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Child-Custody Adjudication - The Twentieth Century Dilemma: Reconciling The Best Interest Of The Child In A Cross-Cultural Setting

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by

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CHILD-CUSTODY ADJUDICATION - THE TWENTIETH CENTURY DILEMMA

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INTRODUCTION

CHAPTER I

The determination of which parent should have custody of the children in a divorce proceeding has become increasingly problematic in the past several decades. As clear rules have been replaced by less well-defined standards for making such decisions, and as societal norms have de-emphasized gender-like differences in the work place and within the family, uncertainty about the appropriate role each partner should play in the child’s life after divorce has increased.

In three centuries since the English colonization of America, no area of law has undergone more changes than family law. The family and family life has changed. Laws regarding child custody have also changed. Marcia O.’ Kelley in her work "Blessing that tie that binds" notes:¹

“To choose one from among custodial alternatives is a difficult kind of decision for a judge to make and for a society to rationalize.”

Determining which parent should be awarded the custody of a minor child is perhaps one of the most difficult and challenging decisions that judges are called upon to make. Custody decisions affect not only the rights of men and women, but most importantly, they have a life-long impact on the innocent child at the center of the battle.² Without clear legal rules, the consideration of the children’s need has been forced to the forefront of the decision making process. Thus, the determination of parent custody after divorce has become an unpredictable and highly charged emotional issue for all involved.

¹Marcia O.’ Kelly, Blessing The Tie That Binds, Preference for the Primary Caretaker as Custodian, 63 N.D. L. Rev. 481,482 (1987).
Custody contests tend to be very nasty because the stakes are so high. The personal integrity of each parent is challenged, and the victor gains control over the child. It seems then that the best approach to deciding custody issues is far from clear. Legal doctrines, psychological theories and social policies have left a difficult problem in a state of confusion. Moreover, regulations and laws at every level have failed to stem the tide of the growing custodial battle. This raises the question of whether or not efforts to regulate custody awards have been successful.

The 20th century has no doubt witnessed the difficulty of formulating a good policy. A good policy is to a large degree a function of several factors. The struggle exists at personal, legal, and societal levels as parents fight not only for care of the children but also for control over them. In addition the rules of fair play, decency, and personal integrity are likely less to be honored in custody disputes than in any other area of the law. Each case represents unique issues. Therefore, the variables of the child's character and the diversity of personalities of parents combine to provide a wide array of problems calling for immediate attention.3

Indeed in modern times we automatically think of child custody in the context of divorce. In the last half of the twentieth century, divorce has been the setting for the vast majority of custodial disputes. Custodial disputes have surfaced more frequently on other occasions such as the death of the mother or one of the spouses,4 the incompetence or financial inability of parents to care for their children, the birth of illegitimate children,5 the temporary removal of the child from the custody of their parents on grounds of abuse and neglect6 and the termination of parental rights leading to the adoption of the child.7

4 See, e.g., Painter v Bannister, 140 N.W. 2d 152 (1966).
6 See, e.g., In re C Children, 169 AD 2d 481, 564 N.Y.S. 2d 354 (1991)(finding abuse where the child was punched in the face and beaten with an electric cord); see also Campbell v Common Wealth 405 SE 2d 1 (Va. Ct. App 1991) (finding abuse in a criminal case where child was hit several times with a belt leaving bruises).
These broad areas continue to be the major social issues that warrant the courts' involvement and determination of custody of the child.

This thesis reviews the historical and legal factors affecting the courts in granting child custody awards in the twentieth-century. Chapter Two is divided into two parts: Part I provides a brief background and overview of the historical factors affecting Child custody awards. The historical review extends from the period of the common law to the present. It traces the history of custodial rights between the parents from the common law granting absolute custody to the wed father, to the 'Best Interest Standard,' which is the standard used by most courts in the adjudication of child custody disputes. The goal in highlighting the historical overview is to provide valuable insights into how custody law has responded to social changes in the twentieth century.

Part II of Chapter Two examines the legal and constitutional factors affecting custody adjudication in the twentieth century. It deals with the feminist movement for the equal rights of women, and its effects and implications on women in child custody awards. Presently, although several courts have adopted a gender-neutral basis in determining who is entitled to the custody of the child, we see in an increasing measure the courts leaning in favor of mothers because of their peculiar bonds and connection with children.\(^7\) Custodial arrangements such as the joint custody rule and the primary caretaker rule are also discussed.

Chapter Three examines the role and impact of the social and behavioral sciences on custody adjudication. It also provides examples of the dilemma resulting from custody arrangements, which have resulted from the development of reproductive technology.

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Chapter Four provides a comparative analysis of custody laws under the Islamic Law system in Sierra Leone, and Custody Law in the United States. This is intended to provide a foundational framework in viewing the “Best Interest of the Child” analysis in Chapter Five and in asserting that different cultures and States reflect on custody adjudication with diversified interpretations, based on the existing religious and or State laws. This results in inevitable differences in the expectations, interpretation, and true meaning of the best interest of the child doctrine. It is noteworthy to point out that I have selected Sierra Leone as a case study in this regard to depict a diversified cultural setting.

Chapter Five delves into a critical examination of the best interest of the child’s doctrine. The analysis aims to explore the meaning and significance of the “best interest of the child” principle established in Article 3 (1) of the United Nations Convention on the Rights of the Child.”

Chapter Five defines the Best Interest of the Child Doctrine from several legal standpoints: (i) as promulgated by Article 3 (1) of the Convention on the Rights of the Child, (ii) the United States definition as provided by Section 401 of the Uniform Marriage and Divorce Act of 1992), (iii) more traditional societies with links to family and local community like Sierra Leone, (iv) several other State standards.

Although this principle has often been recognized in international instruments and has been applied in the State law of several countries, it still poses a problem in its application in a situation of cross-cultural context where different and varied interpretations may be accorded. Thus for example, it might be argued that in some

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10 Id.
highly industrialized countries like the United States, the child’s best interests are
obviously best served by policies that emphasize autonomy and individuality to the
greatest possible end. Moreover, in more traditional societies with links to the family and
the local community, the principle that the best interest shall prevail will be interpreted as
requiring the subjection of the child’s preferences to the interests of the extended family
and the local community as a whole. As Justice Brennan speaking of the best interest of
the child principle rightly stated,
“it must be remembered that in the absence of legal rules or a hierarchy of values,
the best interest’s approach simply creates an unexaminable discretion in the
repository of the power.”

The open-endedness of the standard can make legitimate practices in some
cultures, which are regarded in others as possibly harmful to children. Furthermore in a
broad sense, the best interest standard provides no yardstick by which a State’s party laws
or practices can be criticized. For some States, the whole matter has become a language
game. The extent to which this principle has gained general acceptance is due to the
frequency with which it is used at the State and international level. Despite it’s very
limited jurisprudential origins, the principle has come to be known in one form or the
other to many national legal systems and has important analogies in diverse cultural
settings.

After examining the interrelated factors that have influenced custody adjudication,
and also applying the best interest principle in a cross-cultural context, Chapter Six
provides recommendations for policy and practice. It further projects valuable proposals
for custody arrangements in the twenty-first century.
CHAPTER II

HISTORICAL AND LEGAL FACTORS

Fathers’ Absolute Rights Era

The colonial period is perhaps the most difficult to reconstruct because the legal system then was not as formally constructed as it is today. Colonial courts far more than today’s institutions were not at the center of the community settling quarrels and disputes. In the early nineteenth century, adjudication of custody disputes between a husband and wife was controlled by a simple rule: the father in Lord Ellenborough’s words, was the person entitled by law to the custody of the child. Fathers had paramount rights to the custody and control of the children in their household. Paternal power with respect to children in America in colonial times contained distinct features reflective of property ownership rights. Children were viewed as important economic producers. The principle value of children to their families was in their work contributions, adding to the family income and supporting aging parents. Parents were at liberty to rear their children as they saw fit, virtually free from government intrusion. Children were often transferred from their families to masters through formalized instruments of indenture or apprenticeship.

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12 See Mason, supra note 8 at xiii.
15 See id.
16 See id.
During this era, mothers had absolutely no rights and could not obtain custody of their children even if the father died and appointed them as guardian. This preference was largely based on the English concept of primogeniture and cultural reality that a woman was unable to provide for herself and her children financially. A colonial mother had no legal rights to her children when her husband was alive and only restricted rights upon his death. For the most part English common law prevailed, except for the unique American experience of slavery, which allowed masters to sell children as chattel. The reality of the child’s life was that the child was part of a work force. At age six or seven children were thought of as making fine apprentices and servants. Children were critical to the colonial labor force. Since they were viewed as economic producers, the courts became principally involved in issues of the custody and control of children when they were asked to resolve conflicts regarding child labor or approve contracts for indenture.

It is significant to note that in the colonial era custody disputes between mother and father following a separation, which has distinguished itself as a major custodial issue in this century, received scant attention in this era, because women had few rights and divorce was rare.

Maternal Preference Era

By the nineteenth century the courts were questioning and modifying the absolute custodial rights of fathers by conditioning the father’s ‘absolute right,’ upon his fitness as a parent. This mitigation was in response to the cruelty and hardships inflicted upon unoffending mothers by the States, and of the law which took little account of their

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18 See id.
19 See Mason supra note 8 at xiii.
21 Mason, supra note 8 at 3.
22 Id at 5.
23 See Mason, supra note 8 at 50.
claims of feelings. Accordingly the seeds of maternal preference were sown. Some historians mark the industrial revolution and the early nineteenth century as a new era in children’s rights. Parents gave up their rights to use the child for labor and in exchange the master assumed the responsibility of educating, clothing and feeding the child. Children were beginning to emerge from their position as mere chattel where they could be beaten or killed at will. They gradually became a valuable, tradable commodity. By the latter part of the nineteenth century, society feared that children were endangered by the conditions of industrialization and urbanization. This fear created an atmosphere out of which the “child saving era” grew. This period was marked by efforts to assure the health and welfare of children through reforms in the area of child labor, education.

For a brief period during the early nineteenth century, there was a complete reversal from a paternal to a maternal preference. While under common law the father had the right to the custody of his child that was nearly absolute, a judicial presumption developed that a child of tender years was best off with his or her mother. This presumption was codified in many States. In 1959, it was reported that the mothers

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24 See id at 42.
25 See, e.g., Paire v Paire, 23 Tenn (4 Humph) 523 (1843).
26 Woodhouse, supra note 14 at 1046.
28 Id.
29 See Pyle, supra note 3 at 351.
30 Id.
32 Peter Jacobson, American Marriage and Divorce 131 (1959).
received custody in about eighty percent of all the cases.\textsuperscript{34} The typical family during this
time consisted of a working father and mother who remained at home with the children.\textsuperscript{35}

The era of maternal preference was short-lived. By the 1970s, rules providing for
a maternal preference, as well as those providing a presumption for the mother based on
the tender years doctrine began to meet with constitutional challenges.\textsuperscript{36} Accordingly a
majority of State courts followed the Supreme Court’s lead in \textit{Reed v Reed},\textsuperscript{37} where the
court struck down as unconstitutional, a statute that classified on the basis of sex. Several
courts subsequently followed this trend by reiterating that any custody law that
distinguishes solely on the basis of gender, is an unconstitutional violation of the Equal
Protection Clause under the Fourteenth Amendment of the United States Constitution.\textsuperscript{38}
This underlining theme continues to dominate and reflects the court’s attitude in the
determination of custody awards.

\textbf{The Best Interest of the Child Era}

Finally the determined entrance of the social and behavioral sciences into custody
issues towards the end of the twentieth century changed not only the legal rules governing
divorce cases, and frustrated by indeterminate standards as a result of the abolition of the
maternal preference, law makers and judges increasingly looked to social and behavioral
scientists to provide guidelines for what constituted the best interest of the child.\textsuperscript{39} They
also employed expert witness to evaluate the relationship between the parent and the
child.\textsuperscript{40}

\textsuperscript{34} See id.
\textsuperscript{35} For example in 1960 only nineteen percent of all married mothers with children under age six
worked outside the home. By 1986 the proportion had grown to fifty-four percent. See generally,
\textsuperscript{37} Reed v Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971) (holding unconstitutional
State statute preferring men as executors of estates).
\textsuperscript{38} See, e.g., Ex parte Devine, 398 So.2d 686 (Ala.1981) (holding that the tender years
presumption is unconstitutional gender based classification between mothers and fathers).
\textsuperscript{39} See id at 162.
The final stage in this evolution grew out of the best interest doctrine and a growing interest in children stemming from emphasis in psychology and psychotherapy on the influence childhood has over the development of personality.\textsuperscript{41} In the changing world of the twentieth century, child custody lawmakers and State officials increasingly relied upon social and behavioral science concepts and applications.\textsuperscript{42} The promotion of this dependence was a result of the abolition the maternal presumption and the fault-based divorce, both of which fostered vague standards for judicial decision making. At the same time, scientific concepts of proper child raising provided the State with authority to remove children from their homes when parental behavior fell below acceptable standards.\textsuperscript{43}

Dependence upon the social sciences accelerated late in the century. The use of social sciences in the twentieth century expanded in three ways. Firstly social science scholarship, usually in the form of psychological theories to support the primacy of mother, father or both parents influenced both legislators and judges in custody disputes following divorce.\textsuperscript{44} Secondly, expert witness most often mental health professionals trained in social and behavioral sciences, were called upon to testify as to the capabilities of a particular parents. Social workers were asked to evaluate the larger parent-child living situation and to intervene in cases of abuse and neglect.\textsuperscript{45} Thirdly, the court moved towards using therapeutic model of mediation in place of the adversarial mode of litigation in all matters of family law.\textsuperscript{46}

\textsuperscript{40} Id.
\textsuperscript{41} Id at 161.
\textsuperscript{42} See id.
\textsuperscript{43} See id.
\textsuperscript{44} Mason, supra note 8 at 162.
\textsuperscript{45} See Pyle, supra note 30 at 353.
\textsuperscript{46} See Mason, supra note 8 at 162.
Equality Rights For Women

The interdependency of the status of women and custody rules regarding children, is a single most important factor in explaining the wide swings in custody law. The organized movement for women’s rights,47 the change in the role of women in the economic sphere,48 and the movement of women out of the home into the labor market,49 affected the way both society and the courts viewed women in relation to family matters. This in turn significantly impacted child custody laws in the twentieth century. The women’s movement, an ongoing battle of women to gain the right to participate in and to contribute to society as full and equal citizens, concentrated on four major areas of concern to women.50 These include constitutional law,51 the family,52 employment,53 and the right over their bodies.54 In the area of the family, the existing rules governing child

49 See id.
51 A rallying point of the struggle for sex equality is the United States Constitution. As a basic charter of the U.S government and the primary right of inhabitants, this single legal document received more attention from advocates of women rights than all other laws combined. Women persevered in advocating their rights to suffrage but the battle for women suffrage was only won after more than half of a century of struggle; see Nicholas, Price & Robin, supra note 51 at 14.
52 Many of the common law restraints on married women have changed since medieval times as a result of the political struggle by feminists in the early nineteenth century. The Married Women’s Property Act passed by most States in the late nineteenth century abolished many of the legal disabilities that had relegated married women to positions comparable to that of children and the mentally incompetent. See id at 28.
53 It was not until 1963 that the first Federal Law was passed reflecting the principle of sex equality in the workplace. The Equal Protection Act forbade employers from paying different salaries to men and women who do equal work. See 29 U.S.C.A. §.206.
54 Women’s concerted efforts resulted in substantial progress towards the normalization of rape laws. Women pressed in for freedom of choice and the constitutional right to decide what happens to her body late 1960s to early 1970’s. The famous case of Roe v Wade 410 U.S. 113 93 S. Ct. 705 (1973)(where the supreme court at last took the position that the constitution of the United States protects a woman’s right to decide what happens to her body).
custody were sex-specific.55 One such rule is that which endorsed the preference of
divorced mothers as natural custodians of children of tender years.56 Coupled with this
prior to 1971, there were numerous sex-specific statutes57 enacted by several legislatures
in various States, which prejudicially affected women. It was not until 1971 that the
United States Supreme Court first held that a statute treating women and men differently
violated the constitution.58 In the landmark case of Reed v Reed,59 the court determined
that the Equal Protection Clause of the Fourteenth Amendment,60 prevents a State
legislature from passing laws which treat people unfavorably because of their sex, unless
the State can offer a reasonable explanation for the difference in treatment.61 As the first
application of the Fourteenth Amendment to women, it was the greatest breakthrough for
women’s legal status since the enactment of the Nineteenth Amendment in 1920.62 Reed
v Reed63 was also the first case to place any strong constitutional restraint upon the
freedom of congress and States legislatures to discriminate on the basis of sex.64 It

55 Sex specific laws in 1960 included laws denying suffrage to women, laws denying them
equal pay with men for the same kind of work done, ‘protective laws’ excluding women from
traditionally male occupations.
56 See Pyle, supra note 30 at 351.
57 See supra text accompanying note 56.
58 Reed v Reed 404 U.S. 71 92 S. Ct. 251 (1971).
59 See id.
60 The Fourteenth Amendment adopted in 1868 provides “No State shall make or enforce any
law which shall abridge the privileges or immunities of citizens of the United States; nor shall
any State deprive any person of life, liberty, or property, without the due process of law; nor
deny to any person within its jurisdiction the equal protection of the laws.” see United States
Constitution Amendment XIV.
61 Reed at 404 U.S at 251.
62 The battle for women’s suffrage was won only after more than half a century of struggle.
Adopted in 1920, the Nineteenth Amendment states simply that “The rights of the citizens of the
United States to vote shall not be denied or abridged by the United States or by any State on
account of sex”. However no constitutional status other than the vote was extended to women at
this time.
63 Reed at 251.
64 Id at 253.
signaled the end of the court’s historic “hands off” attitude, and the beginning of at least minimal accountability to constitutional principles in the treatment of women.65

In the Reed case, Sally Reed an Idaho resident, sued for the right to manage the estate of her son who had recently died. An Idaho statute however preferred male over female relatives as administrators of the estates of deceased persons. By automatic application of the statute, Sally Reed’s husband from whom she was separated was appointed administrator. In appealing her case to the United States Supreme Court, Sally Reed argued that Idaho’s law violated her rights under the Equal Protection Clause of the Fourteenth Amendment.66 The court framed the question as to whether a difference in sex, ‘bears a rational relationship’ to the purpose which the State had in passing the law. The State could offer no evidence that it had actually compared the relative abilities of Mr. & Mrs. Reed to handle their son’s property. Nor could it offer any good explanation for preferring a man over a woman as a general matter, except that it was convenient to eliminate a dispute between competing relatives. The court found that Idaho was making an arbitrary distinction not “rationally related” to the efficient management of the estate. Such an arbitrary distinction based on sex, the court concluded, violated the Fourteenth Amendment’s Equal Protection Clause.67

Shortly after this in 1973, with this simple statement a New York Court challenged nearly a century of a judicial presumption in favor of mothers. It stated:

“The simple fact of being a mother does not by itself indicate a capacity or willingness to render a quality of care different from that which the father can provide.”68

The court rejected the notion that mothers and their children shared a special bond invoking the authority of social scientist, Margaret Meade, who stated that:

65 Reed at 253.
66 See supra text accompanying note 61.
67 See id.
"This is a mere and subtle form of anti-feminism by which men, under the guise of exalting the importance of maternity, are tying women more tightly to their children than has been thought necessary since the invention of bottle feeding and baby carriages."⁶⁹

Subsequently in the latter part of 1970’s and until the 1990’s in nearly all States the presumption that the interests of a child of tender years is better served by in the custody of the mother was legally abolished and demoted as a factor to be considered in custody awards.⁷⁰ The movement for equality of women caused two ideological changes in the legal view of custody. Firstly, as the laws regarding women’s rights and divorce changed so did the custody standards.⁷¹ Constitutionally there was a presumption that if the sexes were equal and should have equal rights as embodied in the Equal Protection Clause of the Fourteenth Amendment. The tender years doctrine could no longer stand.⁷²

The impact of the campaign on divorce law and custody was not direct. Although organized feminists were not direct participants in the revolution transforming divorce and custody law, their crusade for Equal Rights Amendments⁷³ and other constitutional gender discrimination issues⁷⁴ strongly contributed to the legal climate that fostered the revolution in the changing gender-neutral rules of child custody adopted by the courts. Maternal presumption was largely eliminated as an explicit reason for determining custody. By 1990 several States had followed California’s lead suggesting a replacement

⁷¹ See id.
⁷² See Pyle, supra note 3 at 351.
⁷³ In 1923 the Equal Rights Amendment Act was first introduced into Congress in an effort to declare once and for all that equality rights under the law shall not be denied or abridged by the United States or any State on account of sex.
⁷⁴ In 1973 the first Federal law was passed reflecting the principle of equality in the work place when the Equal Pay Act (29 U.S.C.A. §. 206) forbade employers to pay different salaries to men and women who do equal work. This was followed by Title VII of the Civil Rights Act, 42
of the maternal preference to joint custody. Data of the comparison of one hundred Appellate court decisions in 1960 with one hundred decisions in 1990, reveals that while judges cited a preference for mothers as a reason for their decision in twenty-one of the one hundred cases in 1960, there was not a single mention of mothers in their 1990 reasoning. As the country grew more prosperous and new opportunities for employment for women arose, judicial opinion began to argue that women were no longer unable to join men in the work force. In 1970, only twenty seven percent of women with children under the age of three were in the workforce, but in 1985 this figure was more than fifty percent. The appropriate custodian of the child then became a matter of choice giving rise to the ultimate standard of the best interest of the child, a gender-neutral standard that has been widely accepted by all of the States.

