SEX DISCRIMINATION IN OKLAHOMA CHILD CUSTODY AND SUPPORT LAW

By

KELLY MURPHY SPURRIER II

Bachelor of Science

Oklahoma State University

Stillwater, Oklahoma

1978

Submitted to the Faculty of the
Graduate College of the
Oklahoma State University
in partial fulfillment of
the requirements for
the Degree of
MASTER OF ARTS
December, 1981

SEX DISCRIMINATION IN OKLAHOMA

CHILD CUSTODY AND

SUPPORT LAW

Thesis Approved:

James J. Parker
Thesis Adviser

Jimmy A. Davis

Anthony E. Drew

Norman N. Durham
Dean of Graduate College

PREFACE

This is a study of the sex-discrimination aspects of child custody and child support law in the state of Oklahoma. Historical development, trends in literature, and equal protection analysis by the United States Supreme Court are examined prior to undertaking an analysis of Oklahoma statutory and case law on child custody and the support obligation. A tier one-and-a-half analysis is then employed to evaluate Oklahoma law from a constitutional perspective.

The author wishes to express her appreciation to her thesis advisor, Professor Lawler, and to her committee members, Professors Davis and Brown. Their care and critical evaluation of the thesis is worthy of special thanks.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

The laws in the United States concerning child custody and the support obligation vary greatly from jurisdiction to jurisdiction. What is common policy in one state may be seen as a novel innovation in another. The result of this phenomenon is a patchwork of legal rules which often work a discriminatory hardship on one of the parents whose marriage has ended in divorce. While obviously the children in such situations suffer substantial hardship by the loss of continuous contact with one parent and possible financial disadvantages as well, the parents also suffer hardships. Not the least of these is the physical and emotional separation from their children--at least in the case of the non-custodial parent. The courts for a long period in American law have attempted to protect the interests of the child under various verbal formulations, but the substantial loss suffered by the parent has all but escaped judicial attention. This thesis will examine the law of the state of Oklahoma with regard to two aspects of divorce--the custody decision and the support obligation. The

focus of the study of Oklahoma law will be divided into two areas of analysis, one constitutional and the other a policy orientation. Ultimately, the two will be combined into suggestions for reform in the Oklahoma treatment of child custody and the obligation to support the children of a marriage which has ended in divorce.

The first major undertaking of the thesis will be an examination of the history and literature surrounding child custody and support. English common-law origins and the early approaches of the states will provide an historical basis from which to begin. A review of the literature on the development of child custody and support law will be undertaken to analyze the options open to courts in making these crucial decisions. This literature review also will provide a basis for noting the trends which have developed in recent years in a number of American jurisdictions as well as for an analysis of the views of the leading commentators on the subject.

Following the review of the literature and history surrounding child custody and support law in the United States, attention will be directed toward constitutional analysis of gender-based classifications which appear almost to be inherent in the approaches of many courts. The decisions of the United States Supreme Court from Reed v. Reed, 404 U.S. 71 (1971), to Michael M. v. Superior Court of Sonoma County, 101 S.Ct. 1200 (1981), will be

examined to provide the basis for an equal protection test to be applied in the protection of parental rights in child custody and support cases.

The equal protection analysis thus developed will then be applied to Oklahoma law to determine whether the statutory provisions and judicial decisions of the state appellate courts are consistent with the doctrine which has emerged over the last decade in the decisions of the nation's highest court. Similarly, the policy developments in other jurisdictions which were presented in the literature review will be used as a measuring stick by which to test Oklahoma's receptiveness to change in this area of the law.

In studying the Oklahoma law, three hypotheses will be examined. First, it is hypothesized that Oklahoma will not have been in the lead among states in terms of adopting alternatives to the traditional sole maternal custody award. Second, it is hypothesized that Oklahoma appellate courts will be reluctant to intervene to overturn custody and support obligation decisions rendered by the judges of the state's trial courts. Third, it is hypothesized that the Oklahoma appellate courts will have been reluctant to strike out on their own to apply Fourteenth Amendment equal protection analysis as a means of removing inequities in the state's law concerning child custody and financial support obligations.

The study of public law has been one of the central aspects of political science since its beginnings as an academic discipline. While political science has moved far beyond the mere reading of constitutions and court decisions in its study of government, politics, political behavior, and policy it remains true that the study of the interpretation of the United States Constitution and its application to the states is an integral part of the discipline. As this thesis progresses, it will become clear that the "old" approach to the study of politics from a constitutional perspective merges with one of the "newest" aspects of political science in terms of policy choices. The courts of Oklahoma, like the United States Supreme Court, fashion public policy through their decisions in a way that is equally important to that of the legislature's adoption of statutory guides on the questions of child custody and support.

The methodology employed in gathering the data on which this thesis is based is a traditional public law approach. The statutory law of Oklahoma was examined, followed by an analysis of the Oklahoma appellate court decisions on the topics of child custody and support with particular attention being given to those more recent cases in which specific Fourteenth Amendment issues were raised and resolved at the state court level. Similar analysis was given to the decisions of the United States

Supreme Court, this time with special emphasis given to those cases which have involved gender-based classifications subjected to equal protection challenges under the Fourteenth Amendment or due process challenges under the Fifth Amendment.

In the portions of this study dealing with the case law on the topic, extensive quotations have been employed. Rather than attempting to provide a capsule summary of the most important cases, the choice has been made to provide the key passages of the opinions themselves. The words of the courts <u>are the law</u> on the topic, and given the American legal system's reliance on judicial precedent it is preferable to state the law precisely rather than risking error by oversimplification of the reasoning of the justices.

Finally, the thesis will suggest reforms which might be adopted in Oklahoma child custody and support law. With the increasing attention to policy matters in the field of political science, it is becoming more apparent that such suggestions are a vital part of the discipline. If academic endeavors are to have value beyond the study of a topic as it existed yesterday or as it exists today, there is an obligation on the part of those who write to propose solutions to the problems they identify in governmental decisions, whether found in the courts or elsewhere in the governmental process.

CHAPTER II

HISTORY OF THE LAW AND SURVEY OF THE LITERATURE

A. Introduction

The award of child custody and the support obligation in divorce and parental separation cases has been one of the more difficult aspects of the legal problems surrounding the dissolution of marriage. Historically the pendulum has swung between extremes of favoring one parent or the other in the matter of custody, and today appears to be moving nearer a center position. In the matter of support obligation, however, the responsibility always has been imposed on the father (so long as both parents are still living). Presently there is substantial variation among the state jurisdictions in the awarding of child custody and the imposition of the support obligation, as one would anticipate in our federal system in which each state is free to fashion its own statutes and judicial remedies so long as they are consistent with the United States Constitution. This chapter will examine the major trends in development of the law of child custody and support obligation and

examine the scholarly literature on the topic as a prelude to specific consideration of Oklahoma statutory and case law on the topic which will be undertaken in Chapter III.

B. Legal Tradition in Child Custody Awards

As long ago as in Old Testament biblical history, disputes have arisen over the custody of a child between two or more parties. King Solomon demonstrated his legendary wisdom in deciding a custody dispute between two women each claiming to be the mother of a child. He proposed to divide the child in half with his sword and thereby give each woman half of the child. Upon hearing his proposed solution, one of the women relinquished her claim to the other in order to spare the child's life. Solomon then awarded the child to the woman who was willing to give up her claim to allow the child to live, proclaiming that only the true mother would act in this manner.

> Then the king said, "The one says, 'This is my son who is living, and your son is the dead one'; and the other says, 'No! For your son is the dead one, and my son is the living one.'" And the king said, "Get me a sword." So they brought a sword before the king. And the king said, "Divide the living child in two, and give half to the one and half to the other." Then the woman whose child was the living spoke to the king, for she was deeply stirred over her son, and said, "Oh, my lord, give her the

> living child, and by no means kill him." But the other said, "He shall be neither mine nor yours; divide him." Then the king answered and said, "Give the first woman the living child, and by no means kill him. She is his mother. When all Israel heard of the judgment which the king had handed down, they feared the king: for they saw that the wisdom of God was in him to administer justice.[1]

As between parents, the right to custody and control over the child were first to be recognized by the English common law, and the courts had little difficulty in determining which parent was entitled to the child. The sex of the parent was the sole criterion. The English tradition was that the father was the natural guardian of the children and it was he who controlled both their educational and religious training. He had primary right to his children's services and, in return, he was liable for their support and maintenance. According to the common law, the rights of and to the children were seen as property rights. As married women had no property rights, the children automatically were the chattel of the father, even as the wife also was the chattel of the husband. As Blackstone stated the common law rule,

> . . . the father had a natural right to the custody of his children, while the mother was not entitled to have any power over them; she was entitled only to their reverence and respect.[2]

The rights of the father over and to his children went

to the extreme to granting him custody of the child even while the child was nursing at the mother's breast. The right of the father was absolute unless he somehow had abused his right.[3]

American courts followed suit with their English counterparts and awarded sole custody of the child to the father until the time of the industrial revolution. With the consequent movement of men out of the home to the factories, offices, and other centers of daytime business activity, mothers gradually became recognized as the nurturers of children and as the parent primarily concerned with the caretaking responsibilities. This change in the law was primarily the result of judicial recognition of sociological changes which were taking place in family structure and duties as a consequence of the industrial revolution.

The English Parliament was the first to statutorily modify the absolute right of the father to custody of his children. Justice Talford's Act in 1839 provided for custody to be awarded to the mother if the child was less than seven years old.[4] Hence the "tender years doctrine," as it came to be known, placed a presumption in favor of the mother when there was a dispute between parents regarding child custody. The doctrine was based on the presumption that maternal custody was in the best interests of the child.[5]

In the United States, the common law rule of paternal preference appeared to fade with the coming of the twentieth century in light of specific state statutes providing that no preference be given to either parent in the custody dispute--assuming that both parents were found to be "fit" parents.[6] However, the twentieth century also brought to the United States a new legal presumption clearly expressing that preference should be given to the mother in a custody battle, especially if the child were young. (The courts rarely were clear as to what age was deemed sufficiently young to invoke this preference, however.)[7] This new point of law stemmed from case law rather than from black letter (statutory) law. While statutory language put the mother and father on equal footing, the judiciary in effect reversed the preference from the common-law paternal preference to a preference for the mother in awards of custody and despite legislative intent the tender years doctrine quickly became embedded in marital law. The judiciary typically held that it was in the child's best interest not to be separated from its mother unless she was shown to be an "unfit" parent. Accordingly, the phrases "the best interests of the child" and "parental fitness" became the cornerstone of the maternal preference or tender years doctrine.

While sole custody awarded to the mother has been

and is currently the norm, there are other alternatives available to the courts in custody proceedings. Sole paternal custody could be awarded or agreed to between the parties. The court may also award divided custody (also called "alternating" or "split" custody) where each parent has sole custody over the child for part of the year--usually that time the child resides with that adult. Current literature can be confusing in that the terms "divided," "split," and "alternative," when denoting the type of custody, often refer only to physical custody, rather than to legal custody. Jurisdictions need clarity in their terms, and for purposes of this thesis, "divided custody" will serve only as the term for "alternating" or "split" custody and will denote divided physical and legal custody. Under this system, custody occurs at different times with regard to each parent. In other words, legal custody is not held jointly under a divided custody arrangement.

The final alternative available to the courts is joint custody. Under a joint custody arrangement, parents share legal responsibility for all important decisions related to the upbringing of the child, as well as some degree of shared physical custody. It is this aspect of <u>shared</u> legal custody which differentiates joint custody from divided custody (in which legal custody alternates between the parents). A joint custody

arrangement insures that neither parent will take any major action with regard to the child and its upbringing without first informing and consulting the other parent.

