty to animals on the ground that she was a member of the animal kingdom in need of protection. HELFER, *supra* note 5, at 13. *See* McGough & Shindell, *supra* note 3, at 210 n.7.

11. *Id.* As a result of the *Mary Ellen* case New York City founded the Society for the Prevention to Cruelty to Children. *See* N. EBELING & D. HILL, CHILD ABUSE: INTERVENTION AND TREATMENT 8 (1975). The Massachusetts Society was the second such organization founded in 1878. Great Britain followed by passing an act preventing cruelty to children. Unfortunately it was not until 1964 that Massachusetts specifically described the kinds of protection children could be expected to receive from abuse.

ing environment, and have worked similarly to decide the custody of a child whose parents have severed matrimonial ties, they have shown great reluctance and trepidation where parent and nonparent-third party[12] custody disputes are concerned.[13] Traditionally, these disputes posed no problem for the court. If the parent was fit,[14] he had a natural or an inherent right to his child.[15] This philosophy, commonly referred to as the parental rights doctrine, mandates that a biological parent is entitled to custody of the child unless the parent is affirmatively shown to be unfit. This doctrine focuses on the natural parent and his rights and feelings: minimal consideration is given to the child's rights and feelings.[16]

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12. A parent is one who generates a child. It generally refers to the father and mother by blood or one who has acquired legal custody through adoption or otherwise. In custody disputes a third party is one who may be related by blood or marriage but more distantly than that of the natural parent. He or she is often a grandparent, step-parent, brother, sister, aunt or uncle. However, he or she need not be related in any way to the child except by psychological or emotional bonds.

13. The Illinois legislature like other state legislatures, borrowed their custody standard from the Uniform Marriage and Divorce Act § 402. In Illinois the standard can be found under the Marriage and Dissolution of Marriage Act § 602. Apparently little thought was given to a third party seeking custody, as all relevant factors to be considered under the standard, and the language of the standard itself, applies to custody disputes between natural parents after the breakdown of their marriage as the Act's title indicates. Legislative indirection in third party disputes may be responsible for the confusion and uncertainty exhibited by courts in third party disputes, resulting in the absence of uniform application.

14. Illinois requires clear and convincing evidence of unfitness to terminate parental rights. *In re* Nitz, 76 Ill. App. 3d 15, 394 N.E.2d 887 (1979). Mrs. Nitz was found to be indifferent to her child's severe health problems and an examination of the child showed that his nutrition was deficient. There were rats in the hallway of the building and unsanitary conditions existed in the Nitz apartment. The child, on one occasion, was observed drinking curdled milk. Dog feces and urine stains were evident throughout the apartment. There was no evidence that Mrs. Nitz made any commitment to improve this environment. *See* ILL. REV. STAT. ch. 37, §§ 705-2, 705-7 (1979); *New Directions*, *supra* note 2, at 545; *See also* Simpson, *The Unfit Parent*, 39 U. DET. L.J. 347 (1962).

15. *In re* Weinstein, 68 Ill. App. 3d 883, 386 N.E.2d 593 (1979); *In re* Sparrow, 59 Ill. App. 3d 731, 376 N.E.2d 236 (1978). Parental rights are parents' inherent right to the custody of their children. *See also* Behn v. Timmons, 345 So. 2d 388, 389 (Fla. 1977); State *ex rel.* Sparks v. Reeves, 97 So. 2d 18 (Fla. 1957). A basic proposition is that parents have a natural God-given right to enjoy the custody and the companionship of their offspring. This rule is older than the common law and traces its roots to *Genesis* 4:1. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 589 (1877) [hereinafter cited as STORY] (the father's common law custodial rights could only be terminated for gross misconduct on his part by the chancery court).

16. *See* note 14 *supra*. *See, e.g.*, Cormack v. Marshall, 211 Ill. 519, 71 N.E. 1077 (1904) (court ignored the child's emotional attachment to his grandfather and failed to discuss whether the child even knew his father).

Growing concern for the welfare of the child in custody situations, due to a burgeoning fascination with psychological studies and the disappearance of the child as personal property concept,[17] has led to a gradual change in judicial attitude. This change in attitude has given rise to the best interests of the child doctrine.[18] This doctrine is presently applied in the vast majority of jurisdictions in custody disputes between parents, although few jurisdictions apply it to parent-third party disputes.[19] The best interests of the child doctrine, in contrast to the parental right doctrine, focuses on the child's needs and requires that the court consider the child's experience and emotional makeup when deciding to whom custody will be

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17. *See, e.g.*, Wilson v. Mitchell, 48 Colo. 454, 111 P. 21 (1910); Chapsky v. Wood, 26 Kan. 650 (1881). *See* Eyre v. Countess of Shaftsbury, 2 P. Wms. 103, 24 Eng. Rep. 659 (1722); Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672-79 (1942).

18. *See, e.g.*, ILL. REV. STAT. ch. 40, § 602 (1980).

Best Interest of Child.

(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
  (1) the wishes of the child's parent or parents as to his custody;
  (2) the wishes of the child as to his custodian;
  (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
  (4) the child's adjustment to his home, school and community;
  (5) the mental and physical health of all individuals involved; and
  (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person but witnessed by the child.

(b) The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.

For a criticism of the best interest standard as it is applied in Illinois custody proceedings, *see* Taylor, *Child Custody Problems in Illinois*, 24 DE PAUL L. REV. 521 (1975). *See also* Schiller, *supra* note 2 (discussion of the need to enact legislation which provides objective criteria and frees the court of evidentiary and procedural formalities); Comment, *The Child Custody Provisions of the Illinois Marriage and Dissolution of Marriage Act*, 56 CHI. KENT L. REV. 671 (1980) [hereinafter cited as *Child Custody Provisions*].