**Joint Custody Rule**

A direct result of the demise of the maternal standard was the rush to find a new standard for custody arrangements. Legislatures strove to achieve greater predictability in decision-making, and to offer more precise guidance to judges in difficult cases. Many turned to the joint custody presumption. The vacuum created by the retreat of the maternal presumption encouraged legislators to draft specific joint custody statutes, to direct judges in the determination of custody awards. The rationale behind the drafting of

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U.S.C.A §. 200 e-5 (1964) which forbade discrimination on the basis of race, sex, or religion in any terms or conditions of employment.

75 See Freed & Walker, supra note 71 at 465-66.


78 Many courts have authorized joint custody without express statutory support. See, e.g., Beck v Beck 432 A.2d 63 (N. J. 1981).

these statutes was that they provided a solution that gave fathers equal time with mothers, thereby avoiding the problem of choosing between legally equal parents. 80

The concept of joint custody comprises of two components: joint legal custody, and joint physical custody. 81 Joint legal custody refers to the equal rights and responsibilities of the parents to make major decisions affecting the child, while joint physical custody refers to the time spent with the child and the parents' participation in the upbringing of the child. 82 Joint custody an alternative to traditional sole custody has been described by some legal scholars as a "small revolution in child custody law." 83 Prompted and endorsed by the need to fill up the vacuum created by the retreat of the maternal presumption, and avoiding the problem of choosing between legally equal spouses, this concept has been widely embraced in recent years by several States. 84 California led the way in custody initiative as it had no-fault divorce by introducing a preference for joint custody in 1980. 85 By 1988, several States had followed California's lead. 86

80 Jay Folberg, Custody Overview in Joint Custody and Shared Parenting 2 (Jay Folberg, ed. 1984).
81 Nadine E. Roddy, Joint Custody in the 1990s: The Concept in Practice, 6 Divorce Litigation 21-23 (1994).
82 See Roddy supra note 82 at 23.
84 The number of States adopting joint custody has increased at an enormous rate. In 1978 only three jurisdictions expressly recognized the legitimacy of Joint Custody by Statute. See M. Roman & W. Haddad, The Disposable Parent (1978). By contrast a 1989 article found several States with joint custody statutes of one sort or the other. See Freed & Walker, supra note 71 at 465-66.
85 The wording of the statute is ambiguous. It could be construed as giving sole custody equal footing with joint custody, where there was a dispute or giving joint custody first preference [Cal. Civ. Code, §. 4600 (West1983)], but the statute unambiguously stated that when parents agree to joint custody, "there shall be a presumption ... that joint custody is in the best interest of the child" [ Cal. Civ. Code., §. 4607 (West Supp. 1989)]. As part of the reform package, the legislature required mandatory mediation in contested custody cases. Later an appellate court clarified the intent of the legislature in re Wood, 141 Cal. App. 3d 671, 683-840, 190 Cal. Rptr. 469, 477-78 (1983) (where it was stated that a trial court could impose a joint custody arrangement against the wishes of one parent).
86 See Freed & Walker, supra note 71 at 465-66.
The distinguishing feature of joint custody is that both parents retain legal responsibility and authority for the care and control of the child much as an intact family. Proponents of joint custody point to the fact that the least disruptive custody arrangement is one that most closely resembles the custody and control exercised during the marriage. Used in the proper circumstances, proponents maintain that joint custody actually promotes cooperation between the parents and provides an environment for the child similar to that prior to the divorce.

This arrangement also offers an opportunity for the child to enjoy a meaningful relationship with both parents and may reduce the traumatic effects upon the child that can result from the dissolution of marriage. Furthermore, it allows both parents to function as and be perceived as parents, which is crucial and necessary for the healthy development of the child. Finally proponents maintain that joint custody is flexible and can adapt to the changing needs of the family.

As with all areas of developing law, criticism against joint custody arrangements exist. Arguments against joint custody arrangements are premised on the idea that moving between two homes and responding to two domestic regimes disrupts the stability and continuity on which the child depends. Critics say that this arrangement could be used as an opportunity for manipulation of the parents, by the children. Moreover, regarding the role judges must play in awarding custody, critics of joint custody maintain that this arrangement creates a greater opportunity for judges to avoid

87 Jay Folberg, Custody Overview, in Joint Custody and Shared Parenting 2 (Jay Folberg, ed. 1984).
88 Jay Folberg and Mary Graham, Joint Custody Following Divorce, 12 U.C. Davis L. Rev 523, 525 (1979).
89 Folberg supra note 88 at 573.
90 Id.
91 See id.
92 For a general discussion on Joint Custody arrangements see Gerald W. Hardcastle, Joint Custody: A Family Court Judge’s Perspective 32 Fam L.Q.201 (1998).
choosing one parent and disappointing the other by simply awarding custody to both even in non-ideal circumstances.\textsuperscript{95}

In sum the objections most frequently raised include contentions that such an arrangement creates instability for children, causes loyalty conflicts, makes maintaining parental authority difficult, and aggravates the already stressful divorce situation by requiring interaction between hostile ex-spouses.\textsuperscript{96} Notwithstanding, some States have adopted a legal presumption favoring joint custody in custody determinations.\textsuperscript{97} The real issue that States are faced with is striking the balance between the advantages of joint and continuing contact with the child by both parents, and the detriment of parental conflict. Some States will not order joint custody unless both parents agree,\textsuperscript{98} whilst others have followed California in imposing joint custody on unwilling parents.\textsuperscript{99}

These troubling sets of rules have further endorsed the social and legal dilemma already confronting child custody determinations. The forced enforcement of joint custody on unwilling parents in a child custody proceedings for which the best interest of the child is to be the governing and underlying principle is inappropriate and undesirable. Only where evidence is strong in support of a finding that the existence of a significant potential for compliance with each other should joint legal custody be granted. In the absence of such evidence, the whole concept becomes a mockery to the already troubling

\textsuperscript{94} See id.
\textsuperscript{95} See id.
\textsuperscript{96} See William F. Hodges, \textit{Interventions for Children of Divorce; Custody, Access, and Psychology}, 114 (1991). Because joint custody and divided custody are very similar, indicators of inappropriateness for joint custody apply to divided custody.
\textsuperscript{98} See, e.g., Dodd v Dodd 403 N. Y. S. 2d 401 (N.Y. Sup. Ct. 1978).
state of affairs in custody determinations. Parents must be willing to undertake joint custody. Where there is no clear of evidence of demonstrated willingness, the courts should refrain from imposing such arrangements. Thus anything short of effectively managing a balance between the advantages of continuity and parental contact, and the potential benefit and wellbeing of the child or children, would become counterproductive.

**Primary Care-Taker Rule**

While some legislators suggested that joint custody provided a solution that gave fathers equal time with mothers, others adopted the primary caretaker rule.100

Under this rule, custody is awarded to the parent who has assumed the bulk of the child care responsibility on the theory that reciprocal affections is strongest between the parent and the primary caretaker.101 The rule is said to have solved the difficulty inherent in the indeterminacy of the best interest standard. This is because it shifts the courts task from predicting the future of the child, that is where would the child be best off, to deciding historical facts like who was the child’s primary caretaker?102 Since historical facts are clear predictions of the future, this doctrine it is argued, may prevent parents during the trial from taking advantage of the uncertainties inherent in the best interest standard.103 The doctrine though favored by legal scholars but has also been floundered in practice.104

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101 See Pikula v Pikula 374 N.W. 2d. 705 710-11 (Minn. 1985) (adopting the primary caretaker presumption as a workable index of the psychological parent); see also David L. Chambers, Rethinking the Substantive Rules For Custody Disputes in Divorce, 83 Mich. L. Rev. 477 478 (1984).
102 See generally, Ellman, Kurtz, & Barlett, supra note 94 at 514.
103 Id.
104 At least 16 States have flirted with the “Primary Caretaker presumption but only West Virginia has retained a judicial preference. See e.g., W. Va. Code. §. 44- 10-4 (1995). Minnesota formerly had a statutory preference but now includes it as part of a general factor in its statutes. Minn. Stat. Ann. §. 518.17 (1994); see generally, Gary Crippen, Stumbling Beyond the Best Interest of the Child: Re examining Child Custody Standard- Setting in The Wake of Minnesota’s
Despite the attractiveness of this presumption, the primary caretaker presumption is fraught with major problems. One such problem is that the quantity of the child-care in some cases may not correspond with either the quality of the childcare, or the quality of the parent-child relationship.\textsuperscript{105} Secondly in families where parents share or allocate parents tasks or change parenting roles either during marriage or after separation the presumption is practically unworkable.\textsuperscript{106}

Finally the primary caretaker rule has generated huge quantities of litigation revolving around petty issues such as who does the supper dishes, makes the peanut butter, or changes diapers.\textsuperscript{107} This presumption succeeds only in easy cases, for example, where one parent is a full time homemaker caring for small children. Some critics have maintained that in difficult cases, instead of facilitating the resolution of custody determinations, it might complicate custody decisions.\textsuperscript{108} Thus the presumption is psychologically sound for young children of pre-school age but inappropriate for school age children. In stretching the application of these presumptions to school age children the law has ignored these developmental truths.\textsuperscript{109} Furthermore, some legal commentators and scholars consider it to be a modern version of the maternal preference or tender years doctrine purged of sexual preference in language but not in effect.\textsuperscript{110} The critical questions that one may ask regarding this presumption includes the following: Is this presumption useful in resolving the present custody dilemma? Can this presumption be said to be a significant solution, and an improvement to the previously abolished maternal preference rule? It would seem for instance, that a strict application of this rule

\textit{four year experiment with the preference}, 75 Minn. L. Rev. 427, 428-40 (1990) (discussing the problems associated with the primary caretaker rule in custody cases in Minnesota.)

\textsuperscript{105} See Crippen, supra note 105 at 460-61.
\textsuperscript{106} Id at 475-77.
\textsuperscript{107} See Crippen, supra note 105 at 452-60.
\textsuperscript{108} See, e.g., Gibson v Gibson 304 S.E. 2d 366 (W. Va.1983) (as a result of the difficulty of ascertaining who the primary caretaker was there was three hearings on the issue).
\textsuperscript{109} See generally Crippen, supra note 105 at 460-61.
\textsuperscript{110} See Pyle, supra note 30 at 397.
may however be unfair in situations outlined above. As some legal writers have noted, it is possible that this presumption though intended to make the best interest standard more determinate, has merely shifted the focus from the indeterminate standard of what is the best interest of the child to that of who is the primary care taker?\textsuperscript{111}

\textsuperscript{111} See Ellman, Kurtz and Barlett supra note 94 at 514.
CHAPTER III

CUSTODY DILEMMA IN THE 20TH CENTURY

Reproductive Technology

Advancing technological intervention on reproduction in this century has raised new custodial issues for which courts must address. These technological interventions have raised basic questions of motherhood and fatherhood and have also sparked off new custodial issues regarding the custodial rights over the product of each stage in the cycle reproduction. The law in this rapidly evolving area has sought to address significant custodial issues regarding to the product of these interventions. These technological interventions include artificial insemination, surrogate motherhood contract and In Vitro Fertilization.


113 Artificial insemination is the process by which a woman is inseminated by a means other than sexual intercourse. When the semen comes from her husband it is regarded as homologous artificial insemination. Thus the law considers the father/child relationship the same as any father-child relationship where the child is born during the marriage. On the other hand, if the semen is from another man other than the husband, the procedure is termed 'artificial insemination by donor or heterologous artificial insemination.

114 A Surrogate Motherhood Contract is a contract in which a woman agrees to carry a baby and after birth give it up to the contracting parties usually a husband and wife couple. The baby is produced by artificial insemination with the husband's sperm, or by implanting a fertilized ovum of the adopting mother.

115 In vitro fertilization translated literally means "in glass". The process of In vitro fertilization occurs where the ova and sperm of a married couple or in some instances another male or female or any combination therein is conceived in glass and implanted in the womb of the wife, or a woman who could be likened to a surrogate mother, except for the fact that unlike a surrogate mother she had no biological connection to the fetus. In another variation the embryos could remain unplanted, but frozen for future use.
Artificial insemination, the process by which a woman is artificially inseminated by a donor other than her husband is the first and most established form of reproductive intervention. The earliest case came before the California Supreme Court in 1968. In *People v. Sorrenson*. In this instance, Mr. Sorrenson Reluctantly agreed in writing to his wife's artificial insemination from an unknown donor provided by a doctor, after a marriage of fifteen years with no children. A male child was born to Mrs. Sorrenson and the three lived as a family for four years. When they divorced in 1964, Mrs. Sorrenson did not request child support. Two years later however, she fell ill and requested public assistance under the Aid to Needy Children Program. The District Attorney then sought support from Mr. Sorrenson who objected on the grounds that the child was not legitimate. The Supreme Court however refused to deal with the concept of legitimacy but insisted that for the purpose of support Sorrenson was clearly the father. It stated: “A child conceived through heterologous artificial insemination does have a “natural father” as that term is commonly used. The anonymous donor of the sperm cannot be considered the “natural father” as he is not more responsible or the use of his sperm than is the donor of blood or kidney...”

The Uniform Parentage Act soon adopted this line of reasoning and provided that a child born out of artificial insemination, if insemination was performed by a licensed physician with the written consent of husband and wife, is legally the husband's child. The donor is specifically treated in law as if he were not the natural father. While this act solved the problem in States that adopted or enacted similar legislation, in many cases it did not settle the matter in those States that did not. There are many instances where the husband may refuse consent in writing and where insemination is not

116 *People v. Sorrenson*, 66 Cal. Rptr. 7 10 (1968).
117 See id.
119 See id.
performed by a licensed physician. This may result in uncertainty as to the rights and obligations of the donor.

Moreover, donor mothers raise far more legal controversy than donor fathers. This is due primarily to the fact that women have far more biological options available to them. For instance, women can donate eggs, or embryos, they can serve as the nurturing womb for someone else’s embryo, or they could carry their own baby conceived by artificial insemination and under contract to relinquish the baby at birth to the father.121

The last scenario in many instances causes the most legal controversy in custody disputes. The latter part of the twentieth century has witnessed the increase of surrogate mothers who contractually agree to bear children for childless couples.122 Normally the surrogate mother is artificially inseminated with the husband’s sperm carries the baby to term and is given some payment in return for her services.123 In addition an agreement is made by the surrogate mother to terminate all parental rights and the expectations, followed by an adoption by the wife of the father of the child. This will result in vesting upon the infertile couple the responsibility of the sole parents of the child.124 Controversy over custodial rights often arises when the surrogate mother decides she wants to keep the child.

In a struggle for custody, In the Matter of Baby M,125 Mr. Stern entered into a surrogate contract with Mary Beth Whithead and her husband. Mrs. Whitehead agreed to become impregnated by artificial insemination with Mr. Stern’s sperm carry the child to term, deliver it to the Sterns, and then do what was necessary to terminate her parental rights. Mary Beth Whitehead did deliver the baby upon birth but was overcome by

121 See Lorio, supra note 121 at 1645.
122 Id.
123 See, e.g., In the Matter of Baby M 109 N.J. at 396.
‘unbearable sadness’ and threatening suicide, and thus pleaded to have the baby returned to her for only a week. The Sterns complied, but when Mrs. Whithead failed to return the baby as promised they initiated legal action to enforce the contract. Mrs. Whithead and her husband fled to Florida where they evaded the police and media. Police finally found the child and a thirty-two day trial ensued in which the trial court found the surrogate contract valid, ordered that Mrs. Whitehead’s parental rights be terminated, and granted sole custody of the child to Mr. Stern. The New Jersey appellate court rejected the trial court’s decision to uphold the contract, declaring that under public policy surrogate contracts were void.

The appeals court treating the surrogacy contract as non-existent deemed the legal issue to be custody between a natural mother and a natural father. Under the Uniform Parentage Act the claims of a natural mother and a natural father are given equal weight. Therefore the courts determined that the best interest of the child were shown at the trial to reside with the more stable and wholesome father with some visitation available to Mrs. Whitehead.

Presently some jurisdiction actively regulate or prohibit the practice of surrogate motherhood, but few States have taken positions on surrogacy or have any clear articulated policies. Even if laws are silent on the subject disputes unavoidably come to the courts. Furthermore, as the court faces disputes about the parenthood and custody of the child the question then becomes on what basis or guidelines should a judge be guided or directed in a jurisdiction whose laws are silent on the subject? Perhaps the most difficult question is how does society intend to treat surrogacy at this point in its history?

125 In the Matter of Baby M. at 396.
127 The Matter of Baby M at 1263.
128 Kentucky is one of the jurisdictions where these rules are settled and the Supreme Court has issued a definitive ruling on the subject matter. See Surrogate Parenting Associate Inc. v Kentucky, 704 S. W. 2d. 209 (1986); Michigan, Louisiana, and Nebraska have passed statutes
Popular sentiment concerning surrogacy varies enormously and there are many views ranging from policies of total enforcement, to a preference for a total ban on surrogate arrangements.\(^{129}\) Existing laws are flexible and still subjected to considerations of policy that could support any result.

Parental rights involving in-vitro fertilization have also reached the courts and legislatures. Custody disputes relating to frozen embryos have posed legal questions before the courts in recent times. In *Davis v Davis*\(^{130}\) a Tennessee resident John Lewis Davis sued his wife in a divorce action to restrain her from having any of their seven fertilized eggs implanted. During their ten years of marriage Mrs. Davis had experienced five tubal pregnancies, which led to her infertility. At an In Vitro fertility clinic the doctors harvested her ova and twice unsuccessfully attempted to implant the eggs fertilized with her husband’s sperm in her uterus. When the couple divorced there were still seven frozen pre-embryos awaiting implantation. Upon the determination of custody of the embryos, the trial court awarded custody to Mary Sue Davis, that she be permitted the opportunity to bring these children to term through implantation. The court of appeals reversed, finding that the husband Junior Davis, has a constitutionally protected right not to beget a child where no pregnancy has taken place and awarded them joint custody and equal voice over their dispositions.\(^{131}\)

While the case dragged through the courts each party remarried and Mary Sue decided she did not want to use the embryo for herself, but rather to donate them to another needy couple. When the case came finally before the Supreme Court of Tennessee, the court entertained extensive scientific testimony before definitively labeling the frozen embryos as pre-embryos thereby avoiding the growing body of law declaring surrogate contracts void. Other jurisdictions are still considering a broad spectrum of proposals.

\(^{129}\) See Field, supra note 125 at 9.


\(^{131}\) Id at *3
that gave some rights to the fetus. As pre-embryo the frozen matter had no rights, and the test was not a best interests\textsuperscript{132} test, but rather a contest between the rights of the adults. The court determined that the rights at stake were the right to procreate and the right not to procreate.\textsuperscript{133} Upon carefully weighing the interests of each party, the court decided in favor of the husband Junior Davis concluding, that Mary Sue Davis’

interest is not as significant as the interest Junior Davis had in avoiding parenthood.\textsuperscript{134} The court maintained that if she was allowed to donate these pre-embryos, he would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it. He had testified clearly that if these pre-embryos were brought to term he would fight for custody of his child or children.\textsuperscript{135} Donation if a child came out of it would rob him twice, his procreational autonomy would be defeated. and his relationship with his offspring would be prohibited.\textsuperscript{136} Avoiding a presumptive rule, the court determined that absent an agreement or a contract the party wishing to avoid procreation should prevail assuming the other party has a reasonable possibility of achieving parenthood by means other than the use of pre-embryos.\textsuperscript{137}

Modern reproductive technology is now being used to serve the desires of childless couples to achieve a nuclear family, but potentially this could make parental rights over the child and custodial arrangements more complex and complicated. In addition, the threat to the nuclear family structure is also at stake in these contracts.\textsuperscript{138}

\textsuperscript{132} ‘The Best Interest’ rule is the prevailing substantive standard adopted by most States in determining the custody of children. It has been widely used by most jurisdiction in the United States and its goal is to seek the best possible custodial placement for the child.