C. Survey of the Literature

Divorce in the United States has become so prevalent that child custody issues today directly affect one in every six children. One million children a year experience their parents' divorce.[8] Upon the dissolution of the marriage, some parents are able to come to an amicable agreement regarding custody. More often, however, divorcing parents cannot come to a decision as to the parent to whom the care of the child will be entrusted and as to which parent will make the important as well as the unimportant decisions regarding care, health, and education of the child. In this latter case, the unpleasant task of deciding between two parents traditionally falls to the trial court. American courts have wide discretion under the doctrine of parens patriae to intervene in a family relationship and protect the welfare of the child. Most state statutes reflect broad parens patriae power which includes jurisdiction, custody, support and maintenance, visitation, decree modification, and legitimacy.

> [T]he principle of the controlling power of the state as parens patriae , look[s] . . . to the defense of those who are unable to

> defend themselves, and to the interest which society has in the proper care and training of children upon whom it is to depend for its future existence.[9]

It is at the discretion of the judge to assume the responsibility for choosing with which parent the child can develop without suffering unnecessarily due to the divorce. The wrong decision by the court can have a devastating effect on the child's future. This decision is even more difficult because "a decree of divorce with its custody provisions cannot contrive a satisfactory substitute for a happy parental home," and "there are no reliable, empirical studies that can be used to predict the consequences of an adult's assumed future behavior upon a child."[10]

C.1. Tender Years

In order to make decisions regarding custody, the judiciary in the early twentieth century turned to social sciences of the day and the consensus of American culture. The result of this search gave us the maternal preference or the tender years doctrine. In this period, there was a definite change in the structure of family relations as a result of the industrial revolution. This change was a determining factor in the courts' decisions. The primary role of the father in the family came to be that of the provider, and this role took him out of the house

and into the factory or office for a majority of the day. The mother at this time rarely worked outside of the home and therefore became the parent more responsible for child care duties. The literature indicates that the "best interest of the child" grew to a position of primary importance during this period as the standard by which the courts would determine custody, and most often the court granted the mother sole custody of the child on the theory that she would provide full-time nurturing. The mother was assumed the more natural parent, and the courts took the position that the child's future health, welfare, and happiness depended on its relationship with the mother. From this judicial perspective, the "best interest" of the child was synonymous with being in the custody of its mother, even though the courts seldom expressed the doctrine in such a clear statement.[11]

The literature also notes that courts recognized that there is an obvious biological link between a mother and child. The mother not only carries the infant during gestation and gives birth to the child; she also often gives it nurishment biologically during infancy. Given this fact, the courts frequently noted both sociological and biological bases for the maternal preference in the awarding of child custody.[12]

> Eventually, the belief that the mother was the natural and proper custodian of her children became so widely assumed that it

> was rarely questioned and even more rarely challenged. As Roth recently observed, the rare rationales that were offered for the maternal preference had the ring of divine right theory. For example, an Idaho court concluded that the preference for the mother "needs no argument to support it because it arises out of the very nature and instincts of motherhood; nature has ordained it." Similarly, a 1958 New Jersey decision referred to the preference as the result of an "inexorable natural force," and a 1972 Maryland decision as a "primordial" material tie.
>
> In recent years some courts' justification for the maternal presumption seems to have shifted from the laws of nature to "the wisdom of the ages," as a 1973 appellate court phrased it. Along the same lines, a 1975 Utah decision affirmed the presumption in favor of the mother because it was grounded in the wisdom inherent in traditional patterns of thought.[13]

In granting an award of sole custody the court seeks a home environment which is stable so that the child will grow and develop in a setting which gives it a feeling of security. One parent is given sole, permanent custody so that the child will not be shuttled back and forth between homes, constantly reminding the child of its broken home and undermining that sought-after security interest. The non-custodial parent, usually the father, is granted reasonable visitation privileges as it is in the child's best interest to have continuous relations with both parents. According to the literature, the "natural right" of non-custodial parent to visitation is in most jurisdictions subservient

to the best interests of the child.[14] While the court is hesitant to sever the bond between the natural parent and child, it will do so where the child's emotional or physical health is imperiled by contact with the non-custodial parent.[15] Other jurisdictions, however, disagree as to whether it is a "right" or "privilege" of a parent to visit the child.[16]

The custodial parent is given sole authority over the child concerning every aspect of the child's development. This includes decisions regarding the child's health care, education, religious training, friends, activities, visitation, and any other decision affecting the child's life. The court's reasoning is the same in that stability is the major objective, and this goal will be best served by authority over the child being given to only one parent.

Commentators on custodial law have noted that most states have at one time or another adopted the tender years doctrine, with its maternal preference, and even though adherence to the doctrine is waning, the effects of it are still apparent in custody disputes. According to a 1979 study conducted by the Census Bureau, the mother is awarded sole custody in ninety percent of the adjudicated cases, and the same study indicates that the mother also assumed custody in ninety percent of the cases which did not reach judicial resolution.[17]

While some states still statutorily possess the tender years doctrine and base their custody decisions solely upon adherence to it, other states make use of it primarily as a "tie breaker." In other words, where both parents are found to be fit and neither parent is entitled to custody of the child over the other parent as a matter of statutory right, courts in these states will use the tender years doctrine to tip the scales in favor of the mother.[18]

Another variation is states in which there is statutory equality between the sexes with regard to the custody decision but in which the judges have continued to give effect to the tender years presumption in their actual decisions awarding custody.[19] In effect, this leads almost to judicial nullification of the legislative intent to remove maternal preference. In at least one state, the legislative response to such judicial avoidance of the statutory language was to further amend the custodial statute to make it even more apparent that no preference whatsoever was to be given to the mother solely because of her sex in a parental dispute over custody of the child.[20]

Other states have rejected the maternal preference embodied in the tender years doctrine on constitutional grounds.[21] Full treatment of this equal protection basis for rejecting gender preference is reserved to a

later chapter of this thesis which will examine the development of constitutional law in the area of equal protection with emphasis on gender-based classification.

It is apparent that the "best interest" standard has been used to achieve a variety of ends. At some times and in some states, it has been used to ratify the maternal preference contained in the tender years doctrine, but at other times in other states the same phrase has been employed to avoid the maternal preference while still attempting to vindicate the interest of the child in having the best possible upbringing following a divorce of its parents.

Recent literature expresses a great deal of criticism of the maternal preference expressed in the tender years doctrine and suggests that indeed an award of sole maternal custody is not in the best interests of the child.

> Just as social sciences and the state of the American culture gave rise to the tender years doctrine , changes in American culture and the pronouncements of social sciences apparently underlie its demise.[22]

Available data indicates that a child placed in the sole custody of the mother generally will not receive full-time nurturing, attention, and companionship at home. A 1975 study conducted by the National Council of Organizations for Children and Youth indicated that

in single-parent families headed by women, forty-seven percent of mothers of preschool age children were in the labor force and fifty-seven percent of mothers with school age children work outside the home.[23] Clearly, a grant of sole custody to the mother for the intended purpose of giving the child full-time care and nurturing by the mother is not achieving its purpose.

Similarly, the child is not guaranteed economic security with a sole custody award to the mother. In an unpublished dissertation, it is shown that it is common for fathers simply to ignore their court-ordered responsibility of supporting their children.[24] The author explains that fathers apparently feel that they not only divorce their spouse but their children as well. The support obligation which historically has fallen upon the father has become a problem of national significance as increasing numbers of divorced fathers have failed to provide this support. Congress has been prompted to legislate to help reduce the number of children who are placed on the public support rolls because of the delinquency of fathers on their support obligations.[25] The support obligation is treated in more detail later in this thesis, but it is commented upon at this point to indicate its relationship to the best interests of the child in the sole maternal custody award area concerning economic well-being.

Further problems common in the sole custody award are the actions and intentions of one parent to alienate the child's affection for the other parent and even the refusal to allow visitation by the non-custodial parent. Most often these problems end up back in court. Despite the divorce, it is common for divorced parents to fight the same old battles--this time on a new battleground. The new field of battle becomes the children rather than direct personal confrontation between the adults. Not only custody but also visitation becomes a battle with the "winner" being "awarded" custody and the "loser" receiving merely visitation privileges.[26]

The influential book, Beyond the Best Interests of the Child, by Goldstein, Freud, and Solnit, which was published in 1973 suggested that sole custody is the only award that is in the best interests of the child. The need for stability and continuity both in the child's life after its parents divorce and in its relationship with the custodial parent is so great that ties with the non-custodial parent might need to be severed. The authors espouse the view that visitation accordingly should not be a court-awarded right or privilege, but rather should be left up to the sole discretion of the custodial parent. If for any reason the custodial parent deems it best for the child to have little or no contact with the non-custodial parent, neither the court

nor the non-custodial parent will be allowed to intervene. Generally even though the courts have looked harshly upon this view, Beyond the Best Interests of the Child has been said to have slowed acceptance of alternative forms of child custody.[27]

In its earliest stages, the tender years doctrine was founded upon the romantic view of motherhood. The experience for the child of "mothering" (the warmth, consistency, and continuity of the relationship) is not dependent on the sex of the parent, as is noted in the current literature. The view that females alone, or even best, can provide the mothering function is based solely upon the stereotyped thinking and sociological views of an earlier time. It is the performance of the "mothering" function which fosters the healthy development of the child. This objective can be accomplished and "mother love" can be conferred on a child by a parent of either sex.[28]

Similarly, parental roles are no longer so clearly defined as they were during the period in which the tender years doctrine was gaining acceptance in American jurisdictions. Just as mothers were then considered to lack job skills, fathers were assumed to lack child-rearing skills. Partly because an increasing number of mothers are entering the job market and therefore are unavailable to give full-time care to their children,

fathers have assumed a more active role in parenting. Having discovered the virtues of extensive contact with their children and perhaps encouraged by what they perceive as a more friendly judicial climate, fathers are demanding more equal rights and roles in child custody matters.[29] As a result of increasing demands by fathers, criticism of the tender years doctrine in the literature, and willingness of at least some legislatures and judges to move beyond the maternal preference mandated by the tender years doctrine, the law in recent years has demonstrated an ability to consider alternative approaches to child custody.

C.2. Joint Custody

The legal system is adapting to changing roles of men and women and changing social patterns by experimenting with awards of joint custody rather than the more traditional award of sole custody. Very little attention has been given by courts or commentators to divided custody, but there is a growing trend toward acceptance of joint custody. Joint custody can be of two different forms. In de jure joint custody the arrangement is mandated by the court and is specifically provided for in the settlement or divorce decree, or both. De facto joint custody refers to an out-of-court agreement between the parents, and while the court is not required to honor

such agreements, it will frequently do so.[30]

From a legal point of view, joint custody generally involves two concepts--the sharing by parents of legal responsibility and the sharing of physical care and living responsibility regarding the child. The legal aspect includes joint decision-making about vital choices regarding the child's life. While the decision-making function is usually shared equally, the physical custody over the child is not always equally divided. Foster and Freed, noted authors in the field of custody determination, argue that a frequent misperception about joint custody is the belief that actual physical custody must be shared on an equal-time basis, and they contend that this misconception has retarded the acceptance of the joint custody arrangement.[31] In a joint custody arrangement, there do not have to be major disruptions in the child's life, school, friends, religious training, or quality of care. Many options are available within the joint custody arrangement, and these should be shaped to fit the needs of each particular case. In a joint custody arrangement, the rights and obligations of the parents are similar to those of parents in the intact family. In short, joint custody means continued involvement in the child's life by both parents and provides the best legal assurance of access to the child by both parents.