19. Courts in Colorado, Illinois, Iowa, and Michigan appear to have adopted the best interests of the child standard without reservations. *See* McGough & Shindell, *supra* note 3, at 214. (A survey of jurisdictions lead authors to conclude that the majority of jurisdictions either apply the parental rights doctrine or remain undecided as to which standard applies in parent-third custody disputes). *See also New Directions*, *supra* note 10, at 548 (The comment takes three approaches and divides jurisdictions accordingly: Parental Rights, Intermediate, Child Focused); Note, *Alternatives to "Parental Rights" in Child Custody Disputes Involving Third Parties*, 73 Yale L.J. 153 (1963) [hereinafter cited as *Alternatives*].

awarded.[20]

While Illinois is a jurisdiction which focuses on the child's best interests, this does not necessarily mean that the state has adopted, in total, the more extreme principles advocated by *Beyond the Best Interests of the Child*.[21] This highly successful joint work by three legal and psychiatric authorities advocates a model child placement statute. This model urges courts to disregard parental rights if the bond between the child and such parent has been broken. The parent's rights may also be overlooked if they interfere with a child's psychological relationship that may have developed with a nonparent. The least detrimental alternative approach is the formula advocated to resolve these custody disputes. This standard considers three factors in making placement decisions: (1) safeguarding the child's need for continuity of relationships;[22] (2) reflecting the child's sense of time;[23] and (3) the law's incapacity to supervise interpersonal relationships and its limited knowledge make long-range predictions unrealistic.[24]

Although still controversial, this approach is beginning to have some impact in Illinois, but not to the extent that Illinois courts consistently favor the "psychological parent"[25] over the

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20. *See* note 18 *supra*.

21. *See generally* GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter cited as GOLDSTEIN].

22. *Id.* at 35. The first guideline suggests that the law should protect and foster "psychological parent-wanted relationships," as these continuous and permanent relationships, surroundings, and environmental influences are necessary for normal child development. The courts that follow this guideline would regard child placement "as final and unconditional . . . as permanent as the placement of a newborn with its biological parents." *Id.*

23. *Id.* at 40. The second guideline, while a necessary part of the continuity concept requires consideration separate and apart from it. The authors suggest that the younger the child the easier it is to sever emotional ties with an absent parent and to begin developing new ones with a potential psychological parent. They urge, therefore, that courts act quickly to either restore an established relationship or replace it. All those concerned with child placement must reduce the decision making time which must not "exceed the time the child-to-be-placed can endure loss and uncertainty." *Id.*

24. *Id.* at 49. This third guideline rejects the traditional notion that the law has a "magical power . . . to do what is far beyond its means." The law can neither supervise the parent-child relationship on a day to day basis nor can it cause one to develop and grow. Further, the law is incapable of making long range predictions. The authors maintain that the law should and usually does prefer "the private intrusions in them." They urge courts to confine themselves to short range predictions in the child's best interest. *Id.*

25. The term "psychological parent" is used in GOLDSTEIN, *supra* note 21, at 17. The authors describe the concept as follows:

. . . .

[F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results

natural parent. Illinois courts have, however, given priority to the needs of children rather than parents for some time.[26] The courts have been supportive of their need for permanence and stability that comes from a continuous relationship,[27] and have avoided the pitfalls of long range prediction by opting for the more modest short term prediction.[28] Yet, these same courts have persistently side-stepped the contradiction between the more traditional parental rights doctrine and the more contemporary best interests doctrine or child focused approach in parent-nonparent custody disputes. Unless a parent's fitness is questioned or there are compelling reasons to conclude otherwise, there is a legal presumption that a child's interest is best served in the custody of a natural parent.[29] This presumption

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from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his "psychological parent" in whose care the child can feel valued and "wanted."

. . . .

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

Id. at 19.

26. In 1969, the Illinois Supreme Court held that a natural parent may be deprived of custody, without a finding of unfitness or forfeiture, if the child's best interests require it. Edwards v. Livingston, 42 Ill. 2d 201, 247 N.E.2d 417 (1968). *See* Veverka, *The Right of Natural Parents to Their Children as Against Strangers: Is the Right Absolute?* 61 ILL. B.J. 234 (1973) [hereinafter cited as Veverka] for a history of Illinois law specifically dealing with custody fights between natural parents of *legitimate* children and anyone other than the State.

27. Look v. Look, 21 Ill. App. 3d 454, 315 N.E.2d 623 (1974). The father agreed to the custodial arrangement with the grandparents for five years. The court held:

When the people having the actual custody of the child at the time a change is sought have properly provided and supervised its needs for a substantial period of time and the child has become attached to the environment and to them . . . a court is not justified in transferring that custody to another except for the most cogent reasons.

Id. at 456, 315 N.E.2d at 425-26. The father, by leaving his child with a third party grandparent, lost the benefit of the presumption that he should have custody.

28. *In re* Ross, 29 Ill. App. 3d 157, 329 N.E.2d 333 (1975) Natural parents sought the return of their twelve and fourteen year old daughters who had been living with a foster family for more than six years. The appellate court agreed that the guardian ad litem's depiction of the foster parents as the psychological parents "reflects the relationship which has arisen" and demonstrated interest in the children's immediate (short-range) best interests by not returning them to their natural parents. *See* note 24 *supra*.

29. Annot., 25 A.L.R. 3d 7, 20 (1969).

allows courts to avoid the contest over which doctrine, in effect, is controlling.[30]

In *In re Custody of Christy Elizabeth Townsend*,[31] the court has again been confronted with this conflict. This note will address the strength of the *rule* that a parent has a superior right to the custody of his child, absent a finding of unfitness, and examine the strength of the presumption that it is in the child's best interest to be in the custody of a natural parent. In addition this note will further explore the circumstances necessary in Illinois to rebut that presumption in light of the unique set of circumstances that exist in this case. Of major concern is whether the court has reconciled this rule and presumption with the statutorily mandated best interests standard which Illinois courts have long professed to follow. Finally, this note will discuss the basis for the wide discretion vested in the trial court, and analyze whether the appellate court reversal in this case squares with Illinois case law.

FACTS AND FINDINGS OF THE LOWER COURT

In 1975, Gary Townsend, husband and father, began an intimate relationship with Dorothy Salmon. At the time Dorothy was married to George Poling, and mother of a teenage daughter, Brenda. In 1976, Gary learned that Dorothy had become pregnant by him.[32] Although a subsequent divorce attempt was unsuccessful, he moved in with Dorothy, who was separated and was soon to be divorced from her husband. After a few months, Gary returned to his wife, but continued visiting Dorothy[33] up to the time of the birth of their child. After Christy's birth, Gary continued to visit Dorothy and Christy but by 1978, the relationship had begun to deteriorate.

On December 11, 1978, Dorothy went to the Townsend home and shot and killed Gary's wife. She was subsequently convicted of the murder.[34] From the day of the murder until the

30. *See Alternatives*, *supra* note 19, at 154-55 n.18. The author concludes that most courts applying the best interest standard to third party contests use a variety of procedural devices which invariably increase the likelihood of the natural parent winning. The most common device employed is the presumption that awarding custody to the biological parent will be in the best interest of the child.

31. 90 Ill. App. 3d 292, 413 N.E.2d 428 (1980).