\textsuperscript{133} Davis, at *1.

\textsuperscript{134} Id at 14.

\textsuperscript{135} Id.

\textsuperscript{136} Id at 15-6.

\textsuperscript{137} See id.

No doubt the problems of modern reproductive technology are numerous and profound. They challenge not only what remains of the traditional nuclear family, but interplay on custodial issues as well. The critical issue is must we allow these embryos to be the subject of experimentation and research, and thereby opt for the inevitable consequences that go with such experimentation? If society is to allow research at all, it must also consider for what purposes it will allow the embryos to be created. Most individuals do not object to the use or reproductive technology, and justify the untold happiness such brings to childless couples.

One of the obvious possibilities of such advancement in technology is that the embryo storage creates the possibility of transference after the parents have died. This transference can become controversial because it raises a lot of questions. Can we be certain about who is legally and justifiably entitled to custody of the infant or which custody rules govern such children or offspring? On what basis rationale, or legal principles should we determine the best interest of the child in these instances? It is also difficult to imagine how custody laws will respond to these issues. Are the courts prepared to regulate, invent or formulate new rules to govern the custodial rights of such children? This is an example of how long term storage of embryos have innumerable possibilities of upsetting family relationships, and custodial arrangements.

With or without regulation modern reproductive technology will greatly transform the future of custody determinations. It is true that technology has developed the capability of doing something that adds to the happiness of some people yet this is more likely done at the expense of other critical issues.

**Social And Behavioral Sciences**

The latter part of the twentieth century the courts are increasingly relying upon social and behavioral science concepts and applications. Social Science data increasingly
are being used in the formulation of appropriate rules governing custody awards at divorce. These policy rules are framed in broad terms and are designed to limit the discretion of judges, or at least to guide that discretion. Dependence upon the social sciences accelerated late in this century as a result of the demolition of the maternal presumption\textsuperscript{139} and the abolition of fault-based standards\textsuperscript{140} for judicial decision. Judges and legal precedents have increasingly given way to social workers and mental health professionals who base their judgments on scientific theories.\textsuperscript{141}

The use of the social sciences in the late twentieth century has expanded in three ways. Firstly expert witness most of ten mental health professionals trained in the social and behavioral sciences are called upon to testify to the capabilities of a particular parent, and social workers are asked to evaluate the larger parent/child living situation and to intervene in cases of abuse and neglect.\textsuperscript{142} Secondly, social science scholarship in the form of psychological theories supporting the primacy of mothers or fathers or both parents have influenced both legislators and judges in custody disputes following divorce.\textsuperscript{143} Thirdly the courts have moved towards using a therapeutic model of mediation in the place of the adversarial mode of litigation in all matters of family law.\textsuperscript{144} At the same time mental health professionals trained in psychological theories have

\textsuperscript{139} See, e.g., Ex Parte Devine 398 So. 2d 686 (Ala. 1981) (holding that the ‘tender years doctrine’ was violative of the equal Protection Clause and constituted unconstitutional gender discrimination.

\textsuperscript{140} The revolution in custody law that followed no-fault divorce confounded legislatures and judges. Divorce reforms swept through all States removing fault as a consideration in divorce and custody disputes. At the same time gender-based biases were removed primarily as a result of the campaign for gender equality before the law. With the removal of the old rules judges were more inclined to turn to the social sciences to develop new guidelines to aid them in making the most difficult decisions.

\textsuperscript{141} See L. Gardner, Child Custody Determination: Ideological Dimensions of a Social Problem, in Redefining Social Problems 165, 169 (1986). One assumption underlying the role of the mental health professionals in custody determinations is that they are able to make objective, reliable assessments and predictions of parental capacities and children’s needs in the context of divorce.

\textsuperscript{142} See generally Mason, supra note 8 at 162.

\textsuperscript{143} See id.
appeared regularly in the courtroom as expert witnesses to testify on which parent is fit.\textsuperscript{145} Relationship criteria, increasingly dominates the list of factors to be considered in determining the best interests of the child.\textsuperscript{146} Likewise the laws defining the grounds for the removal of children from their parents expanded to include psychological criteria. One such example is the California statute citing grounds for removal.\textsuperscript{147} Evidence supporting this subjective criteria could not be obtained outside the courtroom by testimonies or evaluations of the parties by mental health professionals. Thus experts have been increasingly utilized in child custody cases and are engaged in every step of the proceedings.\textsuperscript{148}

The use of experts in child custody trial introduced in the 1950s and 1960s reflected in part the growth of the mental health profession.\textsuperscript{149} Mental health experts were prominent in the pretrial procedure where most disputes are settled. Between 1960 and 1990 the pattern of expert utilization at trial changed dramatically.\textsuperscript{150} The number of experts soared, and these experts are more likely to be appointed by the court rather than the parties.\textsuperscript{151} The nature of their testimony also shifted from an evaluation of the sanity of the parent, to observations regarding the relationship between parent and child, and in

\textsuperscript{144} Id.
\textsuperscript{146} For example, the North Dakota legislature dictated that among ten factors the first two to be considered were (i) the love affection and emotional ties existing between the parents and child (ii) the capacity and disposition of the parents to give the child love, affection and guidance and to continue the education of the child. \textit{See} N. D. Civ Code §. 14.
\textsuperscript{147} The California statute citing grounds for removal included the following: ‘Minors is suffering severe emotional damages, as indicated by extreme anxiety, depression, withdrawal or untoward aggressive behavior toward self and others, and there is no reasonable means by which the minor’s emotional health may be protected without removing the minor from the physical custody of his or her parent or guardian.’ \textit{See} Cal. Civ. Code. §. 361.
\textsuperscript{148} See generally Bolocofsky, supra note 147 at 197.
\textsuperscript{149} See Mason, supra note 140 at.20.
\textsuperscript{150} \textit{See id.} These figures are taken from Mary Ann Mason’s comparative study of appellate court decision in 1920, 1960 &1990.
a substantial number of cases these experts testified regarding sexual abuse.\textsuperscript{152} Parents also sought the services of mental health consultant to aid them with private mediation.\textsuperscript{153} The courts have also utilized the services of psychologists to testify regarding the parent-child relationship.\textsuperscript{154} These evaluations provided a wide range of information about parents and children including social and economic data.\textsuperscript{155}

In \textit{Vishefsky v Vishefsky},\textsuperscript{156} the father employed two psychiatrists to testify regarding the mother’s emotional illness and how her emotional disorganization would have adverse effects on the children, resulting in suffering and difficulty in school, at home, and adjusting with playmates. Similarly in \textit{Galbraith v Galbraith},\textsuperscript{157} custody of four children was originally granted to the father. However five years later the mother who suffered from a mental illness petitioned for modification to receive custody and a psychiatrist testified on her behalf that she was sufficiently mentally competent.

By the 1990’s, the trend favored psychologists over psychiatrist, and expert testimony had to do more with the relationship between the parent and the child rather than the mental illness of the parent. This trend however reflected the new relationship-oriented laws and the abolition of the maternal presumption.\textsuperscript{158} When mother and father hired mental health professionals to testify as to their relationship with the child, it sometimes became a bitter battle for experts.\textsuperscript{159}

\textsuperscript{151}See, e.g., Palazzo v Coe 562 So. 2d 1137 (La. App.4th Cir 1990).
\textsuperscript{152}This fact is mentioned by twelve of the experts at trial in 1990, while never mentioned in 1960. See, e.g., Mason, supra note 140 at 13.
\textsuperscript{153}Id.
\textsuperscript{154}See, e.g., Palazzo at 1137.
\textsuperscript{155}See \textit{id}.
\textsuperscript{156}Vishefsky v Vishefsky 105 N.W. 2d 314 (Wis. 1960).
\textsuperscript{157}Galbraith v Galbraith 356. P.2d. 1023 (1960).
\textsuperscript{158}See generally, Folberg & Graham, supra note 89 at 523-35.
\textsuperscript{159}See Williams v Williams, 563 N.E.2d 1195 (Ill. App.3 Dist. 1990) (where the father hired a pedantic psychologist who examined the relationship between the three year old daughter and the mother and her lesbian partner, and testified that the best interest of the child would be served by placing custody of the child with the father, and the mother’ expert psychiatrist a
No doubt, the social and behavioral sciences can inform us about human behavior in a manner that the law cannot. Studies of parent-child relationship can provide important and vital information to decision-makers. However the use of social science data in legal policy-making is potentially problematic because too often the conclusion of the social science researcher is often viewed divorced from the researcher’s own bias.  

There are however two important dimensions to the problems associated with the application of social sciences to custodial issues. The first is the misuse of social science data by legal consumers particularly in custody determinations, and the second is the inherent flaws in its methodological applications.

**Misuse of Social Science data by Legal Consumers**

Critics of the social sciences maintain that the social sciences have been utilized selectively to promote arrangements like shared custody and father custody, that are politically inspired and which do not reflect the range of social scientific research.  

Professor Martha Fineman and Ann Opie for example argued that the social sciences have been misused at the policy making level to present a basis for rules favoring fathers over mothers that appear to be scientific, objective, and value free when in fact relevant questions are moral, liberal and political.  

Feminists’ writings have also stressed the ‘male’ value and control of the social sciences and the prevalence of this value both in society and in the profession. In addition legal scholars have also maintained that at a

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160 See generally Ziskin & Faust, “Psychiatric and Psychological Evidence in Child Custody Cases” 24 Trial 44 (1989) (for a discussion on the use of scientific and professional research to dispute the expertise of social science experts, and to question the validity of their evaluations).


162 Id.

policy making level proponents of a particular rule will utilize studies or theories from psychology, psychiatry or social work to influence the creation of a legal standard.\textsuperscript{164}

A classic example on this point could be seen in the case of \textit{Beck v Beck}.\textsuperscript{165} In this case Dr. Goodman and Dr. Grief both offered testimonies about the general advisability or lack thereof of joint custody. Dr. Jerome Goodman the expert called on behalf of Mrs. Beck, testified that he had interviewed the children and their mother and concluded that custody should remain with Mrs. Beck. His reasoning was based on the supposition that adopted children have a special need for security and that joint custody particularly alternating physical custody reduced constancy and would in turn cause the children to experience insecurity. The testimony of the plaintiff’s expert clinical psychologists, Dr. Leonard Abramson, was offered to establish that the father was a fit parent. Based on an interview with Mr. Beck and on certain psychological tests, the doctor testified that he found the plaintiff to be matured and well adjusted. He described Mr. Beck as “sensitive flexible non compulsive or rigid, not overly gregarious’ and having a genuine interest in the welfare of the children.\textsuperscript{166} Regarding the advisability of joint custody for the Becks, the plaintiff offered expert testimony of Dr. Warren Clark a school psychologists and proponent of joint custody arrangement. He favored joint custody in this case based on his opinion formed after interviewing both Mr. Beck and the children. He noted that it would foster the children’s relationship with both parents and would have a long-term beneficial impact on the girl’s development as young women. He was confident that the children being adjusted intelligent and having affection for both parents would be able to adapt to joint custody. This example demonstrates the extent to which expert differ in their findings by utilizing studies, and theories to predict which parent will do a better job of raising the child.

\textsuperscript{164} See Ellman, Kurtz & Barlett supra note 94 at 586.
\textsuperscript{165} Beck v Beck 432 A. 2d. 63 (N.J. 1981).
\textsuperscript{166} Beck at 66.
Professor Peggy Davis, a former judge, raises another criticism relating to the role of social science data in individual cases. He argues that judges premises about child development, determines custody outcomes without any formal procedure for the litigants to test those premises. Critics have further pointed out that expert witnesses do not have an infallible, or even accurate rates of predicting which parent will do the better job of raising a child. In addition, the objectivity of expert witness is questionable when hired by the parents, rather than by the courts. The judge must be the decision-maker because he or she applies a wide range of social and moral factors rather than a single psychological assessment, and a legal forum must be available to test these premises.

Finally, legal writers and commentators have argued that the application of social sciences is the risk inherent in taking away the courts' ultimate decision making power. Since psychological hypotheses are sufficiently elastic to be pressed into the services of virtually any opinion or prediction, psychological testimony could easily be used to justify questionable custody awards, functioning as the cover under which unacceptable decisional factors gain expression. Future judges may give credence to psychological testimony as a means of escaping the frustration of attempting to reach the correct result in a difficult case.

**Methodological Flaws**

On another level, the use of social science literature may also be inappropriate because it contains methodological flaws. A social scientist's conclusions or observations, for example, may be based on information that is the product of a one-interview research.

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167 Peggy Davies, *There is a Book Out... An Analysis of Judicial Absorption of Legislative Facts* 100 Harv L. Rev. 1539, 1541 (1987).
168 *See, e.g.*, Williams at 1195.
169 *See, e.g.*, Ellman, Kurtz, & Barlett supra note 94 at 587.
170 For a discussion on the various criticism levied against the use of social sciences data in custody decision-making, see generally, Ellman, Kurtz, & Barlett supra note 94 at 587.
design, as contrasted with observations based on repeated interviews. Questionnaires are thought to be less reliable than person-to-person interviews. Information that is gathered by self-reports also may not be as reliable as information secured by other means. There is a danger that acceptance of social science can lead to the adoption of solutions that deny the complex and systematic interweaving of relationships. There must be some realization of the extent to which personal awareness and motivation of the social scientist acts to shape knowledge, both on an individual level and through its expression in social institutions. It is very difficult to imagine the data being totally separated from the political, personal, and professional opinions of the person manipulating them.

As is evident from this brief account, the self-criticism within the social sciences community itself should make attorneys and legal policy-makers wary of accepting as 'fact' the products of social science which may be essentially normative and value-laden. It is often difficult to design and implement an adequate study in methodology. This may be particularly true in the custody area, as there are multitudes of variables that children may be exposed to during their formative years.

Custody determinations are by their very nature highly sensitive and emotionally charged. Though the social sciences may help in discussing the contents and the contours of moral philosophy, yet the social sciences alone cannot provide all the answers to the present custody dilemma. Applying the psychological theories to bolster

171 Professor Robert Levy reporting on an empirical study of custody investigations in Minneapolis found many dangers created by such investigations. The dangers included the selective and distorted reporting, biases based on the investigator's personal values etc. For further insight into these inaccuracies See Robert Levy, Custody Investigations in Divorce A.B.F. Res. J. 713 (1985).
172 Id.
174 Id.
175 See Vickers, supra note 165 at 59.
176 See generally Ellman, Kurtz, & Barlett supra note 94 at 587.
approaches taken under the umbrella of the “best interest” of the child adds a superficial air of predictability and certainty to custody determinations when in reality this is far from the case. In the maze of all the social and legal dilemmas confronting custody determination we must be wary as to those who offer us values disguised as social science facts and claim that the data provides the answers we need.

Social science has a vital role in the determination of custodial issues, but social science should assume the role of no more than additional data and should be carefully used in conjunction with other data for questioning or shaping legal policy regarding custody adjudication.
CHAPTER IV

COMPARATIVE STUDY OF CUSTODY ARRANGEMENTS

The Concept of Custody Arrangements Under Islamic Law In Sierra Leone

Background

Sierra Leone has a pluralistic legal system embracing both General Law\(^1\) and Islamic Law legal system shares a common heritage with those of many other former British dependencies in containing an admixture of Laws either inherited from England or influenced by English Law, indigenous laws and customs and Islamic Law tinged with the customs and traditions of the people. In Sierra Leone statutory provisions in the 'General Law' relating to the regulation of child custody are contained in the Children and Young Persons Cap 44 of Volume 1 of the Laws of Sierra Leone (1965).\(^2\)

With reference to Islamic Law, the Mohammedan Act\(^3\) specifically deals with custody. Principally the act deals with marriage), divorce and laws pertaining intestate succession. All Moslems in Sierra Leone belong to one Islamic Umma\(^4\) which governs of forms the basis of laws on personal status.

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\(^1\) This term was first used in the §. 2 of the Local Courts Act (1963) which provides: 'General Law' includes the common law, equity and enactment in force in Sierra Leone, except insofar as they are concerned with customary law; Sec. IV of the Sierra Leone Constitution (1971) as amended also defines “general law” as meaning ‘the common law, equity and all enactment in force in Sierra Leone.’

\(^2\) Children and Young Persons Act Cap 44 of Volume 1 of the Laws of Sierra Leone (1965).

\(^3\) The Mohammedan Act is found in Cap. 8 of the Revised Laws of Sierra Leone (1960).

\(^4\) Nasir, The Islamic Law of Personal Status, 29-34.
the roots of Sharia are the Quaran, the Summa, and the Ijma of which the Quaran\textsuperscript{182} is the most authoritative. According to Islamic belief the Quaran was divinely revealed to the prophet Muhammed\textsuperscript{183} and is therefore immutable. However the schools of Islam differ over their approach to the laws and its interpretation. In Sierra Leone principles of Islam are enforced in accordance with varying degrees, depending on the local customary tribe.\textsuperscript{184}

Within the framework of Islamic law there are specific provisions relating to the rights, and duties, and custody of children. and the rights and responsibilities of parents. According to the Quaran\textsuperscript{185} men are the protectors and maintainers of women because Allah has given more strength than the other, and because they support them from their means. Thus under Islamic Law children have different entitlements from each parent. A child is entitled to the physical custody, care, and nourishment of the mother, and a legitimate expectation that the father is the provider and supporter of basic financial needs.\textsuperscript{186}

According to the principles of Islamic Law, a child from birth is entitled to guardianship. Guardianship is a duty given to a person based on a natural kinship, testament, or court appointment in order to protect and manage the interests of another person regarded as being of limited legal capacity including children. Guardianship, which is an equivalent term to modern day custody, is defined in the Sharia\textsuperscript{187} as the care of the infant during the earliest years.

\textsuperscript{181} Sharia term used interchangeably meaning body of Islamic law.
\textsuperscript{182} The term Quaran is referred to as the “Holy Book” and governs the tenets and faith of Islam. It is analogous to the “Bible” used in Christianity.
\textsuperscript{183} Muhammed lived in Mecca from 610 - 627 A.C.E.
\textsuperscript{184} There are 15 customary tribes in Sierra Leone living in distinct geographical regions of the country.
\textsuperscript{185} Quaran is an inspired and authoritative book used by Muslims that contains Islamic principles / law regulating their every day life.
\textsuperscript{186} § 15 of the Mohammedan Act Cap 8 of the Revised Laws of Sierra Leone (1960).
\textsuperscript{187} See S. P. Pearl, A Text on Islamic Law 49 (1979); see also L. D. Hodkinson, Muslim Family Law 1 (1984).
Guardianship is divided into three parts, guardianship of the infant,¹⁸⁸ guardianship of the person,¹⁸⁹ and guardianship of property.¹⁹⁰ Islamic Law accords the child a right to an upbringing which creates correlative duties upon the mother to provide fosterage and custody and on the father to provide to provide maintenance.¹⁹¹ The term hadina¹⁹² (fosterage) generally refers to provisions of care including food and nourishment during the first year of a child. This is normally done by the mothers. It is based on the religious imperative in the Quaran that mothers shall nurse their offspring for two whole years.¹⁹³ The justification for this division is that it regards the mother as best suited to meet the child’s early needs and leaves the father able to work and fulfill his duties of providing sufficient food, shelter, and clothing.