The disagreement and discord which characterizes the family prior to a separation or divorce is difficult for children. This situation, however, is only compounded by a sense of loss when a child is placed in the sole custody of one parent.[32] Admittedly, there are only small amounts of data available regarding the effects of divorce on children, and psychological theories are not reliable enough for purposes of predictions. Long-range empirical research on the effects of custody alternatives is also limited and elementary with only one exception.

> [R]esearchers are finding that the key variable affecting satisfactory adjustment of children following divorce is the extent of continuing involvement by both parents in child rearing. Similiary, divorces having the least detrimental effect on the normal development of children are those in which the parents are able to cooperate in their continuing parental roles.[33]

The child's loss is clear--it needs two caring, involved parents. Other studies, while not of the long-range and predictive type scholars desire, indicate that in the sole custody of one parent children have more trouble in developing confidence and self-worth. Particularly in the instance of sole maternal custody, boys tend to be disruptive and less receptive in school while daughters develop too great dependence on and attachment to the mother. Children often feel anxious

because they feel that if one parent has already "abandoned" them, they cannot be certain that the other parent will not also leave them. In order to protect themselves from such a second loss, children become afraid to disobey the custodial parent both in actions and belief. Refusal to see the non-custodial parent on the part of the child is not unusual if the child can sense the custodial parent's approval of this action. For the non-custodial parent to force this issue only compounds the problem.[34]

Children also view the non-custodial parent as a second-class citizen. If the child identifies with him or her, then the child's sense of self-worth is severly damaged. Further, children in sole-custody homes have no role models of both sexes on which to pattern their behavior.[35]

"Winner-take-all" custody decisions tend to aggravate parental differences and cause predictable post-divorce disputes with each parent attempting to get the last word.[36] Joint custody attempts to alleviate these various damaging circumstances as well as to enhance the parent-child relationship.

The literature on joint custody notes that the severity of problems which accompany joint custody is a valid cause for concern and that in some instances the disadvantages may outweigh the benefits. The problems

are not necessarily insurmountable, however, and they should not automatically preclude consideration of a joint-custody arrangement. The concerns and objections most often expressed in considering joint custody fall into two categories--parental conflict and disruption to the child enhanced by a lack of finality in the custody decree.

The major problem confronting a joint-custody arrangement is the interaction between divorced parents. By definition, joint custody entails continuous parental cooperation. It can be argued that parents who did not get along in the marriage will only perpetuate the antagonism and disagreements in a joint-custody situation. Presumably, if the parents could agree, they would still be married and the custody issue would never have arisen. Further, it is feared that parents will use the child as a weapon against each other and create loyalty conflicts in the child along with other emotional stress.

In response to this question as raised in the literature, commentators reply that this argument applies equally well to any custody decree--including the most common form, sole custody. Where even minimal contact is excessive in some cases, the court is probably still giving some visitation priviliges to the non-custodial parent. In addition, the support obligation is also present and can well entail some form of contact.

Problems in visitation and support obligation contact can often force parents back into court for clarification of their respective rights and obligations. Therefore, it is apparent that it is not the custody decree itself but the child and its needs that necessitate the prolonging of the parents' relationship.[37] Blame should not be displaced to the nature of the custody arrangement when in reality the problems are present regardless of the type of decree. Some authors suggest that when parents exhibit strong animosity, the courts should impose restrictions on their interaction such as requiring the visiting parent to pick the child up at school or some other "neutral" location rather than at the home of the other parent to avoid direct face-to-face contact which might result in the animosity being exhibited in the presence of, and to the detriment of, the child.[38]

The second major criticism of joint custody noted in the recent literature has two parts. First, there is the lack of permanence in the decree itself. The second concern is the instability of the child's environment. According to a U.C.L.A. Law Review article, both aspects of the argument are flawed. The impermanence of the joint-custody decree depends ultimately on the relationship of the parents. For parents who are able to put aside personal bickering and revenge in order to work

out the "best" arrangement for their child, it is unlikely that there will be a return to court for a modification of the decree. The argument assumes that one or the other parent will return to court for a modification of the decree so as to grant them sole custody. In response, it is noted that impermanence exists in any decree because they are always subject to later modification.[39] A study conducted by Roman concluded that joint custody decrees are less likely to go back to court for modification than are sole custody decrees; rather, in the joint custody arrangement there is a greater likelihood that the parents will work out disagreements between themselves without any formal modification of the court's order.[40]

Joint custody by definition means the child is frequently shuttled between parents. The second facet of the argument against joint custody contends that the constant shifting is detrimental to the child's need for security, stability, and general psychological growth. In response to the contention concerning shuttling of children, it is noted that this is not a problem which is exclusive to joint-custody situations. It occurs with frequency in sole custody arrangements. Visitation can be weekly visits, weekends, and even partial summer vacations. Further, it can be argued that the frequent juggling of work, time, and social life may force the

custodial parent in a sole-custody situation to rely on sitters and others outside the home in caring for the child in such a way as to create more uncertainty than would occur in a joint-custody arrangement.

The second facet of the argument relates to the instability of the child's environment caused by the shifting of the child between parents. It is noted that this presumption is not supported by psychological evidence.[41] Accordingly, some experts feel that a continuous, meaningful relationship with both parents outweighs the difficulties faced by children in post-marital reorganization of family structure.[42]

Numerous minor problems also exist with the joint-custody alternative. Often the arrangement requires that parents' mobility be restricted. Courts often require that the ex-spouses live in close proximity to each other to facilitate the exchange of children, but some courts are not inclined to find distance between the places of parental residences an impediment to an award of joint custody. For the courts which insist on close proximity, the alternative is complete loss of custody, and it is to be assumed that such loss of custody is to be borne by the parent who is willing to move away from the children.[43]

There also are physical and monetary problems in shifting a child from one home to another. The child

must of necessity have clothing, toys, and other items. Transporting these items from home to home can be a serious barrier to smooth operation of a joint-custody arrangement, and it may be a financial impossibility to duplicate these items in both homes.

To the extent that systematic evaluation of joint custody on the child is available, there is the indication that the concerns voiced above as objections against such arrangements are not justified. The authors conclude that families who are committed to making joint custody work deal with conflict in a constructive fashion of negotation and acceptance and are able to make the children feel loved and secure in two homes.

A study conducted in New York by Roman looked at the impact of child absence on the father rather than the traditional absence of the father in relation to the children. Roman advocates joint custody as a presumption in all cases, following the results of intensive interviews of fifty middle-income fathers who had been divorced no more than two years and who had children between the ages of three and twelve years.[44]

Roman concluded that the two most often voiced criticisms of joint custody, parental conflict and disruption to children, either failed to materialize or were outweighed by the benefits of joint custody. Some of the conflict is dismissed merely by the parents'

simply opting for joint custody rather than each struggling to be victorious over the other in a battle for sole custody with the children as the prize. Further, there is no guarantee of harmony in the traditional custody arrangement and often the custodial parent uses custody and visitation over the non-custodial parent as a weapon, and the children are caught in the middle. Roman asserts that joint custody more fully satisfies parental needs. In traditional, sole-custody, form, the mother is usually shut in with the children, and the father is shut out. Joint custody allows both parents to be involved with their children and to share burdens and joys of child raising.

In response to the "child as yo-yo" disruption of changing residences, Roman asserts that this argument simply is not supported by the evidence. Instead, joint custody offers the most satisfactory living arrangement with its flexibility allowing it to evolve through the different stages of the children's development.

As a device to resolve differences between parents which become sufficiently severe as to threaten the viability of a joint-custody arrangement, Roman advocates the use of family conciliation courts, counselors, and mental health professionals as an alternative to the adversary relationship fostered by reliance upon the normal court process to reach a custody decision.

The first in-depth study of joint custody was conducted by Professor Alice Abarbanel in the San Francisco Bay area. Abarbanel studied the practice of joint custody by four families and analyzed the effects of the arrangements on both parents and children. The four families studied included seven children between the ages of four and twelve years. All parents had been married for six to seven and one-half years, and they had been separated between one and two years. Living arrangements varied, and allocation of child care responsibilities ranged from fifty-fifty to sixty-six-thirty-three. All parents lived within close proximity to their ex-spouses.[45]

This study found that children were generally well-adjusted and comfortable in the living situation of two homes, even though they were unhappy about the separation of their parents. The children continued to have two psychological parents and experienced each in discipline, play, and daily routine situations. Further, Abarbanel found that this constant close communication with both parents thwarted the efforts of children to play one parent off against the other.

Abarbanel concluded that joint custody is neither inherently good nor inherently bad but works best when certain conditions are present. Parents must first make a commitment to make joint custody work. Each parent

must support the other and encourage the other's relationship with the child. Much flexibility in scheduling, planning, and sharing of responsibility is required. Each parent also needs to distinguish his or her past relationship with the ex-spouse from the role of a parent.

Now in its initial stages is the Joint Custody Study Project which is co-sponsored by the Jewish Family and Children's Services and by California Women Lawyers. It is a comprehensive study of joint custody in San Francisco which is gathering information and identifying factors characteristic of families with successful joint custody arrangements. The goal is to make concrete information available to attorneys and counselors to give assistance for those seeking joint custody.[46] While this project is not sufficiently far into the reporting of its research to be of value in this thesis, it is a firm indication of the commitment to research in this area which may assist in an empirical evaluation of the pros and cons of joint custody in comparison with the more traditional, sole custody decree. In those courts which are responsive to such empirical data, the results of this and similar studies may have an impact on further modification of the pattern of custody awards.

Preliminary conclusions drawn from the studies discussed above indicate that in a substantial number of

cases joint custody helped to "sooth the wounds and make the transition to post-divorce life a smoother one."[47]

In addition to attempts to refute the purported disadvantages of joint custody, the literature has compiled a number of positive attributes to the joint-custody arrangement. It can bring advantages to the child, mother, and father as well as sociological and psychological benefits to family relations.

Children of divorced parents feel bewildered and often even guilty for their parents' divorce. In the midst of this confusion, they must choose between their parents as a result of the parental power struggle in a bitter situation or as a self-imposed mandate in a more harmonious situation between the parents as the divorce is completed.[48] Joint custody can help to alleviate both situations. Where parents are using children as weapons or pawns in their own power struggle, joint custody provides an environment in which the child does not have to make a choice. Both parents are still involved in the child's life and so the threat of being a "winner" or "loser" is abolished. Joint custody also can raise the parents' self-esteem and eliminate the need to manipulate the child's affections.

Further, joint custody offers the opportunity to

develop a more natural and individualized relationship with each parent. In a sole-custody environment, the non-custodial parent usually visits all of the children at the same time. This type of arrangement gives the non-custodial parent almost no chance to parent--because it is extremely difficult tp provide close, individual attention to each child. This is especially true when the children are of a different age or sex. Trying to converse with a teenager and entertain an elementary school age child at the same time would most likely be fruitless.[49]

Joint custody provides a chance for the child and parent to communicate on every level including discipline, normal day-to-day activities, and play time. Individual contact can be made with each child rather than in a group in an artificial setting.[50]

Joint custody can also benefit the parents as well as the child. The literature questions whether it is valid to consider only the interests of the child when those interests are inexplicably intertwined and bound to the best interest of the family.[51] Again, as is the case with impact on children, there is little systematic evidence on the effects of divorce on adults. What little information is available agrees with the results of a study by Roman and Haddad. According to these authors, mothers who obtained sole custody of their

children feel that their children overburden and imprison them. "Further evidence shows that these mothers become physically and emotionally exhuasted, as well as socially isolated."[52] Mothers with sole custody not only have full responsibility for the children but often must also work outside the home in order to supplement the amount received from her ex-spouse in child support. She may be at a distinct disadvantage if she has dropped out of the work force to raise a family or if further education or training is needed to advance her skill. The alternative obviously is a low-paying job.