32. All parties stipulated that Gary is the father of Christy. *See* Brief for Appellant at 5, *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 413 N.E.2d 428 (1980).

33. Throughout this time, Gary's wife was aware of Gary's visits with Dorothy. *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 293, 413 N.E.2d 428, 429 (1980).

34. *Id.* at 294, 413 N.E.2d at 429. Dorothy was sentenced to thirty years, and incarcerated at Dwight Correctional Center.

date of Dorothy's trial, Christy was in the custody of her half-sister, Brenda Poling. Brenda, along with her own baby daughter, Courtney, had lived with Dorothy prior to the murder. Shortly thereafter, the three moved into the mobile home owned and occupied by Brenda's father.[35]

Gary's attempt to acquire custody of his daughter began after the murder, although he was unaware of her whereabouts at that time.[36] Immediately after Dorothy's conviction, however, Gary filed a petition to obtain custody. Brenda intervened.[37]

At trial, Gary presented character witnesses who testified to his good character and his good relationship with his son, Alan. Gary also testified concerning his rapport with Christy[38] and his plans for the future.[39] Brenda's witnesses similarly attested to her good character and the warm relationship she and her daughter shared with Christy.[40] Even prior to the murder

35. *Id.* Brenda testified that George, a father figure to the two children, had a good relationship with them. Brenda, Christy and Courtney slept in one bed in the smaller bedroom of the mobile home.

36. *Id.* The day after the murder, Gary tried to locate his daughter. Brief for Appellant at 5, *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 413 N.E.2d 428 (1980). He was informed by the Macon County State's Attorney's office that the child was being cared for.

37. Pursuant to ILL. REV. STAT. ch. 40, § 601(b)(1) (1979), the proceeding commenced by the filing of a Petition for custody. Brenda Poling, pursuant to a Leave to Intervene, filed a Counter-Petition for custody of her half-sister, Christy.

38. Gary testified that in the first six months or year of Christy's life he visited Dorothy and Christy several times a week and consequently, Christy came to know him as her father. *In re* Custody of Christy Elizabeth Townsend. 90 Ill. App. 3d 292, 294, 413 N.E.2d 428, 429 (1980). *See* Brief for Appellant at 5, *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 413 N.E.2d 428 (1980). Gary allegedly exhibited affection for Christy during the year and a half after her birth by doing such things as changing her diaper, playing with her and putting her to bed. He allegedly bought her gifts and clothing and spent time crafting a table and chairs for her to play with. He allegedly maintained medical insurance for her and contributed to her support. *But see* Brief for Appellee at 5. *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 929, 413 N.E.2d 428 (1980). Dorothy Salmon alleged that Gary did not exhibit much interest in Christy and had requested that Brenda take Christy and leave when he came to visit Dorothy. Dorothy also denied that Gary Townsend ever contributed any money to Christy's support. Any money donated was for the phone calls that Gary made and charged to Dorothy's phone.

39. *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 294, 413 N.E.2d 428, 429 (1980). Gary testified concerning the large house that he was building on several acres of land. Brief for Appellant at 6, *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 413 N.E.2d 428 (1980). Christy would allegedly have her own bedroom, and farm animals would be nearby.

40. *See* Attorney for Minor's Brief at 4, 5, *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 413 N.E.2d 428 (1980). Christy and Courtney are the same age and have been raised as sisters. Evidence indicates that because of the close relationship Christy and Courtney share, the

Brenda took an active role in raising and caring for Christy, as Dorothy went back to work soon after her birth.

Dr. Kiley, a child psychologist who had on several occasions observed Brenda and the children together, testified that they shared a warm relationship. In particular, he was pleased that Brenda was taking Christy to visit her mother as he believed these visits would permit a relationship between mother and daughter that could eventually help Christy better cope with, and understand the tragic events and circumstances of her life.[41]

In his closing argument, Christy's guardian *ad litem*[42] recommended that she be placed permanently with Brenda. While finding both parties fit and suitable custodians, the trial judge noted that Christy had never been in her father's home as his daughter, implying an absence of any familial bond between them. Further, the court considered the effect that Christy's living with her father would have on Gary's son. Accordingly, the judge decided that it was in Christy's best interests to remain in the custody of Brenda. Gary was, however, granted visitation rights.[43]

OPINION OF THE ILLINOIS APPELLATE COURT

The Illinois Appellate Court reversed the trial court's grant of custody to Brenda Poling and remanded with the direction that custody be granted to Gary Townsend. The court determined that inadequate consideration was given to Gary Townsend's right as the child's father.[44]

The court, in measuring the strength of the natural parent's right to the custody of his or her child against the best interest standard, found that it was very strong indeed. The court stated that although the nonparent may be given custody without a

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separation of the two would be "traumatic". It has also become apparent that Christy views her half-sister as a psychological parent. *Id.*

41. Attorney for Minor's Brief at 6, *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 413 N.E.2d 428 (1980). Dr. Kiley testified that due to the rancor between the parents, if Christy was in the custody of Gary Townsend, "future visitation with the mother might do more harm than good." *Id.*

42. *See* Schiller, *supra* note 2, at 253 for an explanation of the guardian *ad litem's* function in child custody disputes. *See also* ILL. REV. STAT. ch. 40, § 506 (1977), which provides for representation of the child at the discretion of the court.

43. *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 295, 413 N.E.2d 428, 429 (1980). The trial judge described the case as the most difficult he had been involved in during his nine year tenure on the bench.

44. *See* STORY, *supra* note 15, dealing with the father's right to the custody of his child at common law. *See also* text accompanying note 15 *supra*.

finding of parental unfitness or forfeiture of parental rights, there is a presumption that it is in a child's best interest to be in the custody of a natural parent. Therefore, the courts require some "compelling reasons,"[45] "convincing grounds,"[46] or "other circumstances,"[47] sufficient to overcome a parent's right to custody.

The court determined that there were no compelling reasons, and therefore no justification, for the decision to place Christy with her half-sister. The court rejected, as not compelling, the trial court's concern that granting custody to Gary Townsend could adversely affect his son.[48] The court similarly rejected the trial court's decision that Christy's need to maintain contact with her mother was not a compelling reason to give Brenda custody.[49]

Finally, while cognizant that the close, long-term relationship that had developed between Brenda, Christy, and Courtney was an important factor, the court considered Christy's attachment to her environment as of the time her father first sought custody. Christy was then 2½ years old. To do otherwise, the court reasoned, "would encourage a litigant with custody to de-

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45. 90 Ill. App. 3d at 296, 413 N.E.2d at 431, *citing* Pierson v. Bloodworth, 81 Ill. App. 3d 645, 652, 401 N.E.2d 1320, 1325 (1980); *See* note 76 *infra*.