With reference to child custody which could arise as a result of adoption, Islam generally frowns upon the institution of adoption to strangers outside the extended family unit, which it regards as tampering with the child’s identity.¹⁹⁴ In the event of a marital breakdown where a divorce order is granted under Islamic Laws, the children are transferred to the immediate family members, in this order: the paternal grandmother, then the maternal grandmother, then the aunts of the child.¹⁹⁵ However in limited

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¹⁸⁸ Guardianship of Infancy refers to the nurture and the care of the infant during his/ her earliest years.
¹⁸⁹ Guardianship of Person includes the authority to discipline, to provide medical care, to educate, to direct, to give consent to marriage and all other matters related to the care of the person of the minor. See Islamic Personal Status Act No. 59/ 1953 (Art. 170) as amended by act No.34 (1975).
¹⁹⁰ Guardianship of Property gives the father or male relatives the authority and responsibility for property administration.
¹⁹¹ H. M. Joko Smart, Customary Law and Marriage In Sierra Leone 45 (1985).
¹⁹² Term used to describe physical custody and care of the child in Islam, during his /her first two years.
¹⁹³ Sura 11, Verse 233.
¹⁹⁵ Children are regarded as the property of the paternal family based on the transference of the bride-wealth to the family of the wife. The bride wealth signifies that the woman’s procreative capacity has been bought by the paternal family, thereby giving the paternal family full and absolute right to custody of the children that the union produced.
circumstances, adoption can be generally obtained by outsiders upon rigid standards established under Islamic laws.\textsuperscript{196}

The maternal duty to feed a child during infancy continues regardless of her marital status with the father of the child. The mother may be exempt from this duty if she cannot or will not nurse the child herself, depending on he school of Islam, and she may arrange for a substitute female to nurse and care for the child. In the event of a mother’s death the hadina\textsuperscript{197} is transferred in the following order: the maternal grandmother, the paternal grandmother, the full uterine and consanguine sister.\textsuperscript{198} In addition the hadina\textsuperscript{199} can be removed from the mother if according to the sharia she is ineligible or incapable of caring for the child by failing to meet certain conditions. These include the inability to raise the child and provide for the child’s protection due to disability, age, disease, moral corruption, remarriage to a stranger, and raising the child outside the father’s faith.\textsuperscript{200} Also the mother may lose hadina\textsuperscript{201} if she takes the child to a place far from the residence of the father and in so doing deprives the father of his duty of being responsible for the child’s affairs\textsuperscript{202}. When the custodian of her own free will places herself in such circumstances to render herself incompetent for custody such right will never be restored.\textsuperscript{203}

The father’s right to custody of his child is justified by a combination of customary principles and economic realities,\textsuperscript{204} which would be examined in the

\textsuperscript{196}§ 15 (1) Mohammedan Act Cap. 8 of Revised Laws of Sierra Leone (1960).
\textsuperscript{197}Hadina term used interchangeably meaning fosterage/ custody
\textsuperscript{198}Sura 11, verse 233.
\textsuperscript{199}See supra text accompanying note 199.
\textsuperscript{201}See supra text accompanying note199.
\textsuperscript{202}The financial support and provision required by fathers under Islamic law is regarded as one of the fundamental duties of the husband as ordained by ‘Allah.’
\textsuperscript{203}All Mudawwama Vol 2,336 Cited in Imaim, Rights of Children 7 Journal of Islamic and Comparative Law (1978).
\textsuperscript{204}In the realm of economic realities as a general rule, fathers had better jobs because they often migrate to bigger towns and cities, to seek work opportunities and earn money to support
comparative analysis. Despite the commonly accepted practices of the paternal father’s rights to custody of children of the union as established by the bride’s wealth, the need for economic stability and financial support has become a dominant theme in ascertaining the best interest of the child.

In essence, the best interest of the child is to have the child’s physical needs met. It is generally perceived to be the child’s best interest when legal custody of the child is vested in whichever parent can ensure that the child’s needs would be met. Thus in reality custody arrangements within the extended family may be used as a way of redistributing economic resources within extended families, and thereby enabling children to have their needs met. With this foundational background of custody arrangements in Sierra Leone under Islamic Law I now turn to a comparative study of Custody Arrangements in the United States and Under Islamic Law in Sierra Leone.

A Comparative Study: USA And Sierra Leone

The African traditional concept of family differs markedly from the Anglo-American institution of marriage. Whereas the former recognizes polygamy, the latter is monogamous. Marriage in Africa is not simply a union of a man and a woman. It is an alliance between two families or bodies of kin. African families may be affiliated into an extended family and even further into kin groups which reinforce broader social units. Marriage binds great numbers of people together so that its consequences affect their families. Women generally assume subordinate roles to their husbands as housekeepers, or maintainers of the farm.

205 The practice of polygamy permits the marriage or cohabitation of a man with more than one spouse at a time, in a purported exercise of the right of plural marriages.
206 A monogamous marriage entails the voluntary union of one man and one woman for life to the exclusion of all others. Hyde v Hyde, L.R. 1 P & D. 130,133 (1866).
207 See Brown, supra note 196 at 231.
Consequently, rights and duties arising out of the family relationship are generally shared in common.

Unlike the traditional European notion of a nuclear family, which is composed of mother, father and children, in Sierra Leone under Islamic Law the smallest nuclear family unit is that of the woman and her children. This is because Islamic law marriages are potentially polygamous, in which case each wife establishes her own household and the husband visits in turn. Furthermore the Islamic legal concept of family is much broader than under General law. It is composed of the extended family, which at the very least includes the paternal brothers and the grandparents of a child, and may be extended to all descendants of a specified paternal ancestor. Custody under Islamic Law in Sierra Leone thus varies in major respects from Custody under the Anglo-American based statutes in the following respect:

**Familial Versus Individual Rights**

Historically the United States conceptualizes custody in terms of an individual’s right over his or her child. During colonial times, children were viewed as property of the father who had absolute rule over them. Fathers also had the right to sell their children and to enter them into enforced labor. This reflected the exercise of individual rights and absolute ownership over children who were viewed as property. Sierra Leone under Islamic Law on the other hand, conceptualizes custody historically in terms of familial and trans-generational rights.

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209 Id at 32.
210 See Brown, supra note 195 at 232.
211 See supra text accompanying note 179.
212 Brown, supra note 196 at 231.
213 Barbara Bennett supra note 14 at, 1044.
214 See, Mason supra note 8 at 3.
During an intact marriage legal custody is with the paternal family. This custody is said to arise from the fact that the family, meaning the whole patrilineal family and not just the husband or the father of the child paid the bride wealth\(^\text{216}\) that resulted in the marriage that produced the child. Therefore the basis of claiming the legal right to custody is linked primarily to rights and duties regarding the bride price.\(^\text{217}\) The transfer of bride wealth from the family of the husband to the family of the prospective bride has two main functions. First it validates the marriage. Secondly it signifies a transfer of the bride’s procreative capacity from her family to that of her husband. This transfer entitles the husband and his family to claim custody of all the children the wife bears whether or not he is the biological parent. Because patrilineal societies consider that all children born during marriage belong to the husband and his family, custody at the time of separation or divorce is claimed as a matter of familial right by the father.\(^\text{218}\)

This rule is comparable to the Roman law concept of patria potestas,\(^\text{219}\) and is a concept known to many pre-colonial western legal systems including the United States.\(^\text{220}\) Furthermore the right to custody of a child is linked to the right over the child’s

\(^{216}\) Islam requires a marriage settlement, that is the “dower” (mahr) which is to be provided for the wife. The object of the “dower” is to give the wife her separate property out of which she can make charitable donations or gifts to her relatives. The institution of dower is a practical acknowledgment by the prospective husband of the position of his future wife.

\(^{217}\) Id.

\(^{218}\) This is a general rule or principle of traditional law under which a head of a family or husband is entitled, on behalf of the kinship group, to have all the children born to his wife irrespective of who was their father, provided that sufficient bride-wealth has been transferred to the family of the wife; See generally Beatrice Rwezaura, *Traditional Family Law and Change* 101 (1985).

\(^{219}\) The phrase Patria Potestas stems from the Roman law concept meaning the power of a ‘pater familias’ over his family. ‘Pater familias’ refers to a person who is sui juris or is the head of the family.

\(^{220}\) Until 1886, the English Common Law system made comparable provisions, and it was not until 1886 that the Guardianship of Infants Act abolished the absolute and virtual exclusive right of the father to the guardianship of his legitimate children by the introduction of the principle of the welfare of the child and equal right to custody between both parents.
productive labor. A child is considered as a resource to the family, in that he/she provided labor for the family home and farm.\textsuperscript{221}

**Physical Presence and Cohabitation With Child Not Required**

The western notion of the nuclear family arrangement is defined to include an arrangement where both parents are cohabiting and have physical custody of the child. However for families under Islamic Law a father who is said to be staying with the children, is actually working elsewhere and visits his wife and children regularly usually at the end of the week. Custody in this sense does not necessarily determine who actually does the day to day caring of the child. When the father is said to have physical custody, it is almost always a female relative or the mother who cares for the child often, with the father visiting periodically.\textsuperscript{222} This is the result of the dominant social and economic pattern found in Sierra Leone in which fathers and husbands migrate to the towns, mines, and farms for work but consider their home to be their rural home where their families live. This presents however the first conceptual problem in the notion of custody in that for Islamic families the concept of custody is influenced by the concept of the “home.” A child may be said to be staying with a man even when there is little day to day contact, if the child is staying at the man’s “home” and is supported by him.

Interestingly, this concept is applied almost exclusively to men working away from home, and not women. A woman working away from home is seldom said to be staying with the child. This indicates a profound difference in the concept of custody by a man and custody by a woman. Custody by a woman implies day to day contact, while custody by a man does not. This signifies a marked difference in the notion of physical

\textsuperscript{221}Children are desired particularly for their contribution to the family both in the short term, by doing chores and as a long-term investment.

\textsuperscript{222}In the local vernacular a father may be said to have physical custody and possession of the child even though he is working in town away from the child, and sees the child only when he pays his monthly visits.
custody in the United States, where both spouses are almost always present and assume physical custody and care of their child or children.

Marriage, Divorce and Custody

In the United States the issue of custody frequently arises when the natural parents of a child divorce. In Sierra Leone the concept of divorce under Islamic Law is problematic. Whilst the concept of divorce under General Law\(^\text{223}\) requires a court order to effectuate the dissolution of the marital union, followed subsequently with proceedings for determining the custody of the child[ren], the concept of divorce in the practices of the people under Islamic Law is much more fluid. Since few people approach the customary courts for divorce, it becomes difficult to apply a law, which initiates litigation over custody when the couple separates.

In practice when natural parents of children do divorce or separate without the Assistance of the courts, the children of the marriage go to one of the parents of the spouses, and not the spouses themselves.\(^\text{224}\) Usually either spouse is not allowed to assume physical custody of the child. This rule does not hold in a situation where the child is very young and in which the mother is better suited for custody and care of the child. The reason is that either spouse might remarry and that step-parents generally find it difficult to care for a child which is not of their blood-line.\(^\text{225}\) The other reason is financial. A child or children from a former marriage may affect the woman’s chances of being married. Generally, new spouses are not willing to financially support or care for a child that would bring them no benefit at the end. The economic burden of raising a child

\(^{223}\) See supra text accompanying note 179.
\(^{224}\) The offspring of the marital union are regarded as the property of the paternal family based on the bride price. The issue of bride wealth and the futuristic rights to the offspring of the union is discussed in supra text accompanying note 220.
\(^{225}\) The indigenous inhabitants of Sierra Leone consider it difficult to care for a child who is not of ‘their blood’. Therefore when the natural parents separate the child or children are taken by
and having physical custody of the child who must ultimately return to its father’s family is a primary reason for the lack of enthusiasm of new spouses to assume physical custody of their spouses former children.

In situations where a family makes an out-of-court (informal) custody decision, it does so through the process of discussion and negotiation, in which women are inherently at a disadvantage, because they are not expected to make a decision. They must traditionally be represented by their male relatives rather than play a direct role in the discussion.\textsuperscript{226}

In rare instances where the parties seek an order from the customary courts regarding the custody of children, women’s position are often prejudiced by the fact that a woman is not allowed to approach a court independently of her family and without a male guardian to speak on her behalf. Women often use the court system strategically to formulate their arguments according to General Law,\textsuperscript{227} to establish entitlement to their children that might not have otherwise been possible. Although women are generally favored as custodian of children under the General Law,\textsuperscript{228} they are seldom successful in obtaining custody of children in the customary courts.

In these instances the father’s rights to custody of his child is justified by a combination of customary principles, such as the concept of rights established by the bride-wealth, legal rules, and more importantly the economic realities of raising and caring for the child. The child’s best interest is said to be realized when his physical needs are met. Thus husbands gain the upper-hand in these issues because of their stronger economic position. Significantly different is this arrangement from custody


\textsuperscript{227} The General principles regarding custody awards are analogous to the common law principles favoring the mother as a better suited custodian. See sec 14 (a) Children and Young Persons Act Cap 44 of Vol. 1 Laws of Sierra Leone (1960).
adjudication in the United States arising from divorce, where the courts play a vital role in awarding custody of the child to one parent based on several factors, and more importantly the gender-neutral best interest of the child’s standard.

**Custody - Reasons Unrelated to Separation / Divorce**

In Sierra Leone under Islamic law custody of children may be transferred to another relative, other than the mother or father for a variety of reasons, some of which are articulated to be in the child’s interest and others justified by the needs of others in the child’s extended family. The reasons given for the transfer of custody to relatives other than the mother and or the father are as follows:

**Death of the Parents**

Upon the death of a parent or both parents, the extended family feels committed to caring for their child or children, and the thought of sending a relative to an orphanage is almost unheard of. It is a widely accepted duty to take into custody one’s dead relative’s child, and more importantly it is also considered to be in the best interest of the child.

**Meeting the Economic Needs of the Child**

This frequently happens in cases where both parents or a parent is alive, but fails to care for the child. Members of the extended family structure consider it an obligation to provide for the economic needs of the child and usually ask for custody of the child. Similarly where the parents or parent is seen by a relative to have too great a burden to bear or simply to needs help, a relative may offer to take custody of a child or children to assist.

Related to this, another reason often given for transfer of custody to members of the extended family, is to give the biological parent an opportunity to seek employment.

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228 Id...
Since it is very difficult to search for employment with a child and also very expensive in sponsoring education for children in urban areas, a child may be left with a relative while its custodial parent (s) search for, or engage in employment. Several children are sent to relatives who live close to a school, either where no school is near enough or there is no possibility of getting an accommodation in a nearby school.

**Health Reasons**

Very young children whose mothers become pregnant while they are still breast-feeding are said to suffer if they remain in their mother’s home. For this reason custody is often transferred to other relatives.

**Other**

A peculiar custom of marriages under Islamic law is that a newly-married woman should receive from the family a child to care for before she has one of her own. This can be seen as a method of distributing resources within the family - both economic and sharing.

Finally in some instances, a relative will simply ask for a child because she is lonely or just likes children. Although in these cases the reason for custody may not be framed in terms of the child’s interests, the concept of kinship ties is premised on the family’s maintenance of social relations in the family unit. The best interest of the child may coincide with that of the family unit as a whole, because his/her interests depends on the survival of that unit. In all these instances however, the transfer of custody will almost certainly be temporary and serves the larger interests of the extended family.

Custody therefore fluctuates often with children spending a few years with a relative and then moving to another or back to their parents. These custodial arrangements could also be significantly distinguished from transference of custody of children to non-parents in the United States, because such awards are regulated by
statutory provisions. In Sierra Leone, Islamic marriages prefer and widely utilize informal or what is known as ‘out of court’ custody arrangements. This is due to the fact that indigenous customs and values regarding the preservation of kinship ties, and the extended family unit reflect the general practices of families in the area of custody.
CHAPTER V

THE BEST INTEREST OF THE CHILD DOCTRINE

Background

In the early 1800s changes in society and the view of childhood caused the courts to shift their focus in making child custody awards.\textsuperscript{229} At first the attempt to consider the children’s needs was one-sided and generalized without taking into account the needs of the individual child whose custody was at issue.\textsuperscript{230} The court merely paid lip service to the necessity of preserving the child’s interest, but the principles behind the child’s best interest standard and the evaluation of parental ability were not as yet fully formulated.

Towards the beginning of the nineteenth century, the courts developed a theory of child custody that focused on the needs of the child, and the ability of the parent to meet those needs. This replaced the absolute right to custody given to fathers, which had been prevalent under the common law rule.\textsuperscript{231} This rule came to be known as The Best Interest of The Child rule.\textsuperscript{232}

\textsuperscript{229} See John P. Mccahy, Martin Kaufman, Celeste Kraut, & James Zett, \textit{Child Custody And Visitation Law and Practice} 1-16 (b) 1987.
\textsuperscript{230} Id.
\textsuperscript{231} Under the Common Law rule fathers have absolute custodial rights to their children. The child was treated as a mere chattel and the father was granted complete rights including the power to terminate the child’s life. \textit{See}, e.g., Rex v Greenhill, 11 Eng. Rep 922 (1836).
\textsuperscript{232}The best interest of the child rule seeks as a goal the best custodial placement for the child that the machinery of law is capable of attaining. Factors such as the child’s overall welfare, happiness, and stability play a crucial role. \textit{See} generally, Ramsey Lang Klaff, \textit{The Tender Years Doctrine: A Defense}. 70 Cal L. Rev 335 336, 357 (1982).
This rule emerged as being the critical factor in custody determination. The best interest rule favors neither spouse as custodial parents but allows both to compete for custody of children on equal footing. As a goal in child custody disputes, the rule seeks the best possible custodial placement for the child that the machinery of the law is capable of attaining. The best interest rule gives the decision-maker great flexibility in fashioning a result that is the best possible one for that child. This objective is one with obvious appeal where children are concerned, but not without problems. In the United States and most foreign jurisdictions the best interest rule is the overriding and guiding substantive standard for the adjudication of custody awards between spouses upon divorce.

In the United States, the best interest of the child doctrine was first announced by Judge (later Justice) Brewan in Chapsky v Wood in which the Kansas Supreme Court repudiated the rule which held that the rights of parents was primary over those of third parties to custody of their children. In arriving at this conclusion, the courts further considered the qualities of mothers who were contending for custody at that period of time. The result was that when the rule became the best interest of the child, mother custody, particularly for young children, was seen to be in the best interest of the child. By the early part of the twentieth century the maternal preference for mother in considering what was in the best interest of the child became solidly established in the

233 See id.
235 See id at 326; see also Andrea Charlow, Awarding Custody: The Best Interest of The Child And Other Fictions 5 Yale & Policy Rev 267 268 (1987).
236 See Klaff, supra note 234 at 336.
237 Chapsky v Wood 26 Kan. 650 (1881).
238 Chapsky at 659.
239 The history of the mother preference rule is traced in Klaff supra note 234 at 357.
Today, the maternal preference has been abolished by statute and judicial decision in many States. In addition there is case law holding that the preference for the mother violates the States’ Equal Rights Amendments and in other situations, the Fourteenth Amendment of the United States Constitution. Thus the best interest of the child rule, a rule without any presumptive preferences, and is the guiding principle for custody adjudication in the United States.

There are advantages and disadvantages in utilizing this criteria as a benchmark for custody decision making. The most compelling reason for relying upon a determination of the child’s best interest is that the decision making is centered on the child’s needs, rather than adult considerations or societal stereotypes. The shift to the best interests standard also signaled a willingness on the part of the legal system to consider custody outcomes on a case by case basis, rather than adjudicating children as a class. Another advantage of this rule is that it is responsive to the changing social and legal trends outside of custody law. A number of judicial decisions relying upon a consideration of the child’s interests have become landmark cases, charting a different course in child custody disputes.

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240 The attitude of the court where parents battle over children had inclined so steadily toward the mother, was that unless she has shown herself wanton, or exceptionally inadequate or heartless she is not likely to be separated from them. (Quoted in M. Grossberg, Governing the Heart) 284 (1985).
242 Id.
243 See Klaff, supra note 234 at 336.
244 Id at 335.
245 For a discussion on how the court’s attitude changed from the common law presumption of father’s absolute right to consideration of the interests of the child on a case by case basis See generally Macchey, Kaufman, Kraut, & Zett, supra note 231 at 16.
246 See id.
247 See for e.g., Pusey v Pusey 728 P.2d 117 (Utah 1986) see also Burchard v Garay 42 Cal. 3d 531 742 P.2d 486, 229 Cal.Rptr. 800 (1986).
The core problem with this rule, is the lack of uniformity\textsuperscript{248} regarding which interests to consider, how to define and weigh the importance of different factors,\textsuperscript{249} and the problem of accounting for children’s developing needs over time.\textsuperscript{250} The effect of this lack of clarity is that social workers, attorneys, custody evaluators consider and emphasize different factors or interpret the same concepts such as continuity and stability in entirely different ways to benefit the parent they represent or favor.\textsuperscript{251} With the absence of clear findings or guidelines, judges are compelled to make difficult decisions by relying upon their own subjective value judgments and experiences, resulting in considerable inconsistencies in the outcomes within jurisdictions.