Often a mother may simply not want sole custody of the children but may be hesitant to reveal her feelings. Where "motherhood" by some case law is something just short of divine, women may feel that there is something selfish or unnatural in not wanting sole custody of her children. The notion is still with us that when a mother is not given sole custody of her children something is radically wrong with her.

If mothers feel overburdened, then fathers must naturally be underburdened. Recent celebrated decisions, such as the Salk decision,[53] and influential books such as The Disposable Parent,[54] are laying to rest the notion that fathers walk away from a divorce "scott free." In an unpublished dissertation by Judith Greif, evidence

showed that men experience stress expressed in physical problems, depression, and a severe sense of loss.[55] In a typical award of sole custody to the mother, men lose wife, home, and children and receive only visitation rights and support obligations. Foster and Freed indicate than men often become so overwhelmed by these difficulties and pain that they give up seeing their children in order to avoid more hurt.[56] When the interest in the children is gone, it generally means that support payments are less likely to be made.

Joint custody can be advantageous to both parents. It has been noted that "mothers reported the greatest advantage they saw in joint custody was the sharing of responsibility for the children," whereas men noted an "opportunity for the child to maintain contact with both parents."[57] Both parents are given more free time, less constant responsibility, a chance to be more involved with other interests, and a more natural relationship with the child. Moreover, there is a psychological benefit in joint custody. Improving the psychological health of one member of the family results in the improved emotional well-being of the entire family unit.[58] It gives the divorcing family a chance to "reorganize" rather than "break up." Parental bonds can remain intact, and the situation can be the closest possible to the situation found in families which remain intact.

While joint custody may be the exception rather than the rule, some type of shared custody is judicially recognized in at least twenty-eight states. At the present time, California, North Carolina, Iowa, Oregon, and Wisconsin statutorily provide the court with a joint-custody option. Joint-custody legislation presently is under consideration in Illinois, New York, Minnesota, Connecticut, Ner Jersey, Ohio, and Utah, while still other states are enacting legislation recognizing fathers' rights in custody matters (Arkansas and Alaska).[59] Joint custody has proceeded with the statutory authority directing "as the case may warrant," as "is necessary and proper," as the children's "spiritual as well other interests may require," and "best interests."[60]

Joint custody also appears consistent with the Uniform Marriage and Divorce Act. Section 402 uses the "best interests" test and requires that the court determine custody. It is noted that this is distinguishable from a direction to designate a single custodian.[61] The court is given broad discretion through the language of the Uniform Marriage and Divorce Act in order to promote its underlying purposes. The "best interests" standard is the summation of the five factors designated by the Act to determine the meaning of phrase. Section 402, subsections A through E, includes the following factors: the wishes of the child's parents, the wishes

of the child, the interaction and interrelationships of the child with the custodian and other siblings, the child's adjustment to home, school, and community, and finally, the mental and physical health of all individuals involved.

Upon examination of the current literature, it appears that the general agreement is that joint custody is workable in almost all situations. Few problems are insurmountable that would preclude anything except a sole custody arrangement. Because courts have limited experience in applying the "best interest" standard in a joint-custody arrangement, or for that matter with any standard in a joint-custody arrangement, commentators have suggested guidelines to assist the courts in making joint-custody determinations.

Although there is some variation, a few suggested guidelines are apparent in all of the literature. Because joint custody benefits both parents and children through shared authority similar to that within an intact marriage, courts should decree joint custody when there are certain factors present. First, both parents must be fit. A finding of parental fitness assures that the child will not be subjected to the care of a parent who is incapable or unwilling to provide for the child's needs and is designed to protect the child from harm. The finding of fitness also protects parents as it could

prevent the other parent from seeking modification of the decree on the grounds that the other parent is unfit. It also should be noted that a fit parent is not required to have been a perfect parent with regard to extra-marital relationships prior to the divorce. The effect of this relationship on the child (note that there will be wide and varied judicial discretion on this point) and the parent's ability to care for the child should be considered rather than the court's adopting a per se rule that any such relationship automatically makes a parent "unfit" for custody purposes.[62]

Courts likewise should grant joint custody when both parents wish to continue their active involvement in raising the child. If one parent does not wish to have continued active involvement with the child, the court need not go further in the consideration of a possible award of joint custody.

The court also should grant joint custody where the parents are capable of making reasoned decisions in their child's life.[63] Even if parents in the emotional heat of a divorce have not made reasoned decisions together in the best interests of the child, the judge may find that they are are still capable of doing so in the future. It should not be assumed that interspousal difficulties cannot be put aside for the purposes of raising a child. The judge must look to see if this

potential exists even if only in certain areas. The decree can be written so as to give custody over a certain area to only one parent and yet have a joint-custody arrangement in all other facets of child-rearing responsibilities. The court could simply make arrangements for the child regarding the contested concern, yet in all other areas the parents could share responsibility equally.[64] One article even suggests that the couple should establish at the time of dissolution of the marriage a means for arbitration if disputes arise in the future which cannot be resolved by agreement.

> Agreement on a neutral arbitrator--a professional counselor, clergyman or lawyer--or a means of choosing one when the need arises, should be made in advance of the disagreement.[65]

In the increasing number of jurisdictions offering court-connected counseling, such arbitration service is readily available and can be made a condition of joint custody.

The court also may consider whether joint custody would disrupt the parent-child relationship less than other custody arrangements. A parent who prior to divorce did not take an active part in child care or decision-making (assuming this was voluntary and not as a result of spousal subterfuge) may not be in a position to do so after the divorce. The court should seek to structure the custody arrangement so as to minimize any

disruptive effect on the child.[66]

In addition to the previously mentioned criteria, it is suggested in the literature that parents work out the logistics of their arrangement between themselves (when possible) prior to judicial determination. This would include division of time the child spends with each parent, the welfare of the child regarding health care and education, financial arrangements, signing of report cards, vacations, camp, replenishing of clothing, and a variety of other items. These, however, change over time and can be adjusted to fit new needs which arise at various phases of the child's growth and development. A single system for meeting these problems need not be dictated by the court, and the judge should be open to whatever arrangements best suit the needs of the parents and the child or children.[67]

Two aspects of joint custody which need individual attention are the logistics of moving children between parents and monetary concerns. The aspect of geographic relationship of the place of residence of the parents requires clarification. A few authors, most notably Roman and Haddad in The Disposable Parent, indicate that close geographic proximity is essential to a successful joint custody plan. Foster and Freed, however, contend that this is not necessarily true. The determining factor, in their view, depends on the division of the

actual time the child resides with each parent. Summer vacations and alternating holidays may be the times in which a change of location for the children may be accomplished over a relatively great distance. By its very nature, joint custody can be tailored to meet the needs of each specific situation.[68]

A second consideration is whether many families can actually afford joint custody. The answer to the question often depends upon the identity of the person responding to it. One judge has acknowledged that joint-custody parents have to have a good deal of money for the arrangment to work.[69] A family therapist and long-time researcher and advocate of joint custody claims that an extra rolled-up sleeping bag in the closet is enough--it depends upon the children's sense of belonging.[70]

As was mentioned earlier in this thesis, non-custodial parents tend to stop seeing their children after divorce. Support payments after divorce also often are short lived. It is argued that one of the most positive attributes of joint custody is its potential for avoiding this problem of non-support generated by the bitterness over the custody battle. Not only does continuous contact with the children create incentive to provide for their needs, but participating in routine activities of feeding, clothing, and housing brings home to the parents the ever-increasing expenses of rearing

them. This awareness tends to promote a more flexible attitude toward the finances involved in care for the child or children. It also brings to reality what each parent can monetarily contribute to the child's needs. Financial arrangements can be divided on an equal payment basis, or they can be computed on a pro rata basis according to the income of each parent. In addition, there is nothing to prevent one parent from voluntarily assuming responsibility for clothing and primary maintenance, with monetary support being supplied by the other parent. Perhaps each can assume different duties that each respectively likes to perform in order to avoid the unnecessary duplication of items or duties. In any event, no one system must be imposed, but the court is encouraged to respect what is in both the best interest of the child and of the parents.

While most of the attention has been given to what factors are critical to a successful joint-custody arrangement, Foster and Freed have listed criteria when joint custody is not advisable (although some of these may be contradictory to others perviously noted criteria advanced by other authors). They indicate that joint custody should be rejected when each party is unalterably opposed to joint custody or the animosity and hostility between parents is so great that joint care and responsibility is not feasible. Courts should reject awarding

joint custody where one parent's work hours make it a practical impossibility--such as an obstetrical nurse with erratic work hours which are not susceptible to being made regular. Further, where it is shown that the child is confused by conflicting decisions or practices of the parents, they argue that joint custody should not be granted. Finally, where the child rebels against, or is strongly opposed to, joint custody the court should not award it.[71]

Another author contends that the greatest fear courts have regarding joint custody ironically is the same fear that they entertain in the award of sole custody to a single parent--loyalty conflicts. The author concedes, however, that in joint custody these loyalty conflicts are at least maintained openly. The children are aware that they are expected to love and to want to be with each parent--even though the parents are no longer married and living in a single home.[72]

While a few criticisms of joint custody have been noted in the literature, and while some judges continue to resist movement in this direction, it appears that the trend (both legislatively and in the literature) is toward increasing acceptance of joint custody as an alternative to the traditional award of sole custody to one parent as was the case under the "tender years" rule. This trend, even though it may be developing slowly, is

a clearly identifiable one. It has not, however, been sufficient to end difficulties alluded to earlier in the treatment of the tender years doctrine--the problems surrounding visitation rights. While joint custody theoretically ends the notion of one parent having custody while the other only has visitation "rights" or "privileges," the literature has continued to deal with this topic, sometimes as a separate matter, and the next section of this thesis will briefly deal with this aspect of commentary on custody.

C.3. The Visitation Problem

The opponents of joint custody criticize those favoring joint custody awards and not only the award of joint custody. Most often the opponents claim that the champions of joint custody overlook the fact that, on the whole, courts award substantial visitation privileges to a fit non-custodial parent. The order is in terms of "reasonable visitation," and the parties are left free to implement details as to physical possession, as long as they can agree.

> In some sense, therefore, some of the agitation for joint custody really involves status seeking as legal custodian (or co-custodian); or "one-upsmanship," since meaningful association with both parents is common under the traditional sole custody, subject to visitation formula.[73]

The central issues of visitation is the emotional and psychological health of the children of divorced parents. Specifically, what visitation "rights" and "privileges," if any, should be granted to the non-custodial parent in order to enhance the well-being of the parent and child?

In theory, the judicial attitude is that the paramount concern is the "best interest of the child." The courts have taken the view that the best interest of the child is to have a continuing association with the non-custodial parent.

> The courts refer to these visitation "rights" as a claim, subservient to the best interest of the child, and not as a legal right per se. But on the other hand, the legal "right" of visitation which purportedly has been demoted to claim status is in practice an absolute right. Only in extreme and unusual circumstances will visitation be totally denied.[74]

A 1977 article by Henszey examines some of the more common instances in which visitation usually is denied.[75] The jurisdictions are split over whether failure to make support payments justifies complete denial of visitation rights. The majority view is that it is not. The duty of support has been shown to be wholly independent of visitation. The minority view, however, holds that when nonsupport is contumacious, it can be justifiable to withhold visitation privileges. Also, where the child's apparent indifference or desire not to see the

non-custodial parent is present, the court will take this into consideration. If it is apparent to the court that the unwillingness is a result of influence by the custodial parent, the court will ignore these desires.