46. *Id.*, *citing* Soldner v. Soldner, 69 Ill. App. 3d 97, 102, 386 N.E.2d 1153, 1157 (1979); *See* note 76 *infra*.

47. *Id.*, *citing* Sholty v. Sholty, 67 Ill. App. 2d 60, 64-65, 214 N.E.2d 15, 17 (1966); *See* note 76 *infra*.

48. We are not unmindful, of course, that placing custody with Gary Townsend would require that Alan live in the same home with a girl whose mother had killed Alan's own mother. However, there was considerable testimony at trial concerning Alan's successful adjustment to the fact that his mother had been killed, and we find nothing in the evidence suggesting that he would be upset by Christy's presence. Thus, Alan's situation is not a compelling reason for placing custody with Brenda.

Id. at 297, 413 N.E.2d at 431. *But see* Petition for Leave to Appeal at 8, *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 413 N.E.2d 428 (1980). The attorney for Brenda Poling commented that at the time of the trial Alan Townsend had only met Christy once and therefore no relationship existed between them. Interpreting the trial court's and Christy's attorney's observations of the situation, Christy would be a living reminder that his mother was murdered by her mother.

49. The court suggested that visits with Dorothy need not be precluded, since George Poling and Dorothy had apparently remarried, and if George and Brenda's affection for Christy is as strong as it then appeared to be, they will be able to arrange for Christy to visit with her mother on a regular basis. In addition, the court said that Gary promised to cooperate in any court order requiring him to allow these visits. Thus, the court was satisfied that contact between Dorothy and Christy could be adequately maintained if Gary was awarded custody. 90 Ill. App. 3d at 297, 413 N.E.2d at 431. *But see* note 41 *supra* regarding the potentially negative effects such visits would have on Christy if placed in the custody of her father.

lay trial in order to build up long standing ties."[50] The court also decided that a 2½ year old child could not have grown so attached "to his environment and those around him that a change in custody would necessarily be devastating."[51]

Concluding that the decision to grant custody to Brenda was against the manifest weight of the evidence, the court reversed, stating that absent compelling reasons a father cannot be deprived of the custody of his child. The dissenting Justice, however, noted that the viability of Christy living with her father and adjusting to the living arrangements under the circumstances was uncertain.[52] Further, the trial court might have believed Dorothy Salmon's testimony that Townsend had not provided child support, nor shown any interest in the child during his visits. The Justice also stated that the trial court's concern over how Christy might retain her relationship with her mother while living with her father and half-brother was a valid one.[53] Therefore, the Justice determined that there were compelling reasons for a trial court to hold that the child's best interests would be served by permitting her to remain in the custody of her half-sister.[54]

CONFLICTING DOCTRINES

The custody provisions of the Marriage and Dissolution of Marriage Act,[55] adopted by Illinois in 1977, provide in part that "the court shall determine custody in accordance with the best interest of the child."[56] These provisions were adopted from the Uniform Marriage and Divorce Act[57] and retain, in essence, the same best interest standard that existed under the prior Illinois Divorce Act.[58]

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50. 90 Ill. App. 3d at 298, 413 N.E.2d at 431. The record is devoid of any indication that Brenda purposely sought delay in order to obtain an advantage, nor was she accused of any such motive.

51. *Id.*

52. The dissenting justice felt that even if Christy's situation is viewed as it existed when the petition for custody was filed, the court could have concluded from the testimony of Dr. Kiley and Brenda Poling that "Christy had been well cared for and was happy in Brenda's custody." This arrangement had proved to be a viable one. (Green, J., dissenting). 90 Ill. App. 3d 292, 298, 413 N.E.2d 428, 432 (1980).

53. *See* note 55 and accompanying text *supra*.

54. The Supreme Court of Illinois heard the case on appeal late this spring and an opinion was rendered in September, 1981. *See* EPILOGUE in the accompanying text *infra*.

55. ILL. REV. STAT. ch. 40, §§ 601-610 (1977).

56. *Id.* § 602. *See* note 18 *supra*.

57. 9 A UNIFORM LAWS ANNOTATED §§ 401-410.

58. ILL. REV. STAT. ch. 40, § 19 (1975) "[T]he court . . . shall make such order touching the care, custody, support and education of the minor chil-

The *Townsend* Court acknowledged this "best interests" custody provision and immediately distinguished it from the Adoption Act. Unlike the latter Act, the custody provision does not allude to the requirement of finding the parent to be unfit before custody may be placed with someone else.[59]

The issue of whether a natural parent must be proved unfit is one with which Illinois courts have long struggled. The court acknowledged that the issue was finally decided in the 1969 decision of *People ex rel. Edwards v. Livingston*.[60] In *Livingston*, the Illinois Supreme Court held that parental custody should be denied where consistent with the best interests of the child.[61]

This child focused standard[62] was no stranger to Illinois courts in the years prior to its inclusion in the Marriage and Dissolution Act.[63] While confirming this, the court, in juxtaposition to the multitude of cases stating this standard, also correctly cited the long standing rule that the natural parent has the superior right to the custody of his or her child.[64] In light of these potentially conflicting rules, the *Townsend* court incorrectly concluded that the trial court had failed to give adequate consideration to the rights of the father in making the custody determination.[65]

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dren of the parties or any of them, as shall be deemed proper for the benefit of the children."

59. *See* note 36 *supra*. *See generally In re* Massey, 35 Ill. App. 3d 518, 341 N.E.2d 405 (1976); *In re* Ladewig, 34 Ill. App. 3d 393, 340 N.E.2d 150 (1975).

60. 42 Ill. 2d 204, 247 N.E.2d 417 (1969).

61. 42 Ill. 2d 201, 209, 247 N.E.2d 417, 421 (1969). In *Livingston*, the Illinois Supreme Court said:

> The best interest of the child is the standard and it is not necessary that the natural parent be found unfit or be found to have legally forfeited his rights to custody, if it is in the best interest of the child that he be placed in the custody of someone other than the natural parent.

See Veverka, *supra* note 26.

62. *See generally* notes 18-21 and accompanying text *supra*.

63. *See, e.g.*, Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300, 304 (1952) ("The guiding star is and must be, at all times the best interest of the child."); Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 556, 565, 158 N.E.2d 613, 618 (1959) ("The parents' natural rights must give way to the welfare and best interest of the child.").