From an international perspective, after nearly a decade of preparatory work the United Nations finalized and adopted by the General Assembly in November 20th 1989, a ground-breaking human rights treaty namely the ‘Convention on the Rights of the Child.’\textsuperscript{252} One of the key concepts in the convention is the concept of the best interest of the child.\textsuperscript{253} Article 3 (1) of the Convention provides that:\textsuperscript{254}

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.’

\textsuperscript{248} See Charlow supra note 237 at 268.
\textsuperscript{249} See David Chambers, supra note 102 at 478-99.
\textsuperscript{250} See generally Charlow, supra note 237 at 268..
\textsuperscript{251} See, e.g., Williams v Williams, 563 N.E. 2d 1195 (Ill. App. 3 Dist 1990) (where the father hired a pediatc psychologists who examined the relationship between the three year old daughter and the mother and testified that the best interest of the child would be served by placing custody of the child with the father, and later the mother’s psychiatrists a specialists in marital and sexual dysfunction testified that the mother would be a better custodial parent than the father; see also Beck v Beck 432 A.2d. 63 (N.J. 1981) (where there was similarly contradictory evidence and testimony by experts called to testify on behalf of both parents).
\textsuperscript{252} See supra text accompanying note 9.
\textsuperscript{253} Article 3 (1) of the United Nations Convention on the Rights of the Child states that ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of Law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.’
\textsuperscript{254} See supra text accompanying note 254.
The convention had the largest number of signatories on the day it was opened for signature\(^{255}\) and it went into force more quickly than any other human rights treaty.\(^{256}\) Although the Convention on the Rights of the Child has been ratified by many States and welcomed with much enthusiasm, the extent to which the principle contained in Article 3(1) is to be applied in national contexts poses a challenge.

The convention has also gained further support in Africa where an initiative regionally, in the form of a charter has been adopted to provide a specific regional complement to African nations. This is known as the African Charter on the Rights and Welfare of the Child adopted in 1990 by the Organization of African Unity (OAU).\(^{257}\) Article IV provides:

“In all action concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”\(^{258}\)

The applicability and interpretation of the best interest concept though widely embraced will be influenced to a large extent by the social, political, and economic conditions of the various nations.\(^{259}\) Factors which do play a role in the process of defining, and applying this concept are also numerous. Firstly the worsening economic conditions of Africa have led to the narrowing of the best interest concept to mean simply the satisfaction of the child’s material needs.\(^{260}\) There is also not yet an agreed standard

\(^{255}\) For general comments on the Convention on the Rights of the Child, see generally, Michael Freeman, Children’s Rights A Comparative Perspective (1996).

\(^{256}\) See id. The Convention on the Rights of the Child went into force on Sept 2\textsuperscript{nd} 1990. Slightly more than nine months after it was opened for signatures and reached near universal ratification by mid 1996.

\(^{257}\) Bola Thompson, Africa’s Charter on Children’s Rights: A Normative Break With Cultural Traditionalism; IC L.Q 41 , 432 at-444.


\(^{259}\) The social, political and economic factors of developing and third world nations do play a crucial role in defining the best interests, and also influences the judicial system’s perception of the factors it takes into account in ascertaining the best interest of the child.

\(^{260}\) See Freeman, supra note 257 at 4-5.
by which compliance to this concept can be measured.\textsuperscript{261} This is due to the fact that the international community is so diverse. There are regions with varying religious beliefs, social systems and economic organizations.\textsuperscript{262} These differences in time reflect their approach to life, their strategies for survival and what they will do for children.\textsuperscript{263} These factors make it impossible for States and even communities to have a common conception and understanding of the vital provisions of the child’s best interest as well as a common strategy for articulating its objectives.

**Principles And Problems**

The *best interest of the child* rule, an attractive rule in the context of custody adjudication, is the standard and gender-neutral referent for awarding custody in the United States.\textsuperscript{264} This rule is constrained by problems of definition,\textsuperscript{265} vagueness,\textsuperscript{266} in defining what set of values are to be given priority in determining the best interest of the child, and by problems involving abuse of discretion by both judges who administer it and parents who use it to further their own interests.\textsuperscript{267} As a result, the rule has been subjected to severe and widespread criticism both in the United States and internationally.

In the United States, modern critics of the rule principally draw inspiration from the work of Robert Mnookin.\textsuperscript{268} Mnookin identifies three problem areas that contribute to the indeterminate nature of the standard. They are as follows: (i) the problem of

\textsuperscript{261} For a detailed critical examination on the difficulties of implementing the convention on a national level see supra note 262 (the entire volume covers essays drawn from all five continents, from the common law world as well as the civil law systems giving an insight into the both the problems of implementation of the convention and progress that is being made to recognize children’s interests).
\textsuperscript{262} See Freemen supra note 262 at 6.
\textsuperscript{263} See id.
\textsuperscript{264} See Charlow, supra note 237 at 258.
\textsuperscript{265} Chambers, supra note 250 at 487-9.
\textsuperscript{266} See Carlow supra note 237 at 267.
\textsuperscript{267} See Chambers supra note 251 at 487-8.
insufficient and relevant information to decide the issue (ii) the problem of predicting the
future and (iii) the problem of definition that is ‘what is the meaning of the phrase ‘the
best interest of the child?’ Mnookin draws attention to the indeterminacy of the
principle arguing that predictions of the effects of the present dispositions on the future of
the children, are necessarily speculative in the present state of knowledge of the judges.
Even if they are not, he states that there is no consensus in the values inherent in choosing
between the outcomes.

A solid decision on the best custodial placement of the child would however,
require the court to assess the needs of the child, the parenting capacity of both parents,
the interaction of the child and parents, and numerous other factors that may influence the
child’s development. He maintains however that the courts are not in the position to
obtain such a range of information in a traditional judicial setting. The courts also face
a grave inability, and limitation in gathering and obtaining the necessary information to
accurately determine the best custodial placement. Finally he suggests that there is no
consistent view of what values are to be served in acting in the child’s best interest.
He sums up the problem by posing several questions regarding what values are to be chosen
when called upon to make decisions in accordance with the child’s best interests.

Custody statutes do not themselves give content or relative weight to the pertinent values
judges should look for. And if the judge looks to society at large, he finds neither a

268 R. H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of
269 See Mnookin, supra note 270 at 226.
270 See id at 228.
271 Id.
272 State statutes typically contain unweighted lists of similar factors that courts consider in
determining the best interest of the child. See for e.g., Uniform Marriage and Divorce Act s 402,
273 See Mnookin, supra note 270 at 228-9.
274 Id.
275 See Mnookin, supra note 270 at 260.
276 Id.
277 Id.
clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.\textsuperscript{278}

Another commentator David Chambers,\textsuperscript{279} finds more fundamental problems associated with the extent that judges are applying the wrong values, and this he attributes to the failure of the legislature in conveying the collective social judgment about the right values.\textsuperscript{280}

Martha Fineman,\textsuperscript{281} has complained that the principle has allowed the values of the helping professions to capture the decision-making process in child placement cases, to the detriment of women's interests. Michael King and Christine Piper\textsuperscript{282} on the other hand, have advanced a contrary position that the determinations of children's best interests reached by those professions, are corrupted by their construction in the legal arena.\textsuperscript{283} Another critic of this rule notes that while this standard appears enlightened in practice, it focuses in reality on parents rather than children, and are marred by personal or cultural biases.\textsuperscript{284} She points out that the hearing and the law attend more to the competing claims of the parents than to any consideration of the child's best interests.\textsuperscript{285} Proceedings she maintains normally revolve around the fitness of the respective parents.\textsuperscript{286}

Perhaps more alarming and disturbing is the high level of discretion used by judges which not only increases and encourages litigation\textsuperscript{287} but may exacerbate the

\begin{flushleft}
\textsuperscript{278} Mnookin, supra note 271 at 261-262.  \\
\textsuperscript{279} See Chambers, supra note 251 at 481.  \\
\textsuperscript{280} See \textit{id} at 481.  \\
\textsuperscript{283} Id.  \\
\textsuperscript{284} See Charlow supra note 237 at 267.  \\
\textsuperscript{285} Id at 268.  \\
\textsuperscript{286} See \textit{id}.  \\
\end{flushleft}
conflict between parents.\footnote{Id.} Some parents may be encouraged to litigate, while others may enter into bad settlements because they perceive sex biases on the part of the court that might lead a judge to deprive them of custody altogether.\footnote{See generally, R. H. Mnookin, Bargaining in the Shadow of The Law: The Case of Divorce 32 Current Legal Problems 65 78 (1979).} Most striking of all the criticisms is that the use of the best interest rule encourages litigation.\footnote{See Chambers supra note 251 at 479; See also Charlow, supra note 237 at 267-70.} An insightful and classic article by Robert Mnookin and Lewis Kronhausser\footnote{Mnookin & Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ 88 Yale L.J. 50 (1979).} offer insights into the bargaining process in divorce, and points to the fact that the outcome of the decision is uncertain, parties are more likely to litigate.\footnote{Id.} In the context of custody critics of the rule maintain, that an encouragement to litigate is particularly unfortunate because the delay and conflict associated with litigation which is usually accompanied by child-parent evaluation studies, and expert examination can be very harmful to children.\footnote{Robert F. Neely Jnr., The Divorce Decision: The Legal and Human Consequences of Ending a Marriage 3, 74-76 (1984). See also Cochran, The Search for Guidance in Determining the Best Interests of the Child at Divorce. Reconciling the Primary Caretaker and Joint Custody Preferences, 20 U. Rich. L. Rev. 1, 4 (1985).} The result of the indeterminate nature of the best interest standard is that it gives judges far more discretion than most critics consider desirable.

On the international level, the United Nations Convention on the Rights of the Child proclaims a series of rights that children should have and also proclaims the Best Interest of the Child rule as a primary consideration in all actions concerning children.\footnote{See supra text accompanying note 254 & 255.} Inherent in the problem of the application of this rule globally, is the fact that conceptions of children’s best interests are strongly rooted in the self-images of different cultures which may vary.\footnote{See as a discussion into the variations of diverse cultures volume Child’s Rights a Comparative Perspective ed. Michael Freeman University College London 4-5 (1996).} One important reason for lacking this common standard is that the
international community is very diverse, and neither homogenous politically, culturally, nor economically.\textsuperscript{296} There are regions with varying religious beliefs, social systems and economic organizations, and these differences are in turn reflected in the world view of the people, their approach to life their strategy to survival and what they would do for their children.\textsuperscript{297} These factors make it impossible for States to have a common understanding of a vital provision of the Convention, the best interest of the child clause. This inevitably constitutes the diversity of interpretations this principle has been subjected to, by various cultures.\textsuperscript{298}

Article 3 (1) of the convention of the rights of the child has been further subjected to numerous criticisms by both legal and human rights scholars.\textsuperscript{299} One such scholar, Stephen Parker\textsuperscript{300} notes however that the version of the best interest contained in Article 3 (1) is not clear as to whether children as a class are intended to be the beneficiaries or children individually.\textsuperscript{301} He notes that article 3 (1) begins by referring to all actions concerning children (in the plural) but ends with the requirement that the best interest of the child (in the singular) be the primary consideration.\textsuperscript{302} He maintains that it is hard to see how practically the article can have anything other than a collective focus.\textsuperscript{303}

Although the courts of law often make decisions about individual children, other decision-makers who embrace the article such as private and public institutions, social

\textsuperscript{296} For further discussion on this issue see generally, Bart Rwezaura, \textit{The Concept of the Child's Best Interest in the Changing Economic and Social Context of Sub -Saharan African} 83 (1994).

\textsuperscript{297} See Freeman supra note 262 at 6.

\textsuperscript{298} See id.

\textsuperscript{299} For detailed reading on the different problems of implementation posed by this rule upon various States like Canada, Argentina, Holland, Japan, & Mozambique see Freeman, supra note 262, for a comparative perspective.

\textsuperscript{300} Stephen Parker is a Professor of Law at Griffith University, Queenensland. His research interests lie mainly in Family Law and Legal Ethics. He is author of the book 'Cohabites' (1991) and co-author of Australia Family Law in Context (1994).


\textsuperscript{302} Id.
welfare institutions, administrative authorities, and legislative bodies often make decisions about groups of children.\textsuperscript{304}

Philip Alston\textsuperscript{305} also criticizes the convention noting that the convention is sometimes misrepresented as being a uni-dimensional document that reflects a single unified philosophy of children’s rights, containing a specific and readily ascertainable recipe for resolving the inevitable tensions and conflicts that arise in the implication of Article 3 (1). He notes that in a given situation among different cultures, this is not the case.\textsuperscript{306} This is true especially in developing or third world countries where the respective entitlements of the different actors involved, which include the child, the parent, the family, the extended family, and the local community involve a much more complex set of arrangements.\textsuperscript{307}

This view is often encouraged by proponents of the convention who wish to emphasize that a particular solution or outcome to the problem, is provided by the text he suggests.\textsuperscript{308} He notes that the provision of Article 3 (1) in the convention is more complex than any characterization would imply.\textsuperscript{309} If the convention is to fulfill the aspirations of its drafters and of those who see it as providing an appropriate framework for addressing the entire range of major issues that the best interest doctrine poses, it would be prudent to develop a better appreciation of the nature of its complexity at the global, as well as the

\textsuperscript{303} Id.
\textsuperscript{304} Id at 49.
\textsuperscript{305} Philip Alston is a Professor of Law and Director of the Center for International and Public Law at the Australia National University, also chairperson of the United nations Committee on economic, social, and cultural rights. He has at the Harvard Law School, University of Michigan Law School , and the Fletcher School of Law and Diplomacy and has been a senior legal advisor on children’s rights to UNICEF since 1985.
\textsuperscript{306} See Philip Alston, Commentary on the Rights of The Child United Nations Center for Human Rights and UNICEF. 1992
\textsuperscript{307} Id.
\textsuperscript{308} Id.
\textsuperscript{309} Id.
national and local levels. Ludwig Salgo, another critic points out that the danger lies in
the fact that anybody can make up a case under the rubric of the best interest of the child
and maintains that personal and societal preferences will inevitably be mingled with
professional standards.

Having highlighted some of the criticisms made against the convention, one can
conclude, that the principle of the best interest rule is yet to acquire much specificity to be
the subject of any sustained analysis designed to shed light on its precise meaning.

Article 3 (1) underlines the fact that the principle applies not only in the context of
legal and administrative proceedings or in other narrowly defined contexts but in relation
to all other actions concerning children. This represents a significant extension of a
principle which was originally little more than a way of ensuring that the interests of any
children involved would be taken into account in divorce or custody cases. When we
realize that neither society nor the convention on the rights of the child has a clear
consensus as to what is to constitutes the best interest of the child, the usefulness of this
concept then becomes subjected to numerous challenges.

Applying The Best Interest Rule In National Contexts

Having outlined the criticisms levied against the universalization of this
concept, this part focuses and explores the application of the principle of the best interest

310 See Philip Alston, The Best Interest Principle Towards a Reconciliation of Culture and
Human Rights, Centre For International Public Law Australian National University Claredon
311 Ludwig Salgo, Das Kindeswohl in der neueren Rechtsprechung der Bundersverfassungsgerichts,
in Bois du Reiman, ed., Praxis und Umfeld der kinder-und Jugendpsychiatrie Bern/ Stuttgart/
Toronto 168 (1989).
312 See Freeman supra note 262 at 5 (where he notes generally that each country has its history
and culture which it confronts in complying with the convention. Subsequently, what constitutes
the best interest of the child will have various meanings and interpretations which may vary from
State to State).
313 See supra text accompanying note 255.
314 For further discussion on this see generally, Rwezaura, supra note 298 at 110.
of the child under the Islamic Laws of Sierra Leone and the Best Interest Doctrine in the
United States. The objective is to arrive at an understanding of the meaning of the best
interest of the child, as perceived by two distinct cultures, having diversified legal, social,
economic, and cultural backgrounds. I will further attempt to reconcile this concept from
a cross-cultural perspective, bringing out the common grounds of perception, and
implementation, by both countries and also explaining the significance of their inevitable
differences.

My aim is not to give a comprehensive definition of the concept of the best
interest of the child doctrine, but to provide a general exposition of some of the factors
that have influenced the definition and implementation of this key principle in both
cultures.

**Applying The Best Interest Principle In Sierra Leone**

In Sierra Leone the notion of the best interest of the child or ‘the welfare of the
child’ as it is commonly referred to, is used in two senses. The first sense in which it is
used is derived essentially from Anglo-American family law principles, which the
general courts, the local customary courts, and quasi-judicial tribunal apply in
determining questions concerning children, in matrimonial, adoption, and guardianship
proceedings. 315 The second sense encapsulates a much wider notion of what the
community and the family under Islamic law considers to be in the interest of a child.316
Factors framed in the determination and implementation of this concept in both senses
will be examined separately. It is significant to note that the best interest of the child
concept is not just on the level of the Islamic local court rules, but also at the level of the

316 Most custody arrangements under Islamic law are settled privately without recourse to the
local courts system, as this kind of arrangement better serves the needs of indigenous extended
families, who consider issues regarding matrimony, property or inheritance a purely communal
matter.
living law,317 which comprises of the informal practices and arrangements of custody of the indigenous people.

The provision of the best interest of the child or welfare of the child is to be found in received statutory provisions in Sierra Leone like most British colonized territories.318 This concept it is often said is not a principle of African law, but came to Africa via the colonial received law.319 The rule is not only to be found in the General Laws of Sierra Leone,320 but is also contained in statutory provisions under the Mohammedan Act.321

**Informal Custody Arrangements: The Living Law & The Best Interest Rule**

On the level of the living law which comprises of the private practices and custodial arrangements of the indigenous people, the best interests of the child is usually perceived to be congruent with those of the extended family, and is related to three basic issues:

(i) Meeting the basic immediate physical needs of the Child

(ii) The Paternal rights of fathers to their offspring. Closely liked with this is the need for the preservation of the social unit of the extended family.

(iii) Religious beliefs associated with this doctrine.

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317 The living law or the practices of the indigenous people play a significant role in the construction and application of the best interest standard. However since Islam generally discourages divorce, and there are however few custody cases brought up to the Islamic Courts most families prefer a settlement of this issue on an informal basis.

318 See supra text accompanying note 317. It states: “In all actions concerning the child undertaken by any person or authority the welfare of the child shall be the primary consideration.”

319 Id.

320 See supra text accompanying note 179.

321 The Mohammedan Act is found in Cap. 8 Of the Revised Laws of Sierra Leone (1960) provides “In all actions concerning the child or children undertaken by this court or other authority the child’s interests and welfare shall be a consideration.”
Meeting The Basic And Immediate Needs Of The Child

required to be a primary consideration, can usefully be analyzed in terms of the
basic needs of the child. After a Muslim couple divorces, it is usually perceived to be
in the child’s best interest when his or her basic physical needs such as food, clothes,
and education, are met. Education is thought to be in his best interest because with
education it is hoped that this training will ultimately enable the child to get a wage
employment. Education is understood to be a process that includes two components:
(i) instruction or teaching and (ii) nurturing. It is a widely accepted view that the process
of nurturing is shared by the family and that the school is to instill in the child the moral,
aesthetic and social values, and a sense of identity, self-respect and belonging.

In Sierra Leone where school is not automatically available to every child and
where starvation is a real possibility, the concept of the best interest of the child becomes
inevitably linked with economic considerations. The child’s interests upon divorce is
therefore only understood in relation to the broader socio-economic circumstances of his
or her family. The need for money to support children coupled with an economy in which

322 In developing and worn -torn-countries like, Sierra Leone the basic prospect of survival for
children is a much needed necessity. The provision of what is in the western world regarded as
fundamental rights is not often the case in Africa. Physical needs such as clothes, food, water,
etc. are essential and not as readily available to children. Thus meeting those basic needs is
considered extremely important in the child’s welfare. See generally UNICEF, The State of the
World’s Children, Statistical data (Oxford University Press For UNICEF 1998) for a statistical
update on the basic needs of children in the continent of Africa.
323 See id.
that custody of the child should be given to the mother who had moved into another country in
this instance (Ghana) took into consideration amongst other factors the availability and prospects
of education for the child. The court considered this to be in the child’s overall long-term
interests).
325 See A. Gindy, Children’s Needs in the Different Stages of Development and the Priority
326 See ,e.g., C. Bledsoe, School Fees and the Marriage Process for Mende Girls in Sierra
Leone, in P.R. Sandy and R.G. Goddenough eds. Primary education for children in Sierra Leone
is not free and parents must pay school fees. In the rural areas, children often must got to
most people have little independent access to money means that the best interest of the child will go where the money is. Thus upon a dissolution of marriage where a custody choice is between the mother and the father, the consideration of the economic interests of the child usually favors the father and is regarded in this sense as in the child’s best interest.