The jurisdictions are unanimous that where there are acts, threats, or fear of physical violence present, complete denial of visitation is appropriate.

The jurisdictions are not unanimous when it comes to sexual and moral conduct of the non-custodial parent, "[h]ence, the cases indicate that only the most base form of sexual or moral conduct will threaten visitation rights."[76]

For parents who threaten or attempt to remove the children from the court's jurisdiction, denial of visitation rights depends on whether it was the custodial or non-custodial parent who lodged the threat. Further, for claims of abandonment or where there is a lapse of time between visits, courts are reluctant but will at times deny visitation privileges.

One area in which Henszey condemns the courts' policy with regard to visitation is the instance where one parent makes derogatory remarks against the other parent. A judicial reprimand is usually what occurs. Henszey feels that the courts are being too naive, and since the emotional well-being of the child is at stake, the court should as a matter of policy deliver a more

severe reprimand coupled with a threat to award custody to the other parent if the situation does not improve.

Several alternatives to the current situation concerning visitation are summarized in the Henszey article. These include simply allowing the custodial parent to make all decisions concerning visitation, the use of a committee to reach decisions on the matter in accord with the child's best interest, the use of family courts to adjudicate the issue, and the establishing of joint custody. Similarly, uniform guidelines for judicial discretion in visitation decisions could be adopted as an alternative to the current patchwork system.

C.4. The Support Obligation

Parental support obligations have become a matter of increasing public concern, with the primary focus at present being directed toward the problem of locating the absent parent and forcing him or her to contribute support monies.[77] Much less attention has been given to the underlying questions of the nature of the support obligation and the extent of each parent's obligation and duty to support his or her child. While the constitutional issue is taken up in a later portion of this thesis, a brief history of the support obligation is warranted as well as a description of the present law and trends in this area.

At early common law, the obligation to support one's own child was considered to be merely a moral obligation and not sufficient to bind either parent legally.[78] Under the principle of coveture at common law, women were denied the ability to hold property, and their husbands were given sole control over the family assets. Coverture thus shielded married women from the financial responsibilities of spousal and child support, while it gave men both the benefits and the burdens associated with the holding of property. It was the common law duty of the husband to support his wife, even if the wife had vocational ability and regardless of her previous financial standing. The husband simply was responsible financially for his wife and for the fulfillment of purchases in order for the wife to perform her household duties. This judicial characterization of women as financially dependent upon men extended beyond marriage through separation, divorce, and widowhood. The American states built on this foundation with alimony statutes which sought to prevent women from becoming public charges once they were removed from the shelter provided by their husband's income.[79]

The considerations noted above also persuaded the courts to assign the child support obligations to the fathers. Women were by common law presumption weaker by nature, and mothers were not entitled to the services of

their children, but only to their respect. Just as women were free from alimony payments to financially dependent ex-husbands, so mothers generally were relieved of the duty of providing financial support for their children, both during and after marriage.

As the moral obligation moved into a legal one, the majority of courts placed the burden of child support solely on the father.[80] In every jurisdiction, it is an enforceable duty by statute or common law,[81] and it generally is imposed in one of three distinct ways: (1) placement of an absolute duty of support on the father, (2) placement of primary duty of support on the father accompanied by a secondary duty on the mother, or (3) placement of a presumptively equal duty on both parents.[82]

Under the traditional view, the father's obligation to support his children is exclusive regardless of the wife's separate income, assets, and earnings. The inequity of this view is clearly apparent in the case of Bill v. Bill, 290 N.E.2d 749 (Ind. Ct. App. 1972), where at the time of the divorce the father's net worth was $106,639. The mother, as beneficiary of a trust fund, had a net worth of over $450,000 and had made substantial financial contributions to the marriage. The father was appealing from an order to pay $240 a week in child support. Despite its apparent reluctance about its

decision, the court stated that even

> [t]emporary forced indebtedness of the father and affluence of the mother . . . do not mitigate a father's firmly established duty to support his progeny.[83]

The court disregarded the mother's past and present ability to make money as well as the established family practice of her doing so. Tradition and precedent compelled the court to perpetuate a double standard which was manifestly inappropriate in the case to which it was applied.

> Most jurisdictions have retreated from absolute liability to a rule under which the father is primarily liable for support payments and the mother "secondarily liable."[84]

There is some disagreement on when the mother's secondary liability comes into play. Usually the father is the sole obligor upon whom the legal duty rests and only when he is unable to fulfill this legal obligation does the legal duty become enforceable against the mother.

In the Missouri case of O'Brien v. O'Brien, 485 S.W.2d 674 (Mo. Ct. App. 1972), the father had full custody of one child, shared custody with the mother over a second child, and the mother had full custody of the third child. The trial court ruled a child support award of $250 a month in favor of the mother. Upon appeal charging that the trial court had abused its

discretion in a situation in which there was evidence showing that the ex-wife had adequate means to support herself and the children in her custody, the court of appeals affirmed the award, claiming the invidual circumstance did not outweigh the well-established rule in that jurisdiction that it is the primary duty of the father to support and educate his children notwithstanding the fact that the mother may have independent financial means.

It appears that the primary duty is more than a presumption in favor of a father's duty to support the children of the marriage.

> It normally amounts to an irrebutable legal duty which is abrogated only by circumstances rendering the father's fulfillment impossible or nearly so. The measure of the father's obligation is the child's needs in relation to the father's station in life, his pecuniary resources, and his earning ability honestly exercised.[85]

This appears very close to absolute liability. Death appears to be the most certain relief from primary liability, but even this is not absolute as the father is sometimes required to carry life insurance on himself with the children as beneficiaries.[86]

In the early 1970's courts began to reconsider state's conferral of child support benefits solely on women. The change in the decisions has been slow in developing, partly because new opportunities for women

have not radically changed the economic inequality between the sexes and partly because of judicial reluctance to depart from established precedent even in the face of changing social and economic conditions.[87]

The most recent trend with regard to the support obligation noted in the literature is to allocate the responsibility between both parents; that is, to place a presumptively equal duty on each parent to support the children financially. This idea of equal obligation of both parents to support their dependent minor children is consistent with the Uniform Marriage and Divorce Act. The Act refers to "either or both parents owing a duty of support" and lists factors to be considered by courts when determining respective support obligations. Section 309 includes the following determinative factors: (1) the financial resources of the child, (2) the financial resources of the custodial parent, (3) the standard of living the child would have enjoyed had the marriage not been dissolved, (4) the physical and emotional condition of the child and his educational needs, and (5) the financial resources and needs of the non-custodial parent.

The statute in no way is detrimental to the child with regard to his or her continuing support assurance; rather, it is meant to increase the level of assurance by having both financially able parents legally obligated

to provide such financial support. Each parent is to be held simultaneously liable for a reasonable portion of the support obligation.

An excellent summary of the factors considered in most jurisdictions, although concentrating specifically on Pennsylvania law, is found in the Dickenson Law Review.[88] The author notes the division of a family almost always involves financial hardship, and the court must face the reality of having to distribute the burdens of such financial hardship in an equitable manner. The factors normally taken into account include the needs of the child (including both past and projected future expenditures), earnings of the parents in terms of capacity to produce income and their living expenses, equalizing the parental burden (taking into consideration the greater responsibility of the custodial parent), and other factors which arise in only some cases--including income of the child, trust fund income, and prior agreement between the parents.

D. Summary

Sole custody arrangements developed at a time when divorce was unusual. The major criticism of sole custody is that it frequently deprives the child of divorced parents of a close relationship with one parent. Further problems develop for the child and the parents because of

the sole custody arrangement, including disputes over visitation, alienation of affection, legal decision-making affecting the child's development, and increased likelihood of failure of the non-custodial parent to provide financial support.

Today, as divorce rates soar, alternative forms of custody which do not divorce the parent from the child have come to the attention of judges, attorneys, legislators in the states, and commentators in the journals related to law. There is a pressing need to develop new custodial arrangements to deal more adequately with the needs of children and parents following divorce.

Joint custody, the most promising alternative to sole custody in the view of a majority of those writing on the topic, is not a "cure all," but it appears to be growing in judicial popularity. It allows for greater contact between the child and both parents, continues to the maximum degree feasible the condition of joint parental decision-making concerning the child's welfare and development which would be present in the intact family, allows flexibility and the possibility of change as the child matures and parental needs change (without the necessity for a return to court to modify the decree), and minimizes the sense of loss and dislocation to the child and parents. While there has been some criticism of joint custody in the literature, the majority position

continues to be supportive of judicial experimentation with joint custody.

Visitation arrangements and child support obligation also are treated in the literature which deals with divorce and gender-based distinctions. These topics, however, have not received the extensive coverage given joint custody and other alternatives to the common law sole custody presumption which has so long dominated American jurisdictions. While there has been some movement toward a more equal balancing of monetary obligations between the custodial parent (usually the mother) and the non-custodial parent (normally the father), neither the commentators nor the courts have undertaken massive movement in this area.

FOOTNOTES

[1]1 Kings 3:23-39 (New American Standard).

[2]W. Blackstone, 1 Commentaries 452-53 (1765).

[3]King v. DeMannerville, as cited in Schiller, "Child Custody: Evolution of Current Criteria," 26 De Paul L. Rev. 242 (1977).

[4]2 & 3 Vict. c. 54.

[5]Weitzman & Dixon, "Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce," 12 U. Cal. D.L. Rev. 473 (1979).

[6]Radcliff, "Pennsylvania Child Custody: The Tender Years Doctrine--Reason or Excuse," 81 Dick. L. Rev. 776 (1977).

[7]H. Clark, Handbook on the Law of Domestic Relations 585 (1968), as cited in Rabbino, "Joint Custody Awards: Toward the Development of Judicial Standards," 48 Fordham L. Rev. 105 (1979); Peck, "The Tender Years Doctrine in Kansas Child Custody Cases," 49 J. Kan. B.A. 22 (1980).

[8]Bratt, "Joint Custody," 67 Ky. L.J. 271 (1978/79).

[9]Radcliff, supra note 6, at 776; Note, "Best Interest of the Child: Maryland Child Custody Disputes," 37 Md. L. Rev. 641 (1978).

[10]Taussig & Carpenter, "Joint Custody," 56 N.D.L. Rev. 223 (1980).

[11]Schiller, supra note 3.

[12]Weitzman & Dixon, supra note 5.

[13]Id.

[14]Nielson, "Joint Custody: An Alternative for Divorced Parents," 26 U.C.L.A.L. Rev. 1084 (1979).

[15]Id.

[16]Henszey, "Visitation by a Non-custodial Parent: What is the 'Best Interest' Doctrine?" 15 J. Fam. L. 214 (1977).

[17]Gouge, "Joint Custody: A Revolution in Child Custody Law?" 20 Washburn L.J. 328 (1981).

[18]Taussig & Carpenter, supra note 10, at 226; Foster & Freed, "Joint Custody: Legislative Reform," Trial, June, 1980, at 23; Peck, supra note 7.

[19]Rabbino, supra note 7.

[20]Nielson, supra note 14

[21]Rabbino, supra note 7.

[22]Taussig & Carpenter, supra note 10, at 227.