64. *See, e.g.*, Cormack v. Marshall, 211 Ill. 519, 523, 71 N.E. 1077, 1079 (1904) ("We regard the rights of the parent as superior . . . when that parent is a fit person to have the custody . . . and is so circumstanced that he can provide the requirements of such a charge."); Jarrett v. Jarrett, 348 Ill. App. 1, 6, 107 N.E.2d 622, 625 (1952) ("[T]he right of a parent to the custody of his child is superior to that of any other person when he is fit and can provide the necessities of life and where both contestants are equally proper persons.").

65. *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d at 295, 413 N.E.2d at 429 (1980).

The appellate court gleaned from other parent-third party custody cases that a nonparent can be given custody without a finding of parental unfitness, yet there remains the presumption that it is in the child's best interest to be in the custody of a natural parent.[66] Consequently, the courts *require* some "special circumstances"[67] before awarding the child to a nonparent, third party.

The appellate court's reliance on the strength of the rule and the presumption was misplaced. Although Illinois appellate courts are divided with regard to a mother's superior right, as against a father's to the custody of a very young child,[68] there is agreement with regard to a natural parent's superior right to the custody of his or her minor child, as against claims made by nonparents. The appellate courts, however, have also agreed that the rights of natural parents are subordinate to the primary concern with advancing the best interests and welfare of the child.[69]

The court, in its opinion, implied that this presumption is applicable in all instances in custody proceedings, and it is applied only with the provision that it be in accord with the child's best interest. Its most common application is in a marriage dissolution action when a third party intervenes in the action.[70] It is not unusual, however, to see it applied in a custody action brought by a natural parent who has maintained a continuing

66. *In re* Marriage of Braden, 70 Ill. App. 3d 535, 536, 388 N.E.2d 939, 940 (1979); Eaton v. Eaton, 50 Ill. App. 3d 306, 310, 365 N.E.2d 647, 650 (1977) (it is in the child's best interest to be raised by his natural parent absent a clear showing to the contrary).

67. *See* notes 79-82 and accompanying text *infra*.

68. A presumption historically used by courts in Illinois is the "tender years doctrine," which presumes that it is in the best interest of children of tender years that they be placed in the custody of their mothers. Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300, 303 (1952). This Illinois Supreme Court decision has not been overruled.

Some appellate courts in Illinois have rejected the tender years presumption as contrary to the Illinois Constitution which provides that equal protection of the law shall not be denied or abridged because of sex. *See* ILL. CONST. art. 1, § 18. *See, e.g.*, Anagnostopoulos v. Anagnostopoulos, 22 Ill. App. 3d 479, 482, 317 N.E.2d 681, 683 (1974); Jines v. Jines, 63 Ill. App. 3d 564, 380 N.E.2d 440, 443 (1978). *See generally* Annot., 70 A.L.R. 3d 262 (1976). Other appellate courts continue to advocate and use this presumption.

69. Historical and Practice Notes, ILL. ANN. STAT. ch. 40, § 602 (Smith-Hurd, 1980).

70. *See, e.g., In re* Marriage of Braden, 70 Ill. App. 3d 535, 388 N.E.2d 939 (1979). The trial court awarded custody of the infant to grandparents with whom she had never lived, rather than to the mother with whom she had been living. The decision was based on the mother's alleged immaturity. The appellate court reversed and reunited mother and infant on the basis that it was in the child's best interest to live with her mother whose care and nurture of the infant was not found to be lacking or inferior.

relationship with the child following the death of the custodial parent. Usually, in this instance, the third party[71] has assumed custody subsequent to the death, and the court has adjudged both parties to be equally fit.[72] Common to both is a past or present familial bond between parent and child.

Illinois has not applied this presumption to a putative father seeking custody of his child where the custodial parent was still living, although incarcerated. Biology, rather than a past or present familial relationship, is the sole basis for Gary Townsend's assertion of parental rights.

In *Townsend* the court cites *Livingston*[73] and *Pierson v. Bloodworth*[74] as examples of the magic language of "compelling reasons," "convincing grounds," or "other circumstances,"[75] without which a nonparent cannot win a custody dispute. However, the court neither distinguished nor analogized these cases. If it had, the court would have discovered that while requiring special circumstances, the cases turned on, and were concerned with, the best interest and welfare of the child,[76] and "that the

71. *See generally* Soldner v. Soldner, 69 Ill. App. 3d 97, 386 N.E.2d 1153 (1979); Eaton v. Eaton, 50 Ill. App. 3d 306, 365 N.E.2d 647 (1977); Sholty v. Sholty, 67 Ill. App. 2d 60, 214 N.E.2d 15 (1966). Usually the third party is a step-parent, grandparent, or close relative.

72. Barclay v. Barclay, 66 Ill. App. 3d 1028, 1031, 384 N.E.2d 564, 567 (1978). In a dispute between parents and grandparents where both parties are found equally fit to care for the child, the parents generally prevail. The rule, however, is applicable only when the parents are not chargeable with laches or forfeiture, but the rule always yields to the best interest of child.

73. People *ex rel.* Edwards v. Livingston, 42 Ill. 2d 201, 247 N.E.2d 417 (1969). *See* note 28 *supra*.

74. 81 Ill. App. 3d 645, 401 N.E.2d 1320 (1980).

75. *See* notes 45-47 *supra*.

76. Pierson v. Bloodworth, 81 Ill. App. 3d 645, 401 N.E.2d 1320 (1980). Custody was awarded to the nonparent/aunt. Facts were cited which clearly indicated that it was in the children's *best interest* to be in the custody of the aunt/stepmother. The children had lived with their natural father and stepmother for ten years. After the father's death, their natural mother who visited monthly, asserted her superior rights to custody. The compelling reasons justifying an award of custody to the aunt/stepmother were: 1) the children expressly preferred remaining with their stepmother; 2) violent quarrels between the natural mother and her husband which upset the children; 3) one child's academic performance was adversely effected while living with her natural mother; 4) the children would suffer a negative impact from the severance of social ties developed over the ten year period.