This is due to the fact that men generally have greater access to wage employment which is the primary and most reliable source of economic resources. Even in cases when a father or his family have not requested custody of the child a woman may of her own volition transfer custody of the child as a way of ensuring that he supports the child economically. However it is significant to note at this juncture, that the application of the best interest of the child under the private, and informal arrangements of the indigenous people, is nevertheless at variance with the child welfare principle as applied under the Mohammedan Act. The law as applied by the Islamic courts prefers mothers as against fathers, as the primary physical custodian of children particularly when the child is young. Notwithstanding, economic realities often demand that the best interest of children of separating parents is to be in the custody of the father and his family. This is attributable to the fact that there is assurance of adequate economic resources to meet the child’s future needs. Therefore, given the fact that informal arrangements are more often preferred to formal court proceedings, the custody children of divorcing couples often goes to the father and his family.

boarding school, which is more expensive. In addition to school fees, parents must also buy uniforms.

327 Often the indigenous people prefer to give custody of the child or children of the marriage to the parent with stronger or better economic resources, as this is regarded as a means of securing financial benefits for the future preservation of the child’s welfare happiness and stability.

328 As with all patrilineal heritage custody of the child not only goes to the father but to the extended family unit of the father -the Paternal Family, thereby preserving the communal and social unit which is basic to the family structure.

329 See supra text accompanying note 325.

330 See supra text accompanying note 181.

331 See, e.g., In re Clarke (An Infant) ALR S.L. 270 (1964-66).
(ii) **Paternal Rights**

Related to the above factor is the concept of Paternal Rights.  
Most men and women consider it to be in the best interest of the child to be associated with his or her paternal family. This can be traced back to the bride wealth, which was paid by the husband at the start of the marriage, giving him futuristic rights to the offspring of the union. Even in instances when the mother or maternal family wants to care for the child she is often faced with limited or no options, but to surrender custody of the child to the paternal father and family which is said to be in the best interest of the child. There are many reasons for the reluctance of women to rush for their rights. Some of these reasons are based on cultural considerations, while others are as a result of simple ignorance, or the inaccessibility of sufficient means to provide for the children.

Unlike the concept of paternal rights, which is emerging in industrialized nations, the concept of paternal rights in Sierra Leone emphasizes familial rather than individual rights. The need of the other members of the extended family such as the grandparents,

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332 The concept of Paternal Rights accords with the African traditional family system. It is a term which expresses a general rule of principle of traditional law under which a head of family or husband was entitled on behalf of the kinship group to have present and futuristic rights all the children born to the wife irrespective of who was their genitor, provided that sufficient bride wealth had been transferred to the family of the wife. See supra note 219

333 The Paternal family consists of the father and all the male heirs of the family unit.

334 The term ‘bride-wealth’ includes the ‘bride price,’ ‘dowry,’ and ‘marriage payments.’ These terms describe the transfer of property such as livestock, money agricultural and industrial consumer goods, and or services from the prospective son-in-law or his family, to the father of the prospective wife or her family. Such payments can be done either in a single lump sum or by installment during the life-time of the married life of the couple.

335 This is a general rule or principle of traditional law under which a head of a family or husband was entitled, on behalf of the kinship group, to have all the children born to his wife irrespective of who was their father. Provided that sufficient bride-wealth has been transferred to the family of the wife.

336 In giving fathers both physical and legal custody it is assumed that they have somebody, usually a woman to whom they can pass on the burden of the day to day care of the children. They are not themselves expected to look after the children.

337 Because patrilineal societies consider that all children born during marriage belong to the husband and his family, custody at the time of separation or divorce is claimed as a matter of familial right by the father.
aunts are put on the same level with the needs of the child. Thus the interests of the child is not seen as conflicting with the interests of the extended family because the child’s interests is perceived as coinciding with the interests of the family unit as a whole. Therefore the decisions which parents make regarding what they perceive as the child’s best interest, largely depend on the parents’ own perception of what is best for the child at a given point in time. Rarely is a child consulted on such matters.

(iii) Religion

The father’s right to control and to direct the religious affairs of his family is given special significance under Islamic Law. Thus the child’s preferences may be deemed subordinate to the importance which the courts and the indigenous people attach to enabling the father to control his or her religious upbringing. Since Islam presumes the child would follow the religion of their father, public policy appears to make it difficult to depart from this view. The best interest concept has also been used to endorse his rights under Islamic Law. The unwillingness to depart from this, coupled

338 See Brown, supra note 196 at 50.
339 In Sierra Leone children have no voice to articulate their needs and preferences, as perceived by themselves and do not constitute pressure groups to demand the satisfaction of those needs so defined. The child does not determine the satisfaction of his or her needs or interests. Instead his or her needs are defined particularly in the family.
340 This could be attributed to the significance of the value placed on the bride wealth which entitles the husband as head of his family the exclusive rights to marital affairs, religion of his offspring custody, inheritance of property etc.
341 Religion plays a significant role binding the larger family unit with the spiritual world. The authoritative teachings of the prophet Mohammed as found in the Quaran provides a basic structure of guidance and rules in religious rituals and ceremonies to be performed by the family. The Quaran is held in high esteem, and contain regulations for living in all aspects of life to the Muslim community. Fathers are accorded an authoritative role based on Quaranic principles and responsible for the religious upbringing of their children.
343 The religious upbringing of the child and the concept of the Child’s Best Interest regarded are some how linked in the sense that the father being the head of the family is also the leader and the head of the religious affairs of his family unit. Under Islamic Law the religious
with the court’s acceptance of such presumption, strengthens the argument endorsing special significance to the father’s right in this regard. People’s views about religion include beliefs about spiritual connections which influence health, luck, and after life, making their perceptions of the interests of the child to include strengthening this spiritual connections.

The best interests doctrine under Islamic law in Sierra Leone is however subjected to tensions between the commitment to indigenous customary practices by the people on the one hand, and the determination of the best interest standard by the Islamic courts on the other hand.

**Formal Custody Arrangements**

**The Local Islamic Courts & The Best Interest Principle**

In determining the best interest of the child, the Mohammedan Act requires the Judge to consider all the relevant factors that include:

(i) Firstly, the wishes of the child’s parents as to the custody or residence of the child as against third parties,

(ii) Secondly, the interrelationship and bonding of the child with the mother,

(iii) Thirdly, the economic resources of the respective parties contesting for custody, and fourthly the character and fitness of each parent, before making a final decision as to the custody of the minor.

(i) **Natural Parents Favored to Third Parties**

As a general rule, the Islamic Courts favors natural parents as custodians as opposed to third parties. Thus the presence of step-parents or third parties contending

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344 See § 24(i) (9 b.) of the Mohammedan Act Cap 8 of the Revised laws of Sierra Leone (1960).

for custody of the children, is often argued as a factor militating against the child’s best interest.\textsuperscript{346} Step-parents are often viewed with suspicion regarding the care they would give to their step children.\textsuperscript{347}

The courts apply the rule which prefer natural parents as opposed to strangers or third parties. Mothers would argue that the step mother would not care as much as they do for their children and the court are ready and willing to make those assumptions.\textsuperscript{348} Thus the marital status of the spouses and the presence of step-parents is a single most important factor that the courts do take into cognizance in determining the best interest of the child.\textsuperscript{349} Women often strategize in courts by using the assumption of gender parenting roles to their advantage Courts reinforce the assumption of gender parenting roles by being particularly concerned about who will care for the child if custody went to the father.\textsuperscript{350} Although a strong commitment to interpreting the child’s best interests in the context of the natural parents rights continues under Islamic law, factors such as parental neglect and indifference, immorality, and poverty are given weight when considering what is in the best interest of the child.\textsuperscript{351}

\textsuperscript{346} Id at 253.
\textsuperscript{347} See for e.g., Anoff supra note 327 at 357.
\textsuperscript{348} See id.
\textsuperscript{349} For e.g., in the case of Spaine supra note 348, it was stated that the court has a wide discretion in making a custody order and should take into consideration all the circumstances of the case, including the sex of the child, its health, the lives led by its respective parents and their prospects of re-marriage, the upbringing of the child by a single parent, or by a step-parent if there is a re-marriage, and the upbringing of children together (page 252, lines 8-11: page 252 lines line 36- page 253, line 3).
\textsuperscript{350} Because fathers rarely stay at home to assume immediate physical custody of their children but migrate into bigger cities or towns to engage in wage employment. Children are often taken care of by an immediate female family member which may either be the step-mother, the grandmother, the female cousin or a woman in the paternal father’s household.
\textsuperscript{351} The best interest rule under Islamic law seeks to guard and preserve the overall interests and welfare of the child and thus the courts do often pay attention to factors or evidence such as parental neglect, and indifference poverty, and many other factors in determining the best interests of the child. See, e.g., Anoff supra note 350 at 357.
The above in themselves have not been considered relevant in the best interest of the child if there is evidence of care and concern.\textsuperscript{352} The focus on the natural parent’s rights and the presumption in their favor, means that the adjudication must be reached within the framework of the law of parental rights and not the child’s independent preferences.\textsuperscript{353}

\textbf{(ii) Maternal Preference}

The Islamic courts have invariably focused on the preferential rights of the mother to physical custody of their children on divorce.\textsuperscript{354} This arrangement is considered to be in the best interest of the child. This is in direct opposition to the practices and informal arrangements of custody between Islamic families.\textsuperscript{355} The court would only interfere with the mother’s preferential rights on the basis of prejudice to the child’s life, health, and the mother’s unfitness.\textsuperscript{356} The general view is that the courts will also recognize the father’s prima facie right when an element of danger or detriment is positively established.\textsuperscript{357} Isolated judicial decisions have interpreted the child welfare as a paramount consideration so as to recognize the father as the preferred custodian of the child.\textsuperscript{358} Nevertheless in the absence of statutory reforms which focuses on the mother’s custodial right and the paramountcy principle, the current trend in the Islamic Courts focuses on the need to interpret the child’s best interests within the framework of preferential maternal right of

\textsuperscript{352} Id.
\textsuperscript{353} There is a strong presumption in favor of the superiority of parental rights to custody of their children. This is a fundamental right that parents have and rarely are children’s preferences taken into consideration as there is no available forum for their voices to be heard.
\textsuperscript{354} For an example of how the courts are willing to enforce the maternal preference presumption See, e.g., Anoff supra note 350 at 359.
\textsuperscript{355} The practices of the indigenous people prefer legal and physical custody to be transferred to the father because of economic considerations.
\textsuperscript{357} See, e.g., In re Allie A.L.R. 338. (1955).
\textsuperscript{358} Id.
physical custody of the child. In practice this is hardly the case, because of economic reasons outlined above.

(iii) Economic Resources

The Courts consider the income of both parties but states that this is in itself not decisive because of the possibility of maintenance order.\textsuperscript{359} However in practice maintenance orders face the problem of poor enforcement and are inadequate.

Character of the Parent

The character of a mother as evidenced by her behavior can be put into issue particularly where a father of a child born outside of wedlock is applying for custody, or a child is young and therefore the father faces a presumption that custody should go to the mother.\textsuperscript{360} In these instances, an implicit argument that the courts are prepared to adopt is that if a woman behaves badly in terms of traditional expectations, she cannot be a good mother to her children. Consequently, it is not in the best interest of the child to be in the custody of a person who does not conform to traditional expectations. In the case of women the traditional expectations are that she must be married, submissive, follow her husband’s orders, defer to his decisions, avoid independent action and be a hard worker.\textsuperscript{361}

\textsuperscript{359} See id. Maintenance order is poorly enforced giving fathers who generally have better economic and financial bargaining power the upper-hand in receiving custody.

\textsuperscript{360} See supra text accompanying note 342.

\textsuperscript{361} Spaine supra note 348 at 249 (the judge in determining the proper placement of the child took into cognizance the instability of the applicant (wife). In this instance there was evidence that the mother intended to re-marry another man in September of the same year, and the courts did not consider it favorable to separate the two boys from the father since the father was a respectable man who could afford to give the children a good chance in life.
The Islamic courts are given wide discretion to determine the issue of custody in the child's interests. The absence of guidelines on the exercise of this discretion is felt in the area where the courts often have conflicts in reconciling between differing parental rights. A basic problem in ascertaining the wishes and therefore the best interests of the child lies in the absence of a procedure for ensuring that this information is available to the court.\(^{362}\)

A child-centered focus in the law which the convention advocates requires facilitating the child's wishes in presenting evidence to the court in a manner, that is truly geared to finding out what the child's view is on the matter. Subsequently, custody awards will be made based on the consideration of other factors in the best interest of the child. The Islamic courts' interpretation and implementation of the best interest principle indicates that a balance between the protection and facilitation of the child's wishes which the convention seeks to implement, has not yet been worked out in practice. Because children have no voice in articulating their own interests as perceived by themselves, they do not constitute a pressure group to demand the satisfaction of those interests. The Islamic family structure and culture does not facilitate the independence of the child's view on issues such as its custody. Instead the child's interests are submerged and defined by the interests of others including the extended family.\(^{363}\) Thus if the interests of others for the child is weak, and inadequate, that would be reflected in the

\(^{362}\) Unlike the general courts the local Islamic courts have do not have a formal procedure of ensuring that evidence, or records of the different parental entitlements to the children, nor testimony of the preferences or wishes of the child be brought before the court.

\(^{363}\) Under Islamic Families are affiliated into extended families and even further into kinship groups, which reinforce broader territorial and social units. Kingship loyalties involve much more than the ordinary sentimental attachments. The ideal set is that of mutual helpfulness and cooperation within the group or kinship, each member helping the other in health, sickness, success, failure, plenty or poverty, and each members interests is considered in terms of the interest of the whole group. See Busia, supra note 210 at 33.
perception and articulation of the interest of the child, thus making the relationship between the interests of the child and those of others unavoidable.364

Applying The Best Interest Principle In The United States

In the United States, when there is custody between two natural parents, or adoptive parents, married or not, all States mandates the judge to place the physical and legal custody of the child according to the best interest of the child.365 The best interests standard which is concerned with the child’s physical and mental well being, grants the trial judge great latitude and broad discretion in predicting with which person a child will have the chance for a better life.366 The judge as a fact finder evaluates the child’s life chances in each of the homes competing for custody, and makes awards on a gender-neutral basis solely in accordance with the best interest of the child.367 The threshold requirement for any custody award based on the best interests of the child, is that the parent must be fit.368 Several States have set forth the factors to be considered in determining the best interest of the child in statutory form.369

364 Id.
366 Evans v Evans, 869 P2d 478 ( Ala 1994) (where the court held that in determining the best interest of the child, the court may consider actors impacting the child, even if they do not reflect upon respective parenting abilities of parties).
367 Ark. Stat. Ann §. 9-13-101 (1991) (where it states that ‘In an action for divorce, the award for custody of the children ... shall be made without regard to the sex of the parent, but solely in accordance with the welfare and best interest of the child; Md. Fam. Law. Code. Ann §. 5.203 (Supp. 1990) (where it states that ‘neither parent is presumed to have any right to custody that is superior to the right of the other parent’; see also Ala. Code. §. 30-3-1 (1989) which states; “upon granting a divorce the court may give the custody and education f the child to....either parent father or mother, as may seem right and proper.”
368 Hunt v Hunt, 112 NC App 722 ,436 SE 2d 856 (1993) (where the court finds one parent unfit, the child should not be placed with other parents without finding that parent is in fact fit).
369 See for e.g., Ark. Stat. Ann §. 9-13-101 (1991) (where it states that ‘In an action for divorce, the award for custody of the children ... shall be made without regard to the sex of the parent, but solely in accordance with the welfare and best interest of the child; Md. Fam. Law. Code. Ann §. 5.203 (Supp. 1990) (where it states that ‘neither parent is presumed to have any right to custody that is superior to the right of the other parent; see also Ala. Code. §. 30-3-1 (1989)
The Uniform Marriage and Divorce Act (UMDA) includes a list of factors required for consideration by the judges.

Factors Used in Determining The Best Interests of The Child

(i) Parental Preference

In the United States, as a general rule, parents as natural guardians have superior rights to the custody of their child over non-parents unless the parents are unfit or extraordinary circumstances exist.\(^{370}\) Therefore a non-parent, has the burden of proving that the parent is unfit.\(^{371}\) Parents are said to have a fundamental liberty interest in the care and management of their child.\(^{372}\) However this preference may not be applicable if an unwed biological father has failed to exercise his rights under the existing State law.\(^{373}\)

(ii) Agreement of the Parties

Because parents are in a better position than almost any third party to know the family situation some State statutes presume that an agreement of the parties as to the custody of the child is in the child's best interest.\(^{374}\) The judge however, retains the ultimate decision making power and can find the agreement not to be in the child’s best interest.

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\(^{370}\) See for e.g., Uhing v Uhing, 24 Neb 368, 488 NW 2d 366 (1992) (award to grandmother reversed in favor of mother who had not been found unfit); Michael v Swords, 568 So 2d 836 (Ala App 1990); see also Schuh v Roberson, 302 Ark 305, 788 SW 2d 740 (1990).

\(^{371}\) W.L.S. v D.L.N.S., 647 So 2d 751 (Ala App 1994) (grandparent had the evidentiary burden to prove mother unfit; evidence of marital indiscretions, mother's involvement with another man, past poor decision-making and alcohol abuse was not sufficient to show mother was unfit).


\(^{373}\) In Re Baby Boy N., 19 Kan App 2d 574, 874 p2d 680 (1994) (no parental preference in adoption proceedings where natural father failed to provide support for mother after having knowledge of the child's conception, mother did not interfere with the father's efforts, and he was afforded due process hearings).

\(^{374}\) See Cal. Civ Code §. 4600.1 (b).
(iii) Child’s Preference

In recent years the courts have placed more emphasis on the child’s perceptions, attachments, feelings and preferences. Some judges put substantial weight on the preference of the child as to custody, whereas others simply consider it as an additional factor aiding the process of the determination. However, if the child is of sufficient age, maturity and understanding the child’s wishes may be taken into consideration.

When both parties are equally fit to assume residential custody and both want custody the judge allows the child’s preference to be the deciding factor.

Thirty-nine States, the District of Columbia and Puerto Rico consider the preference of a child of sufficient age and maturity when trying to determine the child’s best interests. The Uniform Marriage and Divorce Act also includes consideration of the child’s wishes as to his or her custodian. Several statues include the consideration of the child’s preference, as a factor to be taken into consideration. Some jurisdictions have also enlisted the child’s preferences as a factor in deciding whether to award joint custody. The judge can ascertain a child’s preference through the child’s testimony, through an interview with the child in chambers, from testimony of the parents, or

375 Uniform Marriage and Divorce Act sec 402.
377 Zucker v Zucker, 187 AD2d 507, 589 NYS2d 908 (1992) (although children expressed preference to live with father, there was evidence father was exerting pressure on them).
378 See Linda D. Elrod, Child Custody Practice and Procedure Cumulative Supplement 1996 Appendix 4A.
379 Uniform Marriage and Divorce Act (ULA) §. 402.
380 Alaska Stat §.25.24.150 (c) (3).
381 Ariz Rev Stat Ann §.25 -332 (A) (2).
382 Ohio Rev Cod Ann sec 3109.04 (A) (court shall elicit preference in chambers or in open court).
obtain the preference indirectly from reports of psychiatrists, court service officers, or testimony of other witnesses.\textsuperscript{385}

(iv) Religion

Although a court may not inquire into religious beliefs per se, the court can inquire into matters of child development which may be impinged upon because of the parents religious convictions.\textsuperscript{386} Religion and church attendance are not alone sufficient to determine the best interests of minor children.\textsuperscript{387} In the United States the use of religion as a factor in determining the child’s best interests raises constitutional questions about both free exercise and establishment issues.\textsuperscript{388} Because freedom of religion is guaranteed by the Constitution,\textsuperscript{389} judges cannot and do not base custody determinations on the approval or disapproval of specific religious beliefs.\textsuperscript{390} Courts do not give preference to the religious parent finding that religious instruction should not pre-dominate other factors.\textsuperscript{391}

(v) Employment

The courts often utilizes a gender-neutral standard which forbids judges to penalize a working mother any more than a working father outside the home.\textsuperscript{392} Time to

\textsuperscript{385} In re Marriage of Susen, 242 Mont 10, 788 P2d 332 (1990)(Judge not required to interview where findings made that all the witnesses stated that the child loved and enjoyed being with both parents.