[23]Bratt, supra note 8; Poole, "Maternal Preference and the Double Burden: Best Interest of Whom?" 38 La. L. Rev. 1096 (1978); "Split, Divided or Alternative Custody of Children," 92 A.L.R.2d

[24]Bratt, supra note 8.

[25]42 U.S.C. §§ 651-60 (1974).

[26]Ramey, Stender & Smaller, "Joint Custody: Are Two Homes Better than One?" 8 Women's L.F. 559 (1979).

[27]Foster & Freed, "Joint Custody," Trial, May, 1979, at 27.

[28]Taussig & Carpenter, supra note 10; Note, "The Tender Years Presumption in Child Custody Determination," 81 W. Va. L. Rev. 179 (1978).

[29]Weitzman & Dixon, supra note 5; Solomon, "The Father's Revolution in Custody Cases," Trial, May, 1979, at 32.

[30]Ramey, Stender & Smaller, supra note 26.

[31]Taussig & Carpenter, supra note 10.

[32]Rabbino, supra note 7.

[33]Folberg & Graham, "Joint Custody of Children Following Divorce, 12 U. Cal. D.L. Rev. 523, 535 (1979).

[34]Gouge, supra note 17

[35]Nielson, supra note 14.

[36]Folberg & Graham, supra note 33; Gouge, supra note 17.

[37]Nielson, supra note 14.

[38]Id.

[39]Id.

[40]Id.

[41]Id.; Daniels, "Domestic Relations--Child Custody--Reasonable Visitation or Divided Custody?" 42 Mo. L. Rev. 136 (1977); Note, "Child Custody: A Lawyer's Perspetive," 52 Conn. L.J. 317 (1979),

[42]Nielson, supra note 14; Koenig, "Joint Custody: A Viable Alternative?" 60 Mich. B.J. 170 (1981).

[43]Folberg & Graham, supra note 33;

[44]Ramey, Stender & Smaller, supra note 26

[45]Id.

[46]Id.

[47]Id. at 573-74.

[48]Nielson, supra note 14; Koenig, supra note 42.

[49]Nielson, supra note 14.

[50]Id.

[51]Folberg & Graham, supra note 33.

[52]Id.

[53]Solomon, supra note 29.

[54]Foster & Freed, supra note 27.

[55]Grief, "Joint Custody: A Sociological Study," Trial, May, 1979, at 32.

[56]Foster & Freed, supra note 27; Grief, supra note 55.

[57]Folberg & Graham, supra note 33, at 556.

[58]Nielson, supra note 14.

[59]Ramey, Stender & Samller, supra note 26.

[60]Bratt, supra note 8, at 284-85.

[61]Bratt, supra note 8.

[62]Gouge, supra note 17; Folberg & Graham, supra note 33; Rabbino, supra note 7.

[63]Folberg & Graham, supra note 33; Rabbino, supra note 7; Note, "Child Custody: A Lawyer's Perspective," 52 Conn. L.J. 317 (1979).

[64]Nielson, supra note 14.

[65]Id. at 1125.

[66]Nielson, supra note 14.

[67]Foster & Freed, supra note 18.

[68]Id.

[69]Gouge, supra note 17; Nielson, supra note 14.

[70]Folberg & Graham, supra note 33.

[71]Foster & Freed, supra note 18.

[72]Bratt, supra note 8.

[73]Foster & Freed, supra note 27, at 31.

[74]Henszey, supra note 8, at 215.

[75]Henszey, supra note 8.

[76]Id.

[77]Bratt, supra note 8.

[78]Weiner, "Child Support: The Double Standard," 6 Fla. St. L. Rev. 1317 (1980).

[79]Dover, "Financial Equality in Marriage and Parenthood: Sharing the Burdens as Well as the Benefits," 29 Cath. U.L. Rev. 733 (1980).

[80]Id.

[81]Schmehl, "Calculation of Child Support in Pennsylvania," 81 Dick. L. Rev. 793 (1977).

[82]Dover, supra note 79; Conti, "Child Support: His, Her, or Their Responsibility?" 27 De Paul L. Rev. 707 (1976).

[83]Dover, supra note 79, at 758.

[84]Weiner, supra note 78, at 1321.

[85]Id.

[86]Id.

[87]Dover, supra note 78; Conti, supra note 82.

[88]Schmehl, supra note 81.

CHAPTER III

CONSTITUTIONAL ANALYSIS OF OKLAHOMA CHILD CUSTODY AND SUPPORT LAW

A. Introduction

One of the recently developed constitutional law doctrines in the United States is the equal protection analysis applied to gender-based classifications. The United States Supreme Court has interpreted the Fourteenth Amendment's equal protection clause to provide at least some protection against state action which unfairly classifies individuals on the basis of gender. The language of the Amendment, which provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws," was first interpreted by the Supreme Court to limit gender-based discrimination in Reed v. Reed, 404 U.S. 71 (1971). Subsequent decisions by the Court have also made use of the Fifth Amendment's due process clause to place similar barriers against national governmental classification by gender. While it is probably accurate to state that the drafters of the Fourteenth Amendment did not intend by its terms to grant greater equality between the sexes, the law has come too far in the last decade to deny its applicability

to such types of governmental classification. This chapter will detail the development of the gender-based equal protection doctrine, attempt to demonstrate its applicability to the area of child custody and support law, and analyze Oklahoma statutory and decisional law in an equal protection context. In studying the Oklahoma law, three hypotheses will be examined. First, it is hypothesized that Oklahoma will not have been in the lead among states in terms of adopting alternatives to the traditional sole maternal custody award discussed in Chapter II. Second, it is hypothesized that Oklahoma appellate courts will be reluctant to intervene to overturn custody and support decisions rendered by judges in the trial courts of the state. Third, it is hypothesized that the Oklahoma appellate courts will have been reluctant to strike out on their own to apply Fourteenth Amendment equal protection analysis as a means of removing inequities in the state's law concerning child custody and financial support obligations.

This chapter will first consider the development of federal equal protection doctrine in the United States Supreme Court. It then will analyze Oklahoma law from the constitutional perspective developed in the United States Supreme Court's gender-based classification cases. In the course of this analysis, the three hypotheses listed above will be examined.

B. The Development of Gender-Based Equal Protection Analysis

It took the United States Supreme Court almost a century to apply the guarantee of equal protection to victims of racial discrimination, and it is taking even longer for the Court to extend this same guarantee to victims of sex discrimination. Prevailing social attitudes have generally been reflected by the Court with regard to the status of women and men in their political, economic, and social roles.[1] Generally, cases taken to the Supreme Court concern discrimination against women, and early decisions either avoided the discrimination issue or adopted a "protectionist" attitude to justify the discrimination. In the nineteenth century the Court upheld an Illinois statute which prohibited women from the practice of law, declaring,

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The nature and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood.[2]

In the opinion of the Court written by Justice Samuel F. Miller, the gender-based discrimination issue was ignored, and thus Bradwell v. Illinois, 83 U.S. (16 Wall.) 131 (1873), held simply that the Fourteenth Amendment did not interfere with Illinois' authority to regulate admissions of members to its bar.

The 1875 case of Minor v. Happersett, 88 U.S. (21 Wall.) 163 (1875), further supported the protectionist view of the Court by ruling that the Fourteenth Amendment did not compel the states to allow women the right to vote. Although women were citizens, the right to vote was not a privilege or immunity of national citizenship prior to ratification of the Fourteenth Amendment nor was it added to the list after the passage of the Amendment. It was not until 1920 that women were granted the franchise with the ratification of the Nineteenth Amendment.

Even as late as 1961 in Hoyt v. Florida, 368 U.S. 57 (1961), the Court was denying women equal protection of the law by reaffirming a position taken in Strauder v. West Virginia, 100 U.S. 303 (1880), providing for the exclusion of women from jury duty. This decision, however, was overturned in the 1975 decision of Taylor v. Lousiana, 419 U.S. 522 (1975).

The United States Supreme Court continued with this view while hearing cases regarding working conditions

and laws intended to protect women's morals until the civil rights movement awakened a new view toward other forms of discrimination.[3] It became rapidly clear that the Court's previous protectionist attitude contributed substantially to the discrimination that women felt working to support themselves and their families. Because women had been expected to stay at home, they were generally less well educated than men and as a result obtained lower paying, low skilled jobs where the opportunity for advancement was almost non-existent. When women and men performed the same job function, women received less pay on the theory that a female's earnings were less vital to support of a family than were those of a man. Even Congress was ahead of the Court where equality between the sexes was at issue. In 1963 the Equal Pay Act added to the Fair Labor Standards Act the principle of equal pay for equal work regardless of sex, and Title VII of the Civil Rights Act of 1964 prohibited discrimination on the basis of sex by employers, labor organizations, and employment agencies.[4]

It was not until the 1970's that cases of sex discrimination in various forms began to reach the Supreme Court based on the Fourteenth Amendment's equal protection clause. Early in the twentieth century, Justice Holmes referred to equal protection as "the usual last resort of constitutional arguments."[5] This

description of the "old" Fourteenth Amendment equal protection was probably well deserved. The elements of the "old" equal protection were satisfied if the classification in a statute was reasonably related to the legislative purpose. Under this rational basis test, a classification or distinction made in a legislative enactment was presumptively constitutional. The classification or distinction had only to be reasonable, nor arbitrary, and in some way rationally related to a valid public purpose.[6] If there was any reasonable justification for the legislative decision, it was upheld. Generally, the rational classification requirement was easily satisfied, and the statute and its sexual discrimination withstood the constitutional challenge.

In the late 1960's and early 1970's the "new" equal protection began to emerge. Although it continued to apply the old rational basis test (minimal judicial scrutiny) to most of the legislation being challenged on equal protection grounds, in certain cases the Court developed and applied a newer, stricter standard for evaluating legislation. Such cases involved either "suspect classifications" or "fundamental interests."[7] The Court requires the demonstration of a compelling state interest in order for such statutes to withstand an equal protection challenge. In effect, the statute

is presumed to be unconstitutional if these interests are present--completely reversing the situation under the rational basis test. This places a burden on the state or federal government which is extremely difficult to meet. Almost always the stricter standard of review is fatal to the challenged statute. The Warren Court's strict scrutiny generally asked whether the means were necessary and whether less drastic means were available to achieve the same (valid) legislative purpose.

Strict scrutiny is applied to relatively few cases. Those classifications the Court has placed under this test are headed by classification or distinction based on race, which originally was the prime target of the Fourteenth Amendment.[8] To classifications based on race, the Court later added illegitimacy[9] and alienage.[10] Justice Stone, in United States v. Carolene Products Co., 304 U.S. 144 (1938), suggested that certain "discrete and insular minorities" might require greater judicial protection and that their situations might therefore "call for a correspondingly more searching judicial inquiry."[11] Generally the classifications which have been subjected to such "more searching" inquiry have several common characteristics. First, these are immutable characteristics over which the individual has no choice or control. Second, these characteristics are immediately identifiable. Third, persons with these characteristics have

been the subject of historical patterns of discrimination and also have been underrepresented in the political process. Persons who possess these characteristics are of special interest to the Court which since at least the early 1940's has protected the minorities' interests in the democratic process, at first tentatively and then with more judicial vigor.

The "new" equal protection has thus come to be known as "tier two" analysis. A law challenged under equal protection rationale is subjected either to the minimal level of scrutiny (rational basis, or "tier one" test) or or the more stringent strict scrutiny ("tier two"). If the tier one analysis is employed by the Court, the law is almost certain to be upheld, but if the justices shift to tier two analysis, the plaintiff is almost always assured of prevailing in the challenge against the law.