In Soldner v. Soldner, 69 Ill. App. 3d 97, 386 N.E.2d 1153 (1979), the appellate court reversed the trial court. It held that evidence which confirmed that the divorced mother entrusted the care of her child to the paternal grandparents, often during the week but for good reasons, did not indicate that the welfare and best interests of the child, who was born handicapped and subject to seizures and frequent illness, would not be served by continued custody of the child. While the court stressed that convincing grounds must be proved demonstrating that the natural parent should not have custody, it stated that the superior right of the parent will prevail when other-

superior right of the natural parent to custody of the child can only be determined in context of the best interest of the child."[77]

In *Livingston*, a father was denied custody of his son whom he had not seen for eleven years, although he lived within thirty miles of the child's home.[78] This constituted more than convincing grounds, and could clearly have been regarded as abandonment of all parental duties or forfeiture of all parental rights.[79] In *Pierson*, the court cited facts which also indicated that it was in the children's best interest to be in the custody of their aunt. Poor scholastic achievement while living with the mother as well as the children's desire to remain with their aunt were deemed compelling reasons by the court.[80]

In *Townsend*, the appellate court failed to consider a recent case which is factually analogous. In *Mitchell v. Henderson*,[81] the plaintiff who failed to prove paternity was denied custody of his alleged illegitimate child whose mother had died. The court held that a superior parental right exists only when it is consistent with the best interest of the child. It reasoned that it would not be in the child's best interest to separate her from her grandmother, aunt, and half-sister who had been providing her with good care, attention and a stable environment so that she may live with her "alleged" father and his family even if the issue of paternity were decided otherwise.[82] Certainly, the special circumstances in *Mitchell* are similar to the circumstances in the instant case.

These cases emphasize that the presumption of superior parental rights is merely *a* factor[83] to be considered under the

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wise consistent with the child's best interest. A strong dissent was made in favor of the broad discretion that is accorded the trial judge in custody cases.

In Sholty v. Sholty, 67 Ill. App. 2d 60, 214 N.E.2d 15 (1966), the court held that the evidence supported the decision to award custody to the father rather than the maternal grandparents with whom the mother and child lived before the wife died. "Superior parental rights may be limited by the parents' conduct or other circumstances." Evidence in this case indicated that the father's conduct "had not been inconsistent with his duties and responsibilities as a parent." *Id.*

77. *Id.* at 64, 214 N.E.2d at 17.

78. People *ex rel.* Edwards v. Livingston, 42 Ill. 2d 201, 203, 247 N.E.2d 417, 419 (1969).

79. *Id.* at 205, 247 N.E.2d at 422.

80. *See* note 76 *supra*.

81. 65 Ill. App. 3d 363, 382 N.E.2d 650 (1978).

82. *Id.* at 367, 382 N.E.2d at 654. The child barely knows plaintiff, and she has never been led to believe that he is her father. Further, proper care and attention in the plaintiff's home is questionable.

83. ILL. REV. STAT. ch. 40, § 602 (1980).

Subsection (a) states that the court shall consider all relevant factors and specifically lists six non-exclusive factors. The first five of these factors

Marriage and Dissolution Act. *Townsend* erroneously views parental rights as *the* factor and places it on an equal footing with the best interests standard. Instead, it must be regarded as only one of several elements in the child's social and emotional environment to be considered in determining what is in the child's best interest. Special circumstances and convincing reasons that compel or justify awarding custody to one party over another party, be they parent-parent disputes or parent-third party disputes can always be found.

The *Townsend* court, applying such nebulous and seemingly subjective terms as "convincing grounds" and "best interest" to the evidence, concluded that each of the factors that the trial court considered in making its judgment was insufficient to surmount its view of what constitutes a "compelling reason."[84] The court, with its narrow vision, neglected to consider *all* the factors,[85] which taken together as they should be in every case,[86] and as they were in *Pierson*, contribute to a court's final disposition.

Section (a) of the Marriage and Dissolution Act provides that the court shall consider *all relevant* factors in determining child custody, including several enumerated factors.[87] It does not require the court to make specific findings of fact as to those

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derive from § 402 of the Uniform Act. *See* note 57 *supra*. *See generally* note 18 *supra*. "[T]he language of the section makes it clear that the judge need not be limited to the factors specified." Uniform Marriage and Divorce Act (9A U.L.A.) § 402, Commissioner's note at 198. Presumptions which developed under prior law for determining the best interests of the child are left to case law development insofar as they will continue to be considered "relevant factors" under this subsection. The Commissioner's Note to § 402 of the Uniform Act states: "Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb." *Id.*

84. *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 297, 413 N.E.2d 428, 432 (1980).

85. The court neglected to take into account the conflicting testimony regarding Gary Townsend's support payments and his past interest and concern for his child. The fact that Christy had never lived with her father was a justified concern mentioned in the dissent but ignored in the majority opinion. The court similarly failed to take into account the recommendation of the guardian *ad litem* as well as the recommendation of the child psychologist.

86. *See, e.g.*, In *In re* Custody of Angela Marie Piccirilli, 88 Ill. App. 3d 621, 410 N.E.2d 1086 (1980). The appellate court held that there was sufficient evidence for the trial court to sustain its finding that it would be in the best interests of the child to remain in the custody of her paternal grandparents and that there was no abuse of discretion in making that decision. The trial court did not merely take into account the facts that the child lived almost all her life with her grandparents and desired to remain with them in making a custody determination; rather, "all the facts were considered in determining the best interests of the child." *Id.* at 621, 410 N.E.2d at 1091.

87. *See* note 18 *supra*.

factors. It does require, however, that the record contain sufficient evidence concerning them to enable the trial court to make a reasoned decision regarding custody.[88] The *Townsend* record was sufficient to allow the majority to reject those factors piecemeal.[89]

TRIAL COURT DISCRETION V. APPELLATE COURT REVIEW

While no two custody cases are alike, generally they all share two common elements.[90] One is that the 'best interest' of the child will control the decision. The other is that great discretion[91] is vested in the trial court, and great credence[92] afforded its findings and determinations. Neither is apparently present in this case. The general rule requires that a court of review not disturb the findings of the trial court unless it clearly abused its discretion,[93] the findings are palpably erroneous or manifestly against the weight of the evidence,[94] or unless it appears that a manifest injustice has been done.[95]

The trial judge is in a unique position to observe the parties' conduct and presence while testifying, and is thereby better able to discern what is in the child's best interest.[96] The presumption favoring the trial court's determination is compelling

88. *See* Atkinson v. Atkinson, 82 Ill. App. 3d 617, 402 N.E.2d 831, 835 (1980) (record contained sufficient evidence concerning the specified factors); Blonsky v. Blonsky, 84 Ill. App. 3d 810, 817, 405 N.E.2d 1112, 1119 (1980) (trial court did not err in failing to articulate one of the findings). *See also* Melear v. Melear, 76 Ill. App. 3d 706, 395 N.E.2d 208 (1979) distinguishing Wurm v. Wurm, 68 Ill. App. 3d 168, 385 N.E.2d 894 (1979) ("We do not read either *Wurm* or the new Marriage Act as mandating a recital of the specified factors in the judgment order or as requiring written findings of fact in any other form . . . [just] some indication in the record that the trial court considered the factors listed."). *See Child Custody Provisions*, *supra* note 18, at 677-79.