\textsuperscript{386} Edwards v Edwards, 829 SW2d 91 (Mo App 1992) (mother’s inability to explain new religious beliefs she had adopted since moving in with boyfriend was indication of her unstable living arrangement.

\textsuperscript{387} Alaska Stat §. 25.24.150 (c) (1); see also Haw Rev Stat §.271 -46 (5).


\textsuperscript{389} US Const amend I. “Congress shall make no Law respecting an establishment of religion, or prohibiting the free exercise thereof…..”

\textsuperscript{390} Mendez v Mendez, 527, So 2d 820 (Fla App 1987), cert den 485 US 942 (1988).

\textsuperscript{391} Blonsky v Blonsky, 84 Ill App 3d 810, 405 NE 2d 1112 (1988).

\textsuperscript{392} In re Marriage of Kartholl, 143 Ill App 3d 278, 492 NE2d 1006 (1986) (mother’s working hours at a school from 7:45 a.m. to 4:00p.m. with summers off were not excessive nor reason to modify custody of father).
spend with child is also taken into consideration in determining the best interest of the child.\textsuperscript{393} In one case a mother's flexible work schedule was one factor considered in awarding her primary physical custody.\textsuperscript{394} If a parent's job is time consuming leaving little time to devote to the child, the child's best interest might be better served with the parent who has or who will make more time for the child.\textsuperscript{395} Also the court considers that a parent who has a stable job may be in the best position to provide stability and guidance.\textsuperscript{396} Work may play a role in determining the child's best interest, if the parents fails to work over a long period of time and is not a good role model\textsuperscript{397}. Where a parent has an unstable employment record coupled with other negative behaviors, the greater stability in the working parent's home justify custody to the working parent.\textsuperscript{398} Employment is considered in two aspects. Firstly the stability of employment and secondly time available to spend with children. The fact that a parent works does not deny the parent custody.\textsuperscript{399}

(vi) \textbf{Race}

While it is clear that a court cannot discriminate on the basis of race,\textsuperscript{400} it is unclear the extent to which it can be used as a factor. Courts are split on how to approach cases involving an interracial child. Some have considered race as one of the several factors in awarding custody in the child's best interests, whilst others have used it as a

\textsuperscript{393} Ritter v Ritter, 234 Neb 203, 450 NW 2d 204 (1990).
\textsuperscript{394} Mary M. v Albert J.M., 154 Ad 2d 354, 545 NY2d 672 (1989) (father had an alcohol dependency problem).
\textsuperscript{395} In re Marriage of Hickey, 386 NW2d 141 (Iowa App 1986).
\textsuperscript{396} Porter v Porter, 274 NW 2d 235 (ND 1979) but see In re Riddle, 500 NW2d 718 (Iowa App1993) (father awarded custody; mother worked full time and father had part time jobs; instability is not evidenced by less certain future plans, employment through several part-time jobs, and lower income).
\textsuperscript{397} In re Marriage of Fahey, 208 Ill App 3d 677, 567 NE2d 552 (1991) (mother awarded custody of four sons where father had failed to work and support children for ten years).
\textsuperscript{398} Ex Parte Walters, 580 So 2d 1352 (Ala 1991).
\textsuperscript{399} See In re Riddle at 718.
factor but not determinative. A few find race cannot be used as a factor at all. However, it is significant to note that the United States Supreme Court overturned a Florida statute court modification of a custody award to the father because of the mother's cohabitation with and subsequent marriage to a Negro noting that while the constitution cannot control prejudices, neither can it tolerate them and therefore it cannot justify denial of custody based upon hypothetical effects of private racial prejudice.

(vii) Friendly Parent

Several States encourage the judge to place a child with the parent who will do the most to foster a continuing positive relationship with the other parent. Some courts place an affirmative duty on the parent awarded residential custody to encourage and nurture a relationship with the other parent. The court also in some instances, considers which parent is more likely to comply with the concept of shared parenting and award primary residential custody to that parent in the best interests of the child.

(viii) Keeping Siblings Together

Because of the importance of family ties, most courts presume it is in the best interest of the child to keep the siblings together. Siblings' togetherness they maintain

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404 Schutz v Schutz, 581 So 2d 1290 (Fla 1991).
405 Vena v Vena, 556 So 2d 436 (Fla App 1990).
406 Hadick v Hadick, 90 Md App 740, 603 A2d 915 (1992) (split custody is disfavored and the law frowns upon division of siblings just because one was handicap was not sufficient reason to split.); Wiskoski v Wiskoski, 427 Pa Super 531, 629 A2d 996 (1993) (trial court erred in
is a normal condition of childhood. However the trial judge may allow split or divided custody arrangement and separate siblings under unusual circumstances. Where an older child is a negative influence on the younger one courts consider it in the best interests of the younger to separate them. Intense rivalry between siblings may also justify splitting them. However some scours require compelling reasons to separate siblings.

Having examined some of the factors employed by both court systems in determining the best interest of the child, it is evidently clear that different factors are utilized in the application of this concept. Regarding the factors used in the determination of this concept in both cultures, there is no compelling reason for an expectation that the inherent differences between the cultures interpretation, and implementation of the best interest principle can be exactly the same. This is due to the fact of the diverse legal, cultural, and socio-economic background of each country. Yet one thing that is clear, having construed the meaning of Article 3 (1) of the Convention, is that there is lack of a common-based standard by which the various factors and rationales employed by different cultures can be measured, tested, and contested in the light and intent of Article 3(1) of the Convention. There is a need to maximize the opportunities for contesting the nature, and rationale of actions regarding, and taken on behalf of children from as many different perspectives as possible. This should include rigorous analysis to see who is taking the action in question on behalf of the child, on what basis, and for whose benefit, and how does this action affect children at large or as a group. Particular attention should

separating siblings by awarding the father custody of one) but see Daigle v Daigle, 505 A2d 778 (Me1992) where the court held that there is no rebuttable presumption that siblings should not be separated).
408 Kelly v Kelly, 423 P2d 315 (Colo 1967).
409 In re marriage of Jones, 309 NW2d 457 (Iowa 1981).
410 In New York, See, e.g., Proceedings for Custody and /or Visitation of Minors under art 6 of Family Court Act.
411 Miller v Miller, 444 NW 2d 45 (SD 1989).
be given to understanding the nature, context and dynamics of power relations between and amongst the various actors, and the subject of the action, and subsequently room and possibilities should be created for altering, or adjusting those power relations if need be.

Other than the suggested framework mentioned, the best interest of the child principle will be subjected to a dilemma of reconciliation and interpretation of the actual meaning of this concept, in developing third world nations. A better cross-cultural forum is needed to resolve questions such as: should the best interest of the child as promulgated by article 3 (1) focus exclusively on the child’s rights, and thus lend support to the intentions of the original drafters of Article 3 (1), or should various cultures be permitted to interpret this standard according to their socio-religious perceptions?

Without analyzing any further, it can be deduced that there is in principle, an inherent problem in reconciling the application of this concept in a diversified cultural setting. This leads to a critical issue of how we should interpret the reconciliation of this widely acclaimed principle cross-culturally. The next part seeks to attempt a framework by which this doctrine can be reconciled cross-culturally using the United States and Sierra Leone under Islamic law as examples.

**Reconciling The Best Interest of The Child Principle**

There are different dimensions to the universally accepted best interest of the child doctrine, as well as relationships between this doctrine and several cultures. Despite the extent of support this principle has generated globally, the full complexity of the application of this doctrine in a cross-cultural setting has yet to be fully understood. Although it can be maintained that the United Nations Convention on the Rights of the Child reflects sensitivity in part to the impact of contextual factors, and cultural considerations in the implementation of this concept, there needs to be a framework of

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412 See generally, Freeman, supra note 262 at 4-5.
interpretation and reconciliation of this doctrine cross-culturally. While maintaining that there are inevitable differences between cultures and the interpretation of the best interest rule,\textsuperscript{414} I would argue that there is a need for a common base standard to which State parties must adhere. Inevitably, there are bound to be significant differences between the perception of childhood, and circumstances affecting behavior regarding children in different cultures.\textsuperscript{415} Yet the crucial issue is not a value judgment on which is the more humane perception of childhood, or better way of treating children, and thus determining their best interest. Rather it is simply to emphasize that different perceptions and circumstances are bound to impact on people’s beliefs and behavior in this regard.\textsuperscript{416} If this is the case, there is a need for the development of specific strategies to enable alternative interpretations of this concept, which may compete with dominant ones. This is very relevant for example in relation to the responsibilities, rights, and duties of different cultures to provide direction guidance and workable strategies for children as promulgated by Article 3(1) of the Convention.\textsuperscript{417}

In reconciling the best interest of the principle in the context of the United States and Sierra Leone, one can however notice both the similarities and differences in the factors utilized in the interpretation and implementation of this concept.

With regards to the similarities in both cultures, the best interest standard which is concerned with the child’s physical and mental well-being is given a paramountcy consideration in child custody adjudication, both statutorily and judicially.\textsuperscript{418} In this regard the judicial systems in both countries assume a wide latitude, and broad discretion

\textsuperscript{413} See supra text accompanying note 254.
\textsuperscript{414} See Freeman, supra note 262 at 5.
\textsuperscript{415} See id.
\textsuperscript{416} Id.
\textsuperscript{417} See supra text accompanying note 254.
\textsuperscript{418} Statutorily in Sierra Leone under Islamic law the best interest principle can be found in Mohammedan Act Cap 8 of the Revised Laws of Sierra Leone (1960); In the United States several States have enacted this principle statutorily. The rule can be found in the §. 402 of the Uniform Marriage and Divorce Act.
in predicting with which person the child will have the chance for a better life based on several factors.\textsuperscript{419} Since the prediction of the child's chance for a better life, is futuristic, the need for broad discretion appears to be warranted.

Also in both cultures as a general rule, Parental Rights are preferred as against the rights of third parties in determining the child's best interest. The courts are willing to enforce this presumption, unless parents are unfit, or extraordinary circumstances exist.\textsuperscript{420} Closely connected with parental rights, parental fitness is also a crucial factor taken into consideration by the courts in both cultures.\textsuperscript{421}

Keeping the siblings together, as a way of ensuring the preservation and importance of family ties in the best interest of the child is another common ground utilized by both the courts of both courts in the preservation of the best interest of the child.\textsuperscript{422} Allowance for splitting such however, is only allowed under unusual

\textsuperscript{419} In the United States, the judge as a fact finder evaluates the child's life chances in each of the homes competing for custody, and makes awards on a gender-neutral basis solely in accordance with the best interest of the child; see also The Uniform Marriage and Divorce Act sec 402 which requires the judge to consider all the relevant factors including but not limited to the factors outlined in the provisions. In Sierra in Spaine supra note 348 at 249-53, it was stated for instance that the court has a wide discretion in making a custody order, and should take into consideration all the circumstances of the case including the sex of the child, the child's health, the lives led by its respective parents and their prospects of re-marriage, the upbringing of the child by a single parent, or by a step-parent if there is a re-marriage, and the upbringing of children together.

\textsuperscript{420} In the United States See e.g., Uhing supra note 373 at366 (1992) (award to grandmother reversed in favor of mother who had not been found unfit); see also Michael v Swords , 568 So 2d 836 (Ala App 1990); see also Schuh v Roberson, 302Ark 305, 788 SW 2d 740 (1990). In Sierra Leone see, e.g., Anoff supra note 354 at 357.

\textsuperscript{421} See, e.g., W.L.S. v D.L.N.S. , 647 So 2d 751 (Ala App 1994) (grandparent had the evidentiary burden to prove mother unfit. Evidence of marital indiscretions, the mother's involvement with another man, past poor decision-making, and alcohol abuse was not sufficient to show mother was unfit).

\textsuperscript{422} See, e.g., Hadick supra note 409 at 915. (split custody is disfavored and the law frowns upon division of siblings just because one was handicap was not sufficient reason to split.); see also Wiskoski Wiskosi, 427 Pa Super 531, 629 A2d 996 (1993) (trial court erred in separating siblings by awarding the father custody of one); For Sierra Leone see also In Spaine supra note 352 at 249 (the judge in determining the proper placement of the child took into cognizance the instability of the applicant (wife). In this instance there was evidence that the mother intended to re-marry another man in September of the same year and the courts did not consider it favorable
circumstances or where the courts have compelling reasons to do so.\textsuperscript{423} More importantly as a bedrock policy of this concept, the child's overall long-term happiness, and stability is an overriding factor in both cultures in the determination of the best interest doctrine.\textsuperscript{424}

However there are significant departures in the implementation and application of this concept in both cultures. The perceptions, and socio-economic structure of the indigenous people of Sierra Leone has translated this concept into rights accorded not exclusively to the child, but rights accorded to parents, who determine what they consider to be the child's best interest. In the United States on the other hand, many States now require the judge to consider a child's expressed preference in applying the best interest standard. Although not conclusive in the final determination of who is entitled to custody of the child, the preference of the child above the age of discretion is often given weight in the judge's decision although not a controlling factor.\textsuperscript{425}

Based on societal perceptions, and religious beliefs, the Islamic courts have translated into legal rules and norms, the beliefs of the indigenous population which in turn have shaped the legal rules accordingly. The impact and result is the creation of a socio-legal culture in which children's upbringing, nurturing, happiness and overall stability and welfare is based on religious factors\textsuperscript{426} and parental authority.

The economic status of both spouses have also condition the court's application and implementation of the best interest in Sierra Leone unlike the United States. The local courts in Sierra Leone are criticized for putting much emphasis on who can provide materially for the child, and this often leads to a gender-based presumption in favor of the

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\textsuperscript{423} Kelly supra note 411 at 315.
\textsuperscript{424} The best interest rule under Islamic law seeks to guard and preserve the overall interests, stability and welfare of the child and thus the courts do often pay attention to factors or evidence such as parental neglect, and indifference, poverty, and many other factors in determining the best interests of the child. See, e.g., Anoff supra note 354 at 357.
\textsuperscript{425} See Zucker, supra note 380 at 908. (although children expressed preference to live with father, there was evidence father was exerting pressure on them).
father who has stronger economic resources.\textsuperscript{427} The current economic realities require that the principle of the best interest of the child be construed rather narrowly to mean the satisfaction of material needs of the child.\textsuperscript{428} Thus given the fact that children live in dangerously rash conditions such as war, famine, political repression, for the majority of these children sheer survival is their major goal. The best interest thus means the child goes where the money is, and this is often the father and his family.\textsuperscript{429}

In the United States, employment which encapsulates the economic factor in the determination of the child's interest, translates into two aspects: Firstly employment as a factor is invoked with regards to stability,\textsuperscript{430} and secondly with regards to the time spent with the child.\textsuperscript{431} The fact that one parent works does not deny the other parent custody as the court normally employs a gender-neutral standard which mandates it not to penalize working mother any more than a working father outside the home.\textsuperscript{432} Time spent with the child is taken into consideration, and the child's best interest might be better served with the parent who will make more time for the child.\textsuperscript{433}

\textsuperscript{426} See generally, supra note 345 at 5-7.
\textsuperscript{427} The consideration of the economic interests of the child usually favors the father and is regarded in this sense as in the child's best interest. This is due to the fact that men generally have greater access to wage employment, which is the primary and most reliable source of economic resources. Even in cases when a father or his family have not requested custody of the child a woman may of her own volition transfer custody of the child, as a way of ensuring that he supports the child economically.
\textsuperscript{428} Often the indigenous people prefer to give custody of the child or children of the marriage to the parent with stronger or better economic resources, as this is regarded as a means of securing financial benefits for the future preservation of the child’s welfare happiness and stability.
\textsuperscript{429} As with all patrilineal heritage, custody of the child not only goes to the father but to the extended family unit of the father - the paternal family, thereby preserving the communal social unit which is basic to the family structure.
\textsuperscript{430} See Porter, supra note 399 at 235; \textit{but see} In re Riddle, supra note at (father awarded custody; mother worked full time and father had part time jobs; instability is not evidenced by less certain future plans, employment through several part-time jobs, and lower income).
\textsuperscript{431} See, e.g., Ritter supra note 396 at 204.
\textsuperscript{432} In re Marriage of Kartholl, supra note 395 at 492. (mother’s working hours at a school from 7:45 a.m. to 4:00 p.m. with summers off were not excessive nor reason to modify custody of father).
\textsuperscript{433} See Ritter, at 204-7.
Religion is another factor of departure between the two cultures in their treatment of what is considered to be in the best interest of the child. In the United States the use of religion as a factor in determining the child's interest raises constitutional questions about both free exercise and establishment issues.\textsuperscript{434} Whereas in Sierra Leone under Islamic law, the Courts find this as one of the crucial factors in determining the placement of the child.\textsuperscript{435}

Lastly the Islamic courts readily utilize the maternal preference\textsuperscript{436} rule in awarding custody of children especially young children, whereas the United States have undergone historically, and social changes that have mandated the use of gender-neutral standards that have in turn affected Custody awards and determinations.

From the above case studies, it is clear that the challenge of interpreting the best interest principle is influenced by powerful forces at work in different cultures. We thus conclude that the importance of cultural values across countries with widely diverse legal systems is a major factor in the interpretation and application of the principle. Cultures inevitably linked to customs, customary law, and tradition provides an ethical and sometimes a political base for the protection of indigenous groups including children.

Thus for instance, parents of the western industrialized world would probably plan to have the number of children they wish for personal, financial or life style reasons in the expectation that their children will survive and receive good education and healthcare. Children are expected to move out and make their own lives when they grow up, leaving their parents to enjoy privacy and independence of retirement on their pensions and life-

\textsuperscript{434} Beschle, \textit{supra note} 391 at 383; \textit{see also} US Constitutional Amendment I.” Congress shall make no Law respecting an establishment of religion, or prohibiting the free exercise thereof...”


\textsuperscript{436} See supra text accompanying note 357.
savings. On the other hand parents in the rural areas in developing nations like Sierra Leone and other community-oriented family structure regimes, would try to have as many children as they can. For parents in this region children are preparing for taking care of members of the extended family, in providing private social security for many against sickness and old age. These stereotypes are obviously not universal models of the situation in both cultures, but certainly reflect dominant sociological norms and assumptions that appear to underlie public policy.

There are bound to be significant differences between perceptions of how to raise children to uphold and live by values depending on the religious beliefs and cultural norms of different societies. Thus what would be important for Muslim parents to instill in their children, is likely to differ in some significant ways from that of non-Muslims. With each cultural group economic, educational and other factors would probably influence parent's objectives, and expectations of their children thereby affecting what is generally conceived to be the best interest of the child.

On the one hand, there are instances in which cultural arguments will be used to justify the denial of child's rights.\(^\text{437}\) Thus the best interest principle, clearly has considerable potential to be invoked in defense of cultural practices which are incompatible with children's rights norms. For instance, a case study surveyed the extent to which the principle was applied by the Canadian judiciary to present a consistent preference in favor of the 'apprehension and placement' of first nations children away from their families and communities as natural, necessary, and legitimate rather than

\(^{437}\) These include arguments are designed to defend the full range of practices such as female circumcision, or arguments to justify the non-education of lower class, or to justify the exclusion of girls from educational and other opportunities which would make them, less sought for in marriage
coercive and destructive.\textsuperscript{438} Furthermore, there are many cultural practices, which by the best interest standard are difficult if not impossible to reconcile.\textsuperscript{439}

This endorses and underscores the extent to which individuals States approach the concept and the practice of the best interest doctrine. Their approach is inevitably influenced by their perception of the relationship between international law on the one hand, and national and cultural and other factors influencing, on the other hand. The brief case study of the application of the best interest principle in Sierra Leone under Islamic law, provides a powerful testimony to the fact that State’s perceptions on the best interest of the child can lead to very different results.

No amount of universalistic aspirations as the convention seeks, can cancel out the inevitable influence of cultural values and perceptions regarding the best interest standard.\textsuperscript{440} This should not by any means diminish the important role that international institutions are playing in encouraging consistent approaches and interpretations to international norms. Nevertheless, it should be borne in mind, that the implementation of this standard invokes a heavy responsibility on the part of different cultures.