Despite the fact that sex is an immutable characteristic and immediately recognizable, and despite the long historical pattern of discriminatory treatment of women who were at the same time excluded from, or underrepresented in, the political process, classifications based on sex have not been termed "suspect" by either the Warren or Burger Courts. Since the 1970's the Court has been characterized by indecision and has been unable to determine just what standard of judicial scrutiny is to be applied to sex-based classifications.

The Burger Court has not consistently applied the two tier test (rational basis or strict scrutiny), but according to some legal commentators it has developed a new middle standard of review with which to consider gender-based distinctions.[12] One commentator has described this newest standard as follows:

> The model suggested by the developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases. Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends . . . . The yardstick for the acceptability of the means would be the purposes chosen by the legislature, not "constitutional" interests drawn from the value perceptions of the Justices.[13]

"Under this 'means focused' equal protection analysis, the Court has avoided expansion of scrict scrutiny," and at the same time it has also avoided the "noninterventionist approach of the rational basis test."[14] Professor Guenther has termed this phenomenon "minimum scrutiny with a bite."[15] As Justice Brennan observed in Schlesinger v. Ballard, 419 U.S. 498, 511 (1975), a case involving the Court's interpretation of the Fifth Amendment's due process clause for equal protection analysis purposes,

> While we have in the past exercised our imaginations to conceive of possible rational

> justifications . . . we have recently declined to manufacture justifications in order to save an apparently invalid statutory classification.[16]

The confusion in the law on this point is evident when one considers that Justice Brennan is attempting to summarize the recent case law on the topic but finds himself in dissent in this particular case because of the delicate balance of power on the Court on the sex-based classification cases.

In order to understand gender-based statutes' treatment under the equal protection clause, an examination of some of the recent decisions is necessary. In Reed v. Reed, supra, the Court purported to apply the rationality test. The case involved the estate of a minor child who died intestate. His parents, who at the time were separated, each filed a petition to serve as the administrator of the child's estate. The father was appointed administrator in accordance with an Idaho statute that gave preference to males when a man and a woman were equally qualified to serve. The United States Supreme Court struck down the Idaho statute as a clear violation of the Fourteenth Amendment's equal protection clause. In applying the rational basis (tier one) test, Chief Justice B ger noted that the sex criterion was wholly unrelated to the objective of the statute and was an arbitrary legislative choice.

> To give mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.[17]

According to one legal commentator, the actual test employed was "tier one-and-a-half" as the legislation was neither subjected to strict scrutiny nor given deferential treatment with a presumption of constitutionality.[18]

Two years later in the case of Frontiero v. Richardson, 411 U.S. 677 (1973), the Court explicitly discussed whether sex was a suspect classification. The Court held unconstitutional a statutory scheme which allowed male members of the armed forces to claim wives as dependents without proof of dependency while at the same time requiring proof of dependency before male dependents could be claimed by women members of the armed services. With only Justice Rehnquist dissenting, the Court held that administrative convenience did not justify the gender-based classification. To this degree, the case did not move beyond the rationale of Reed v. Reed, supra, but four justices were willing to make a clear statement that "classifications based on sex, like classifications based upon race, alienage, or national origin are

inherently suspect" in the language of the plurality opinion of Justice Brennan.[19] In addition to Rehnquist, four other members of the Court rejected Brennan's attempt to move sex into the tier two analysis level. Justice Powell, in an opinion concurring in the judgment, was joined by Chief Justice Burger and Justice Blackmun in citing the pending Equal Rights Amendment for not declaring sex a suspect classification.

> There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.[20]

In Kahn v. Shevin, 416 U.S. 351 (1974), and Geduldig v. Aiello, 417 U.S. 484 (1974), the Court appeared to alter course and sustained two statutes which embodied gender-based classifications. In Kahn, a Florida statute giving preferential tax treatment to widows over

over widowers was upheld. The Court accepted the state's claim that preferential treatment for women was needed because women faced more economic difficulties upon the death of a spouse than did men because men could more easily enter the job market.

> This case is not like Frontiero v. Richardson . . . where the Government denied its female employees both substantive and procedural benefits granted males "solely . . . for administrative convenience. . . ." We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heave burden. We have long held that "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 . . . . A state tax is not arbitrary although it "discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy," not in conflict with the Federal Constitution.[21]

In Geduldig, the Court upheld a state disability insurance program that excluded coverage of disabilities related to normal pregnancy and childbirth. The exclusion was challenged as a violation of the equal protection guarantee. The six-justice majority held that the exclusion was based on physical condition rather than sex.

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups--pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[22]

Under this analysis by Justice Stewart's majority opinion, the question simply became one of whether the exclusion was reasonable. The state had a valid interest in maintaining the self-financing nature of the program and sought to give the best quality coverage at as low a cost as possible rather than having lesser coverage over all risks at the same rate of contribution by the state employees. Because the statute did not make a gender-based classification, according to the majority, only tier one analysis was required--and the statute was upheld.

Not surprisingly, these opinions which upheld sex-based classifications did not go unchallenged. Justice Brennan led three-justice dissents in each case as he continued to assert his view that classification by sex deserved to be placed in the same suspect category as race, alienage, and national origin.

In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the Court returned to the Frontiero side of the line by unanimously striking down a portion of the Social

Security Act. The provision struck down provided benefits for mothers who survived their husbands but not for fathers who survived their wives. Justice Brennan held that the statute unjustifiably discriminated against female wage earners who paid Social Security taxes by affording their survivors less protection than those of males. To hold an opinion of the Court together in this case, however, Brennan was forced to abandon his crusade for suspect category status for gender-based classifications.

Stanton v. Stanton, 421 U.S. 7 (1975), saw the Court examine a Utah statute which established eighteen as the age of majority for females and twenty-one for males in a child-support setting where the divorce decree did not specify the ages for termination of child support obligation. The father terminated support payments for the daughter when she reached eighteen but continued to pay for the son under the statutory obligation. The Utah Supreme Court upheld the statute under a rational basis analysis, but the United States Supreme Court reversed on the ground that such clear-cut sex discrimination could not withstand even this low level of analysis. A similar fate awaited Oklahoma's attempt to establish different ages for males and females for the legal purchase of 3.2 beer in Craig v. Boren, 429 U.S. 190 (1976).

In Orr v. Orr, 440 U.S. 268 (1979), the Court examined a sex-based alimony statute of Alabama, a state which lacks its own equal rights amendment. The plaintiff, ex-wife instituted contempt proceedings against her former husband alleging his failure to make alimony payments. The ex-husband asserted that the Alabama statute which required former husbands, but not former wives, to pay alimony was unconstitutional under the Fourteenth Amendment. In the majority opinion, Justice Brennan emphasized that any "protectionist" statute must further the legislature's goal of bringing needy women to parity to pass Fourteenth Amendment equal protection analysis. This statute, however, did not accomplish that purpose since it applied to both wealthy women and needy women, and the legislative end could be furthered by case-by-case judicial determinations.

> Under the statute, individualized hearings at which the parties' relative financial circumstances are considered already occur . . . . There is no reason, therefore, to use sex as a proxy for need. Needy males could be helped along with needy females with little if any additional burden on the State. In such circumstances, not even an administrative convenience rationale exists to justify operating by generalization or proxy. Similarly, since individualized hearings can determine which women were in fact discriminated against vis-a-vis their husbands, as well as which family units defied the stereotype and left the husband dependent on the wife, Alabama's alleged compensatory purpose may be effectuated without placing burdens solely on husbands. Progress toward fulfilling such a purpose would not be hampered, and it would

> cost the State nothing more, if it were to treat men and women equally by making alimony burdens independent of sex. "Thus, the gender-based distinction is gratuitous; without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids." Weinberger v. Wiesenfeld, supra . . . and the effort to help those women would not in any way be compromised.[23]

The Court reaffirmed its stand in Reed v. Reed, supra, that "the state's preference for an allocation of family responsibilities under which the wife plays a dependent role" is not a legitimate state goal justifying use of a sex-based classification.[24]

Wengler v. Druggists Mutual Insurance Company, 100 S.Ct. 1540 (1980), was closely parallel to Frontiero, supra, when a provision of Missouri's workman's compensation law denied a widower benefits in his wife's work-related death unless he could prove dependence on his wife's earnings but did not require similar proof of a widow whose husband died a work-related death. The Court found this provision to be a violation of the equal protection clause in that it discriminated against both men and women. On the one hand, there was discrimination against women in that their beneficiaries were treated differently from those of men (similar to the analysis in Weinberger, supra), and on the other it discriminated against men by imposing an additional burden of proof. The state's attempted generalization

that women were more likely to be dependent on their spouse did not justify the gender-based statute. The Court noted that the legislative end of providing for needy spouses was an important governmental objective, but it concluded that the method adopted by the Missouri legislature did not substantially relate to the achievement of these ends. The state's claim of administrative convenience failed, as had similar claims in prior cases. Thus, the tier one-and-a-half analysis that had emerged in earlier gender-based equal protection cases allowed the Court to strike down the law without having to declare such classifications "suspect" in Fourteenth Amendment terms.

Likewise, in Kirchberg v. Feenstra, 101 S.Ct. 1195 (1981), the Court struck down a Louisiana statute which allowed a husband to unilaterally execute a mortgage on a home jointly owned with his wife when the state law did not provide the wife with the same authority. Speaking for the majority, Justice Marshall agreed with state's contention that the need to designate one of two spouses as the manager of community property was an important governmental interest. He disagreed, however, with the state's assertion that the automatic designation of the husband as the manager was substantially related to the achievement of the state's valid objective.

In its most recent pronouncement on the issue of

Fourteenth Amendment equal protection and gender-based classification, the Court in Michael M. v. Superior Court of Sonoma County, 101 S.Ct. 1200 (1981), upheld a California statute which defined statutory rape in such a way that only men could be criminally liable under the statute. The Court affirmed the decision of the California Supreme Court; however, unlike the state court, the Court refused to apply the tier two, strict scrutiny analysis to the statute. Upon review, the Court found that the statute withstood analysis under the tier one-and-a-half approach. The legislative objective of reduction in the number of teenage pregnancies was indeed found to be an important governmental interest. The Court ruled the law was substantially related to the achievement of the objective and noted that a gender-neutral statute might frustrate the state's purpose as violations would not be as likely to be reported if the victim was in a position to be subjected to prosecution under the statute. The Court, however, was unable to reach agreement on a single opinion. The argument set forth above is taken from Justice Rehnquist's plurality opinion. Justice Blackmun concurred in the judgment and wrote an opinion based on what appeared to be a rational basis test approach to the facts. Justice Stewart saw fit to write a brief concurring opinion in addition to joining Rehnquist's opinion in which he noted that in

the area of teenage pregnancies, at least, males and females simply were not similarly situated in terms of the risks involved.

An attempt to summarize the case law developed by the United States Supreme Court since Reed v. Reed, supra, must include the following points: (1) the Court has been unwilling to advance gender-based classification to the suspect category previously established for race, alienage, and national origin; (2) it is no longer willing, however, to approach gender-based classification from the mere rational basis approach of tier one analysis; (3) there is a division among the justices as to the correct approach to adopt in these cases in Fourteenth Amendment doctrine at the state level and Fifth Amendment doctrine at the national level; and (4) something of a compromise approach has emerged in which a tier one-and-a-half test is employed by which a law which classifies individuals on the basis of gender must substantially further an otherwise valid governmental policy goal.