89. While lacking the detailed findings found in *Pierson* and *Piccirilli*, the findings were sufficient for both the majority and the dissent to comment on them accordingly.

90. Soldner v. Soldner, 69 Ill. App. 3d 97, 104, 386 N.E.2d 1153, 1159 (1979).

91. *See* Eaton v. Eaton, 50 Ill. App. 3d 306, 310, 365 N.E.2d 647, 651 (1977); *In re* Stilley, 66 Ill. 2d 515, 520, 363 N.E.2d 820, 822 (1977).

92. *See* Soldner v. Soldner, 69 Ill. App. 3d 97, 105, 386 N.E.2d 1153, 1159 (1979) (dissent quotes the most often cited versions of the rule in Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 556, 158 N.E.2d 613 (1959)).

93. Cebrzynski v. Cebrzynski, 63 Ill. App. 3d 66, 72, 74, 379 N.E.2d 713, 719 (1978).

94. Garrison v. Garrison, 75 Ill. App. 3d 726, 729, 394 N.E.2d 788, 791 (1979).

95. Atkinson v. Atkinson, 82 Ill. App. 3d 617, 625, 402 N.E.2d 831, 836 (1980).

96. *See* note 90 *supra*. Look v. Look, 21 Ill. App. 3d 454, 458, 315 N.E.2d 623, 626 (1974) *citing* Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 556, 158 N.E.2d 613 (1959).

in custody cases because of these factors.[97] Further, conflicting evidence does not justify disturbing the court's conclusion.[98]

It is clear from the record that the trial court agonized over its determination.[99] Although the appellate court finds that inadequate consideration was given to Gary Townsend's rights as the natural father,[100] there is evidence to the contrary in the record. The trial judge made several references to parental rights and gave what he thought to be compelling reasons why Christy's interests would be better served with her half-sister than with her father.[101]

While recognizing that the presumption favoring the natural parent must not be disturbed, the appellate court ignored the presumption which prefers the existing custodian over any new custodian because of the interest in assuring continuity for the child.[102] The court dismissed this issue by refusing to examine Christy's attachment to her surroundings from a point subsequent to the filing of the initial custody petition.[103] The court failed to consider realistically that the child was now 4 years old,

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97. *See* Atkinson v. Atkinson, 82 Ill. App. 3d 617, 625, 402 N.E.2d 831, 836 (1980); Gren v. Gren, 59 Ill. App. 3d 624, 625, 375 N.E.2d 999, 1000 (1978).

98. Vysoky v. Vysoky, 85 Ill. App. 2d 306, 230 N.E.2d 3 (1967); Kokotekian v. Kokotekian, 23 Ill. App. 2d 171, 161 N.E.2d 712 (1959).

99. *See* Record, *In re* Custody of Christy Elizabeth Townsend, No. 79-F-149 (Cir. Ct. Macon County 1980). *See also* Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21 (1965) speaking for the court, Judge Botein said "a judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision." *Id.* at 23.

100. *In re* Custody of Christy Elizabeth Townsend, 90 Ill. App. 3d 292, 295, 413 N.E.2d 428, 431 (1980).

101. *See* Record, *In re* Custody of Christy Elizabeth Townsend, No. 79-F-149 (Cir. Ct. Macon County 1980).

102. *See generally* Commissioners' Note, UNIFORM MARRIAGE AND DIVORCE ACT § 402. *See* note 27 *supra*; text accompanying notes 81-82 *supra*; Annot. 25 A.L.R. 3d 7 (1969); Barclay v. Barclay, 66 Ill. App. 3d 1028, 1032, 384 N.E.2d 564, 567 (1978) (natural parent did not have superior right to custody where paternal grandparents originally took child temporarily but with time they became psychological parents, and the child's best interest would not be served by taking him from their home); People *ex rel.* Hermann v. Jenkins, 34 Ill. App. 2d 255, 180 N.E.2d 359 (1962) ("In a particular case the forces of environment may be so strong as to compel the court, in the best interests of the child, to deny the natural right of the father even when he is a perfectly fit person to have custody of the child); Look v. Look, 21 Ill. App. 3d 454, 457, 315 N.E.2d 623, 626 (1974) ("To sever home ties of long standing as here where the child has lived with the grandparents almost all of his life, a home full of love and care, for the sole purpose of placing him with his father cannot be said to be in the best interest of the child."). *See also* Mackie v. Mackie, 88 Ill. App. 2d 61, 69, 232 N.E.2d 184, 189 (1967); Price v. Price, 329 Ill. App. 176, 67 N.E.2d 311 (1946).

In each case cited, the children's strong ties to their present environment was a major consideration in the court's determination in favor of the nonparent and is analogous to the instant case.

103. *See* notes 50-51 and accompanying text *supra*.

not 2½, and that change at this time *could* be devastating.[104]

In addition, the court, unlike the court in *Cebrzynski v. Cebrzynski*, chose to ignore the recommendation and proffered testimony of the child psychologist.[105] The *Cebrzynski* court awarded custody to the stepmother, given psychiatric testimony that the children's emotional health would be damaged if they were returned to the natural mother.[106] Similarly, the appellate court in *Townsend* chose to ignore, unlike the court in *Garrison v. Garrison*, the fact that the father's version of his efforts at parenthood, including his alleged payment of support was not as persuasive as the mother's regarding these efforts.[107] The *Garrison* court awarded temporary custody to the grandmother, choosing to accept evidence that ran counter to the father's account of his attempts at making contact with his daughter.[108]

It is axiomatic that the contributing elements and circumstances involved in each case in which custody is at issue are *sui generis*.[109] As a consequence, appellate courts give considera-

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104. *See* GOLDSTEIN, *supra* note 21, at 31.