When considering the future and best interests of a child in a country like Sierra Leone where unemployment is massive, the economy is fragile and the national and economic policies such as structural adjustments require “belt tightening” before improvements can be accomplished, the best interests of the child would of a necessity include actual possibilities which means the consideration and meeting of both the immediate and future interests or needs of the child.

For a child in the United States, determining his or her best interest would include all the relevant findings and factors that the judge will take into consideration in utilizing


\textsuperscript{439} For example female infanticide in various societies like India which is an example of a practice in relation to which culture-based arguments.

\textsuperscript{440} See Alston, Parker, Seymour, supra note 303 at vii.
his or her discretion, and in addition, the child’s preference, which although not a conclusive matter has a decisive weight in certain jurisdictions.\footnote{441 See Scott, Dickon Reppucci, & Aber, supra note 379 at 1035; see also Zucker supra note 380 at 589.\footnote{442} (although children expressed preference to live with father, there was evidence father was exerting pressure on them).}

In Sierra Leone under Islamic law hardly has a child a voice to articulate his or her preferences. In fact, if asked the proverbial question: “What would you like to be when you grow up?” focusing on their immediate long-term needs, and more obviously their best interest, most of them would answer: "\textit{I would like to be alive}". It cannot be denied that because of their different backgrounds and environments, their approaches and perspectives on life differ tremendously. In such a scenario, there can be no pat, “one size fits all answer”. From this we note that the best interest might be different in a perfect world than in a world of limited possibilities.\footnote{442 In Sierra Leone, as well as in other African nations like Zimbabwe, the concept of the best interest of the child is considered on the level of the formal law, and the living law. The best interest of the child is also interpreted in terms of world-view which include the family, and the maintenance of social relations spiritual connections and possibilities which includes the actual options open to children (school, water, clothes, basic subsistence etc). On a practical level, the best interest is not always realized in terms of the world views as a result of limitations due to socio-economic and political structure of the country where poverty and, unemployment is a reality for most indigenous households. The best interest of the child thus must be considered narrowly to meet with the child’s most basic needs and this must be done in view of the limited resources available to the respective families. For a further discussion of the ‘best interest doctrine and limited possibilities of children generally in the Third World See generally, Alice Armstrong, \textit{Custody and The Best Interest of The Child in Zimbabwe} 188 (1993).}
CHAPTER VI

POLICY RECOMMENDATION FOR CUSTODY ADJUDICATION IN THE TWENTY-FIRST CENTURY

The state of child custody adjudication has altered significantly over the last decade by several factors that have transformed, and continue to have a considerable impact on it. By gaining a better understanding of the developmental needs of children and of the impact of divorce on children, parents, society, and the law can render more objectively reasoned, and effective policy considerations in the determination of custody awards.

At the end of the twentieth century two observations could be made. Firstly, the gender-neutral best interest of the child standard is still the subject of much controversy and criticism by legal scholars and writers in both the United States and in the international arena. The indeterminacy of this concept requires us to engage in fundamental research before attempting to implement custody reforms for the twenty-first century. The second observation that can be made is that historical, constitutional and legal factors, have transformed and continue to transform custody adjudication. In this regard there is a need for conducting a thorough research to carefully study the forces that constantly influence the doctrine. This in turn would provide a foundational framework, which would guarantee and enhance an effective construction and implementation of the doctrine. Mary Ann Mason\(^443\) clearly states in her book, that child custody adjudication is not an issue that can be put to historical rest, because more children today than in previous centuries are under the jurisdiction of courts than any other period in history. With this in mind, I will now attempt to propose general policy
recommendations for the implementation of the widely utilized best interest of the child principle in a cross-cultural setting for the next century. In suggesting policy recommendations for the next century, I will focus briefly on recommendations for the reconciliation and implementation of the best interest of the child doctrine cross-culturally. I will also make general recommendations as to child custody determinations with regard to the role of expert witnesses, the social sciences, and the primary caretaker presumption. Central to my recommendations is a proposal suggesting a need to focus on the child’s perceived needs through the eyes of the child himself, free from external forces and personal biases.

While not ignoring the fact that my proposal may not cure the root problem of the indeterminant nature of custody adjudication because of the wide discretion given to judges, I will propose that such discretion be limited. Focus rather should be directed to the child’s interest as perceived through the lenses of the child himself. I admit that some of the policy recommendations were partly drawn from the insightful ideas of legal writers like Robert Mnookin, David Chambers Mary Ann Mason and Lynn M. Arke. I now turn to policy recommendations for child custody adjudication and deal with them under three separate categories. They are

(i) Suggestions for the effective implementation of the best interest standard cross-culturally.

(ii) Proposal on limiting the judges’ judicial discretion in custody adjudication, and the need to focus on the child’s perceived needs visioned through the eyes of the child himself

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443 See supra note 8 at 188.
444 Mnookin, supra note 270 at 226.
445 Chambers, supra note 251 at 477.
Recommendation regarding the role of expert witnesses, and the social sciences and the primary care-taker presumption.

Suggestions For The Implementation Of Best Interest Rule Cross-Culturally

Given the demonstrated inadequacy of a clear substantive basis by which the best interest doctrine can be tested and evaluated amongst several cultures the question then becomes can there be an effective implementation of this doctrine in a cross-cultural context? Records and case studies have demonstrated that countless hours of intellectual energy have been expended by scholars discussing the challenge of implementing Article (3) 1 of the Convention in their local or national settings.  

Because human cultures are also characterized by their own internal diversity and propensity to change, they are clearly distinguishable from each other. While maintaining that these inherent differences between the cultures cannot be eliminated altogether, due regard must be made to the consequences or implications of such differences. It is important to seek to formulate, interpret and most importantly implement the best interest doctrine in a proper cultural context, while precluding an arbitrary imposition of any specific meaning.

Regarding the effective implementation of the best interest rule cross-culturally, I would firstly suggest that the meaning, and implication of the best interest rule in a certain society at any given point in time should not be treated as final or conclusive. Rather it must be opened to challenge, reformulation, and refinement through the processes of internal discourse and cross-cultural dialogue. By this I am suggesting, that the different nations which represent different cultures can evaluate, examine, and test

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448 See, e.g., Freeman supra note 262 (where several essays and case studies regarding the challenges posed by the effective implementation of Art 3 (I) of the Convention in national settings is discussed by various scholars and writers. Countries struggling with the implementation are France, Argentina, Canada, to name a few.)
their actions regarding children, and at the same time maintain a flexibility to the need for a refinement and further reformulation of this doctrine. This can be achievable after such has been the subject of extensive internal and cross-cultural discourse. Although participants in the processes of internal and cross-cultural discourse may have their own agenda, they can all share a commitment to cultivate a deeper understanding of the developmental needs of children. Thus for example, a country’s commitment to the principles set by the Child Convention, should be distinguished from the advocacy of its own established methodology of implementing the best interest rule.

In due course, these processes of dialogue and discourse will promote genuine international understanding on the meaning and implications of the principles of the best interest in various cultures. This also will reduce the risk of violating the integrity of local cultures or the encroachment of the sovereignty of the various peoples of the world. The sharing of insights and experiences of such internal and cross-cultural discourses would in the long run help to mediate cultural and conceptual differences and thereby produce a common standard on the principle of the best interest of the child.

Notwithstanding, with the multiplicity of perspectives and options regarding the meaning and implementation of the best interest principle in each culture, the issue is how do we regulate the process of internal discourse and dialogue over the meaning and implementation of this principle in various policy and decision-making settings.

In pursuing this process the following consideration should be taken:

The scope and dynamics of popular participation should be extended to all segments of the population. While it may appear that there should be no limits on participation, it is unlikely that all the segments of the population would often have a relatively equal or proportionate capacity to participate in this type of discourse in the normal course of events. Participation therefore, should be extended to include both intellectuals and the working masses.
Furthermore, in order to maximize participation, the discourse should also include non-verbal formulations since a wide proportion of the population of various countries especially third word community-based regimes, are disinclined to verbal articulation of their beliefs and attitudes. Non-verbal formulations would include for instance the recognition and observation of folk norms, and the general practices and preferences of the lower masses in their appreciation of what is considered to be in the best interest of the child. This could be used as a reference point for understanding the standard employed by the masses in the interpretation of the principle of the best interest of the child. By examining the way in which different societies are likely to respond to the best interest principle, a key principle of the Convention, a deeper and better understanding of the varied interpretations of children’s rights worldwide will be achievable.

Child’s Interest To Be Given More Weight

The parents’ view of the child’s interests is normally given priority over other interests and this is often conditioned by societal expectations at almost every occasion. Parents in Sierra Leone and in the United States have the authority to make the important decisions about their child’s upbringing including the decision about where the child should live. The United States Constitution has been read to protect the parents’ authority to make such decisions for their children, and might be read to require deference to divorcing parents agreements to lace custody with one of them. In the event of a disagreement however, judges no longer defer but are compelled to look beyond the warring parents for a source of value to place the child in the best custodial placement the law can provide.

449 See, e.g., Parham v J.R. 442 U.S. 584, 602-04, 607 (1979)(upholding a State statute permitting parents to commit their children to mental hospitals with the concurrence of a physician, over the child’s objections and without a court hearing); see also Pierce v Society , 268 U.S. 510, 534-35 (1925). For a detailed discussion on this issue see also Development in the Law, the Constitution and the Family, 93 Harv L. Rev. 1156 1313-15 (1980).
Deciding which setting is better for a child or children is often a conclusion that judges arrive at from their findings. In some cases, they reach such conclusions without explaining why. In other instances judges see themselves as imposing what they believe that a majority of the people in the community in a given situation would say was better or worse for the child. It is of importance to note that there is a likelihood of development of a State-prescribed view of children's interests that may not necessarily refer to the judge's preferences. Expression given to these interests through legal findings, is more likely to end up speaking in terms of placements that serves the state's own needs or interests and not necessarily the child's. Borrowing from David Chambers' insightful work, I would reiterate that rather than adopting the states' interests or the judges' biases at a particular given point in time, attention must be given to developing a strategy that ascertains and defines the child's interests through the child's own expected experience. In instances where the child has not demonstrated preferences, my central recommendation is that the overall findings of the judge based on the collaboration, research and information gathered from experts, individuals closely connected with the child for example school teachers, neighbors, and all officers concerned with the case be utilized. This would offer a larger pool of information that the judge can utilize. With this approach as Chambers notes, the question the court must concern itself with is not what the state has defined as good in the abstract, rather the question for the judge is which placement will the child experience most positively on a day to day basis while growing up and from the vantage of his or her own adulthood.

There are positive practical advantages to this approach. Chambers notes that firstly, it places the focus on the subjective sense of well being of the child (the person) who has to live for the rest of his or her life with the choice the judge makes. Secondly,

450 See generally, supra note 452 at 1323-26.
451 Chambers, supra note 251 at 478.
452 See id.
it affirms society’s care about how this person feels both now and later and defines children’s interests through the child’s own expected experience.\footnote{Id.} Thirdly, the child’s stated view of his or her own interests relies on the child’s own source of values for decision, and it can be defended on the grounds that it is a more appropriate basis for resolving disputes over custody.\footnote{Chambers, supra note 251 at 478-84.} It treats the child more nearly as a full citizen entitled like other citizens to control the decisions or at least to influence the decisions that affects their lives.

In addition judges benefit from this approach in two regards. Firstly, judges will be compelled to make decisions under the framework of “What is this trait or parental conduct I am hearing about likely to mean to the child as she experiences it?” Thus, the primary interest of the child takes precedence over other competing interests, like those of the parents and the State. Judges will then have a reduced temptation to turn to their own values for guidance in the decision-making process, but rather would focus exclusively on the child’s values. At the end of the proceeding, judges would be offered a reasonable, coherent point of view that can permit them, at least in theory, to make defensible choices between parents even in those cases in which both parents can be considered wholly fit.

**The Role of the Social Sciences**

Knowledge acquired from and utilized by social scientific concepts and practitioners is useful and no doubt has had a tremendous influence on custody adjudication in this century. Social science research has made a valuable contribution to child custody. It has helped define problems, identify possible solutions, and also brought new and deeper insight into the parent/child relationship. The social sciences provide us with an arena for an informed discourse and also stress the importance of parent/child relationships rather than rights. Experts from the mental health professions
have been increasingly called upon to evaluate the parent child relationship in custody disputes in order to make recommendations before the trial or sometimes to testify at the trial. In the context of understanding the developmental stages in children the social sciences contribution has been tremendously valuable as opposed to mere judicial intuition.

Notwithstanding, critics of the intrusion of the social sciences claim in part that social science research could be used selectively for political purposes, as in shared parenting cases, or father custody. They also maintain that mental health experts cannot predict with certainty which placements will be the best custodial placement for the child. Proponents take a contrary view, claiming that the social sciences could evaluate child-parent relationships more successfully than judges.

The issue thus is ensuring that the role of the social sciences in the determination of the most suitable custodial placement for the child, is not over-emphasized by judges at the expense of established laws and legal procedures. In this regard it is prudent and appropriate given the complex nature of the issues involved in custody determinations, to establish a clear strategy for avoiding this tendency. I therefore suggest that both judicial and legislative reformers strive to carefully consult with a wide range of other disciplines who work such as various aspects of child development and parent-child relationship. It is now more appropriate than ever to recognize professional limitations as Lynn Arke rightly stated in her comment, and to reach out to other disciplines to be properly educated on a wide range of issues regarding children’s development. This would subsequently contribute to understanding what is best for them. Expert evidence thus should only be a single factor in a larger range of testimony about parent and child relationships.

455 See, Mason, supra note 8 at 185.
456 See Arke, supra note 450 at 629.
Continuous cooperation among other disciplines will thus serve as a step towards understanding and facilitating a better approach in understanding children’s development stages. This in turn would help us to learn what is in a child’s best interest as well as providing objectivity to custody determinations.

**Primary Care-Taker Rule**

Regarding the primary caretaker presumption, I would agree with Mnookin\(^{457}\) that a standard awarding custody to the parent who is able to spend more time with the child, will ignore the qualitative differences in time spent with the child. This may in turn be unjustifiable from the perspective of what is good for the child. It would be very difficult to apply the test because it requires a prediction of the amount of time each parent would spend with the child, and also invite dishonesty and exaggeration in litigation.

It would also be impractical and intrusive to monitor the time the parent actually spends with the child. In the event that a parent spends less time than expected, what remedy would there be in such instances? Removal of the child would be plainly undesirable from the child’s perspective. The absence of a practical check as Mnookin suggests\(^{458}\) would invite the disputants to make unrealistically high estimates of how much time they would spend with the child. Affording the child, as he or she is the focus of the social changes, the option of a choice in this regard is highly desirable. The child better than the judge, may have an intuitive sense of the parent’s love, devotion and capacity, although such choice might affect the relationship of the parent not chosen. In the case of children below the age of five, this rule might however not be suitable.

The above proposals have taken the position that the current open standard for resolving custody should be not be altered to give weight to any particular factor unless evidence suggests that giving such weight will produce better results in the generality of

\(^{457}\) R. H. Mnookin, supra note 271 at 226.

\(^{458}\) See Mnookin, supra note 271 at 226-36.
cases. In the absence of such evidence we should simply call as scholars often do for more and better research.

In a world tolerant of diverse approaches to child rearing, several nations have ducked the problem of definition and simply directed their courts to serve the child’s best interest or welfare without providing any further guidance. Most state statutes have listed factors to consider, which sound very helpful, but do not reveal the goals the state is seeking to serve. Most writings of scholars and professionals have been helpful to a limited extent because they either fail to make clear what the court is to look for. When they prescribe some factors they consider important, their writings fail to explain why the factor is more worthy of weight than others. There is an absence of public consensus about child-rearing and this makes it difficult or impossible to define the bet interest of the child. Robert Mnookin for example summed up with pained eloquence the difficulty of prescribing standards in custody disputes. He notes: “Deciding what is best for the child poses a question no less ultimate than the purposes of value itself... Where should one look for the set of values that should inform the choice that is best.”

The task of making proposal and suggestions to guide custody decisions is indeed difficult, and it is with this frame of mind as Mnookin earlier pointed out, that I have drawn from inspirational writers in making modest proposals as outlined above.
CONCLUSION

The current approach for resolving custody disputes has many flaws. At the end of the century, the custodial fate of children has, and is still undergoing legal transformation and change. For parents, a custody fight is probably the most stressful time in their lives. For judges, custody cases bring forth more of their emotions, personal background and biases than almost any other type of case that they deal with. For children it is a time of uncertainty, disruption and conflicting loyalty. The entire course of their development seems to be at issue. Child custody cases in this century are packed with more emotions than almost any other area of law.

This thesis has undertaken to examine and define the historical, legal and constitutional factors that have affected custody adjudication, and has attempted examine a reconciliation of the best interest doctrine in a cross-cultural setting.

The historical account I believe has guided us into a historical development of the law in this troubled area, informing us of the several lessons to be learnt and raising many unanswered questions. One vital lesson that is learnt is that the legal history of child custody is far more about rights of mothers, fathers, and other interested parties than it is about the welfare of the child. For the most part of history reveals that the interests of a particular child was not an explicit legal concern, as the law only began to recognize children’s interests in custody a little more than a hundred years ago. These interests have not been however clearly defined and they are often interpreted according to the political fortunes of competing interest groups.

459 For a general discussion see Mason, supra note 8 at 188.
Therefore the lesson of history is that children have no political voice and are often the political weapons in other agendas such as, the father’s rights groups and the grandparents rights advocates and the women’s rights advocates, all pulling together in different directions.

To my mind this shifting of the historical development from the paternal absolute rights era to the maternal preference era, and then finally to the best interest of the child in a positive sense, has laid a proper and firm foundation for our current child welfare structure. In a negative sense, it has been and is part of the invisible force impacting custody adjudication in this century.

Modest policy recommendation on important factors discussed above has also been provided. These proposals identified some suggestions that might aid the advancement of children’s interests, and how to define and give meaning to the best interests of the child doctrine cross-culturally. In turn it hoped that the legislatures would wisely create and redefine general presumptions, and thus reduce to some degree the difficulties courts face in making custody determinations.

It is clear that the best interest doctrine has been molded and shaped by many societal forces, and are as well vulnerable to attacks by different ideologies and even legal discourse itself. Yet legal doctrines as Arke\textsuperscript{460} states, are also dependent upon these same forces to provide meaning and authority to their existence.\textsuperscript{461} Cultural differences have brought variability to the interpretation and understanding of the best interest doctrine. On the one-hand, the variability has created contradictions and tensions within the application and implementation of the rule itself. On the other hand, it has helped us to understand that no legal interpretation or meaning of a given concept in a particular culture is conclusive, but should be subjected to testing, evaluation, examination, and if needs be, change.

\textsuperscript{460} See Arke supra note 450 at 628.
\textsuperscript{461} See id.
The comparative study of the application of the best interest of the child in a cross-cultural setting has provided a rich field for further exploration and research. This subject is particularly important for a world moving towards an adoption of universal rights for children. Although it is likely that there may never be a resolution for the indeterminacy of the best interest of the child doctrine, continuous interdisciplinary discourse and cross-cultural discourse can help decision-makers to better understand the complexities involved in child development. Ultimately a deeper understanding of the developmental needs of children will allow the application of the best interest’s doctrine to truly serve the needs of children globally.

Seen in this larger historical, legal constitutional and cross-cultural context, it is apparent that the best interest alone cannot predict custody outcomes. It is not clear whether the factors judges claim are most important in determining custody have much to do with the ultimate result. Nor does the massive use of experts seem to make a significant difference. The reestablishment and continuity of the decision-making in custody adjudication in the United States, Sierra Leone, and internationally may mean that courts must look away from the traditional presumptions as they always done. Instead they must exercise the same judicial discretion by focusing in reality on the interests of the child as perceived from his or her own lenses.

As the dawn of the twenty-first century approaches, there is also contemporaneously an increased recognition both nationally and globally about the rights of children. The vigor and enthusiasm in which States ratified the Convention attests to the fact that State parties are realizing the need for such a noble recognition. Our role as, legal commentators, legislators, policy law makers, is to lend support and aid in the justification of new rights for children and to ensure that custody adjudication undergoes a smooth transition in the next century.
A thorough reformulation of the best interest rule to effectively enhance and reflect the child's interest in the twenty-first century can be one of the stepping stones to a smooth transition of custody adjudication in the next century.
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