> Change of the caretaking person for infants and toddlers further affects the course of their emotional development. Their attachments, at these ages, are as thoroughly upset by separations as they are effectively promoted by the constant, uninterrupted presence and attention of a familiar adult. When infants and young children find themselves abandoned by the parent, they not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful. Where continuity of such relationships is interrupted more than once, as happens due to multiple placements in the early years, the children's emotional attachments become increasingly shallow and indiscriminate. They tend to grow up as persons who lack warmth in their contacts with fellow beings.
>
> For young children under the age of five years, every disruption of the continuity also affects those achievements which are rooted and develop in the intimate interchange with a stable parent figure, who is in the process of becoming the psychological parent. The more recently the achievement has been acquired, the easier it is for the child to lose it. Examples of this are cleanliness and speech. After separation from the familiar mother, young children are known to have breakdowns in toilet training and to lose or lessen their ability to communicate verbally.

Id. at 32-33.

105. *See* note 41 and accompanying text *supra*.

106. Cebrzynski v. Cebrzynski, 63 Ill. App. 3d 66, 379 N.E.2d 713 (1978).

107. *See* note 38 and accompanying text *supra*.

108. Garrison v. Garrison, 75 Ill. App. 3d 726, 394 N.E.2d 788 (1979).

109. Look v. Look, 21 Ill. App. 3d 454, 457, 315 N.E.2d 623, 625 (1974).

> In proceedings affecting the custody of a child, the primary consideration is the present and prospective welfare of the child, or as otherwise stated, the best interest of the child. Naturally, no hard and fast rule can be laid down as what will best serve the welfare and interests of a child. Each case must be determined according to its own circumstances and the question rests largely on the sound discretion of the trial court.

Id.

ble deference to the decisions of trial judges. By rejecting this widely accepted rule, the appellate court's reversal in *Townsend* signalled a contravention of the deference typically accorded the trial court. It chose to substitute its judgment and analysis of the facts for that of the trial judge, who had the best opportunity to evaluate the evidence and to observe the credibility and behavior of the witnesses giving that evidence. Unless clearly against the manifest weight of the evidence, the appellate court should not disturb the trial court's decision.[110]

CONCLUSION

The issue of whether a "pure" best interest standard will prevail in Illinois in a third party custody dispute requires a determination by the Illinois Supreme Court. Whether or not *In re Custody of Christy Elizabeth Townsend* will become a landmark case is questionable at best. The unique facts of this case may be its main flaw. However, since lifestyles, morals, and family life are in a constant state of flux, future cases may be even more complex. If the best interest standard is good law, then it should be applicable no matter how bizarre the case. If it does not apply to any given set of facts then it is altogether useless, and the legislature will be forced to be more precise, therefore, leaving less open to judicial interpretation.

Most recent decisions, however, reflect the growing dominance of the child's interest and welfare. Thus, judges are more cognizant of their particularly unique responsibility to the child and express this concern by refusing to honor the biological relationship when the natural parents are less capable of providing for the child's psychological well-being than the third party.

Recent decisions also continue to echo past decisions regarding the deference given to the trial court's discretion. While its discretion is broad, it is neither absolute nor uncontrollable. It is not clear, however, when the trial court commits an abuse of discretion, or when the findings are against the manifest weight of the evidence, as specific findings of fact are not required. What is a clear abuse is when an appellate court *reweighs* rather than *reviews* the same facts taken into account by the trial judge in making his decision.

In conclusion, consider again the story of the wisdom of Solomon. Inextricably linked to it is the ploy that "blood is thicker than water." However, in view of our ever increasing sophistication and fascination with modern psychology, this philosophy is

110. *See* notes 93-95 and accompanying text *supra*.

clearly out of synch and has become as much an anachronism[111] as is the decision rendered by the appellate court in *In re Custody of Christy Elizabeth Townsend*.

EPILOGUE—THE ILLINOIS SUPREME COURT

The Illinois Supreme Court in *In re Custody of Christy Elizabeth Townsend* reversed the judgements of both the appellate and circuit courts and remanded to the circuit court of Macon County for a hearing consistent with what was expressed in the opinion.[112] While giving "single factor" status to both the presumption favoring the parent over the nonparent and the existing custodian over any new custodian to insure continuity in the child's life,[113] the court applied the former as though it were the *only* factor.[114] The court deemphasized Christy's strong ties to Brenda and her environment while overemphasizing Gary's superior parental rights at the expense of the statutorily mandated best interests standard.[115] The court viewed the relationship between Brenda and Christy as beginning from a legal time frame *i.e.* when Christy's natural parent filed the action, when, in reality, it began at birth and has continued for more than five years.[116] This preferential treatment, afforded the existing custodian, could not "neutralize" the presumption favoring the natural parent. The court did, however, acknowledge that it could be a "determining factor" in a given case.[117] The court apparently focused on Gary's rights and feelings,[118] abandoning Christy's psychological needs for another ride on the legal merry-go-round. The court has thus avoided making a definitive pronouncement and, at the same time, has left the lower court with little or no direction. Perhaps, the court's most obvious flaw is its conspicuous silence regarding the rationale behind the decision to reverse the appellate court. In fact, the court gave every impression, throughout, that the judgment of the appellate court would be affirmed. To add to the confusion, the lower court was directed to consider the recent marriages of all

111. *See* McGough & Shindell, *supra* note 3, at 243.

112. *In re* Custody of Christy Elizabeth Townsend, Nos. 54282, 54365 cons., slip op. (Ill. Sup. Ct. Sept. 1981).

113. *See* notes 27, 28 & 102 and accompanying text *supra*.

114. *In re* Custody of Christy Elizabeth Townsend, Nos. 54282, 54365 cons., slip. op. at 4, 11 (Ill. Sup. Ct. Sept. 1981).

115. *Id.* at 11. *Contra*, notes 69 and 83 and accompanying text *supra*.

116. *In re* Custody of Christy Elizabeth Townsend, Nos. 54282, 54365 cons., slip op. at 11 (Ill. Sup. Ct. Sept. 1981). *Contra*, notes 40, 50, 103 and 104 and accompanying text *supra*.

117. *In re* Custody of Christy Elizabeth Townsend, Nos. 54282, 54365 cons., slip op. at 11 (Ill. Sup. Ct. Sept. 1981).

118. *Id.* at 10-11. *Contra*, note 16 and accompanying text *supra*.

the principals in this continuing family saga.[119] Had the court deferred to the trial court decision as the analysis of this casenote indicates and had the court genuinely concerned itself with Christy's best interest, her future would not now remain uncertain. At this "sometimes pace of our judicial process,"[120] Christy is likely to reach her majority before a final determination is made.

Lynn A. Cohen

119. *In re* Custody of Christy Elizabeth Townsend, Nos. 54282, 54365 cons., slip op. at 12 (Ill. Sup. Ct. Sept. 1981).

120. *Id.* at 11.