C. An Equal Protection Analysis of Oklahoma Child Custody and Support Law

Since the 1970's sex discrimination has been subjected to varying degrees of judicial scrutiny under

the Fourteenth Amendment's equal protection clause. Therefore it is not surprising (especially after the Supreme Court's decision in Orr v. Orr, supra) that statutes concerning family and marital law that classify on the basis of gender are being challenged on this basis. Thus a statute which creates a presumption that, all other things being equal, the mother should be preferred over the father as the legal custodian of a young child may be attacked as being in violation of constitutional equal protection.

In Gordon v. Gordon, 577 P.2d 1271 (Okla. 1978), Okla. Stat. tit. 30, § 11 withstood an equal protection attack when the matter was heard by the Oklahoma Supreme Court. Before an examination of the statute under the various levels of judicial scrutiny required under equal protection analysis is undertaken, a brief review of Oklahoma's child custody law is necessary.

At the beginning of this study it was hypothesized that Oklahoma would not be in the lead among states in terms of adopting alternatives to the traditional sole maternal custody award discussed in Chapter II. On its face, the statutory language confirms the hypothesis.

> § 11. Rules for appointment. In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations:
> 1. By what appears to be for the best interests of the child in respect to its temporal and its

> mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question. 2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father.

The statute emphasizes that the best interests of a child with respect to its moral and temporal welfare are important considerations in making such a determination. The statute also indicates that when parents dispute custody and all other factors are equal, a child of tender years should be given to the mother (although neither parent is entitled to custody as a matter of legal right). If, however, the child is of an age which requires education and preparation for business, the father should be awarded custody. Given the maternal preference built into the tender years doctrine in the law of American jurisdictions, the statutory attempt to prohibit automatic legal rights to custody may almost be negated in the same section of the statute.

While the Oklahoma statute itself certainly does nothing to place the state in the forefront of developments in the law of child custody by way of alternatives to the traditional sole custody award, analysis cannot stop at this point. The first hypothesis could still be negated by creative judicial interpretation of the

statute or by Oklahoma common law.

In child custody cases the Oklahoma appellate courts have repeatedly emphasized the importance of the "best interests" concept as the paramount concern with the determination of which parent should be entitled to custody is secondary. The right of either parent to the custody of a minor child has been viewed as being subject to the court's perception of the child's welfare.[25]

The problem with the Oklahoma courts' strong adherence to the "best interests" language combined with the statutory preference for the mother when the child is of tender years is that the best interest of the child and the preference for the mother are seen as synonymous. Two cases make this point with striking clarity. In Hunt v. Hunt, 315 P.2d 957 (Okla. 1957), a case involving a boy who was eight years old, it was stated that:

> It is generally recognized that the mother is a natural custodian of her child of tender years, and that if she is a fit and proper person other things being equal, she should be given custody in order that the child may receive the attention, care, supervision, and kindly advice, which arises from a mother's love and devotion, for which no substitute has ever been found.[26]

Similarly, in Bruce v. Bruce, 141 Okla. 160, 285 P. 30 (1930), the following language appeared:

> . . . [c]ourts know that mother love is a dominant trait in the heart of a mother, even

> in the weakest of women. It is of divine origin, and in nearly all cases far exceeds and surpasses the parental affection of the father. Every just man recognizes the fact that minor children need the constant bestowal of the mother's care and love. It is for these reasons courts are loath to deprive the mother of the care and custody of her children, and will not do so, as above remarked, unless it clearly appears that she is an improper person to be entrusted with their care and custody.[27]

Bruce placed mother love nothing short of being divine, and the Oklahoma Supreme Court in Gordon v. Gordon, supra, furthered the adherence to the maternal preference doctrine by noting the biological differences between the sexes and declaring mothers to be the favored custodians over fathers when all things were equal.[28] It is apparent that the Oklahoma appellate courts still cling to these antiquated and unproven theories despite current literature which recognizes established associational ties as essential prerequisites for realistic love.[29] Awarding custody on the basis of an arbitrary doctrine which is based on an anachronistic doctrine not founded on empirically based theory surely inhibits inquiry into the best interests of the child. Casting further doubt on unstable ideas is the increasing trend in some jurisdictions that the best interests of the child may not lie with the mother's sole custody and consequent award of joint custody.

The Oklahoma courts also have tended to ignore the

equal footing language of the statute with regard to neither parent having a right over the other concerning custody. In order for the father to obtain custody, he must show that awarding custody to the mother would actually work to the detriment of the child. See Irwin v. Irwin, 416 P.2d 852 (Okla. 1966). The mother's position becomes superior to that of the father, and he must prove other things are not equal by showing the mother's unfitness or incompetence. This places an unfair burden on the father. Proving a mother's unfitness is extremely difficult and often results in bitter court proceedings. The hostility engendered by these proceedings may work against, rather than foster, the best interests of the child.[30]

Oklahoma's courts give little help as to what evidence determines unfitness. In Waller v. Waller, 439 P.2d 952 (Okla. 1968), the court's language is vague and states that

> before a mother is deprived of the custody of her children of tender years, it must clearly appear that she is an improper person to be entrusted with it.[31]

To say the least, this attempt at clarification of the standard was less than successful.

In Roemer v. Roemer, 373 P.2d 55 (Okla. 1962), the father presented undisputed psychiatric testimony that

he was a proper person to care for, nurture, and love his son. Testimony also indicated that the mother appeared to be rejecting the child. The mother, however, was not characterized as a moral degenerate, and the court awarded her custody of the child. It is obvious that courts which fail to include relevant facutal, medical, and psychological evaluations in their deliberations place an onerous burder on the father seeking custody.

Perhaps a minor departure from the established pattern may be perceived in Park v. Park, 610 P.2d 826 (Okla. Ct. App. 1980), in which Judge Brightmire, writing for Division Two of the Oklahoma Court of Appeals, sustained a trial court's award of custody to the father of two boys, ages five and eight, both of whom were in school. In his opinion, Judge Brightmire attempted to play down the importance of the "tender years" doctrine.

> But even though the supreme court has applied the "tender years" integrant a time or two, it has not yet rejected the last clause of the statute specifying that the child be given to the father once it advances beyond the "tender years" plateau--a vague and indistinct age level . . . . And so the result is that even if the "tender years" rule is applicable, the trial court was justified in awarding custody to the plaintiff since there was sufficient eveidence that the children were not of "tender years," other things [were not] . . . equal," the boys were both of an age to require education, and that the youngsters were better off living with their father than with their mother.[32]

Because of the last portion of the above quotation, however, this case cannot be taken as a drastic departure from established law. The Court of Appeals specifically notes that things were not otherwise "equal," and it in general defers to the discretionary award of custody by the trial court. As will be noted later in this chapter, such deference to trial courts in custody cases is sufficiently strong to require at least an inference that is it the deference, rather than a conscious shift in judicial policy, which explains the decision in this case.

From this brief survey of the leading cases on child custody law in Oklahoma, it is apparent that the case law of the state has not moved in the direction of reform mandated by the Supreme Court's interpretation of the statute or by its own creation of policy through the decisional process. The Supreme Court has not been overtly hostile to trial court experimentation in occasional cases, however, so long as it has been satisfied that the "best interests of the child" have been the primary concern of the trial court in arriving at some form of custody other than sole maternal custody. While such cases appear to be unusual from the reported opinions of the appellate courts, at least two can be found. Gilbert v. Gilbert, 460 P.2d 929 (Okla. 1969), and Conrad v. Conrad, 443 P.2d 110 (Okla. 1968),

demonstrate approval of arrangements under which the children spend the school year with one parent and vacations with the other. When, however, the appellate courts face a situation in which the logistical problems of joint custody become burdensome on the child--such as in a week-by-week basis--the sole custody preference again asserts itself, as in Rice v. Rice, 603 P.2d 1125 (Okla. 1979). In this case, the award of sole custody was to the father, but it involved conduct on the part of the mother which supported the finding that the child's best interests would be furthered by paternal custody. In the opinion, it should be noted, the Supreme Court held that the inconvenience of the week-by-week joint custody arrangement was by itself sufficient reason to set aside the dual custody provisions of the original decree.

In view of this analysis of the Oklahoma decisional law, the cases tend to confirm the first hypothesis. Oklahoma has not taken the lead in departing from the traditional sole maternal custody award to experiment with alternatives.

The second hypothesis examined was that the Oklahoma courts are reluctant to intervene to overturn child custody and support decisions rendered by the trial courts of the state. In a line of cases reaching as far back as Gilcrease v. Gilcrease, 176 Okla. 237, 54 P.2d

1056 (1936), the Oklahoma Supreme Court has taken a strong position against interference with trial court discretion unless the trial judge's ruling was contrary to the clear weight of the evidence. Cases specifically relating to child custody and support include Cordilla v. Taylor, 181 Okla. 20, 72 P.2d 375 (1937); Scott v. Scott, 203 Okla. 60, 218 P.2d 373 (1950); Tschauner v. Tschauner, 206 Okla. 586, 245 P.2d 448 (1952); West v. West, 268 P.2d 250 (Okla. 1954); Smith v. Smith, 396 P.2d 1016 (Okla. 1964); and Duncan v. Duncan, 449 P.2d 267 (Okla. 1969). A recent statement by the Court of Appeals confirms that this is still the dominant doctrine in the law of Oklahoma. In Rice v. Rice, supra, it was held that,

> The best interest of the child is the paramount consideration of the trial court, and where it does not appear the court has abused its discretion it will not be reversed on appeal.[33]

So long and clear a line of cases makes it evident that in Oklahoma the trial court's discretion will be given great deference on appeal. There is little, if any, indication of a willingness on the part of the appellate courts to intervene to impose their policy preferences over those embodied in the trial court decisions, and thus the second hypothesis also tends to be confirmed.

The developments over the decade since the United

States Supreme Court's decision in Reed v. Reed, supra, have perhaps made it inevitable that equal protection challenges against the Oklahoma law of child custody and support would be mounted. The third hypothesis to be tested in this study is that the Oklahoma appellate courts will have been reluctant to strike out on their own to apply Fourteenth Amendment equal protection analysis as a means of removing inequities in the state's law concerning child custody and financial support obligations.

The majority of decisions handed down by the United States Supreme Court which have found laws discriminating on the basis of sex unconstitutional have focused on discrimination against women. Discrimination on the basis of gender as a denial of equal protection can apply equally well to men, however.

Oklahoma's child custody and support laws are discriminatory against both men and women. The statute undeniably treats men and women differently. While the Oklahoma Supreme Court in Gordon v. Gordon, supra, found that Okla. Stat. tit. 30, § 11 as it contains the "tender years" presumption withstood an equal protection review under any level of judicial scrutiny. The Court suggested the custodial preference embodied in the statute represents an instance "where the sex-centered generalization actually [comports] to fact," using

language taken from the opinion of the United States Supreme Court in Craig v. Boren, supra.

While the majority of Oklahoma's highest court may have taken this position in terms of equal protection analysis, this study will attempt to show that a more careful analysis of the three levels of scrutiny does not support the ruling in Gordon, supra.

Even under minimal judicial scrutiny, the "tender years" doctrine would not pass constitutional muster. Certainly the legislature is attempting to advance a valid governmental interest in seeking to provide for the welfare of children of divorced families, and this is emphasized in Okla. Stat. tit. 30, § 11 through the adoption of the "best interest" as well as the mental and temporal welfare wording. There is, however, a complete absence of rationality between the maternal preference or "tender years" doctrine and the purpose of the legislature. The Court is completely ignoring current studies which indicate "mothering" to be an aspect of "parenting" rather than a matter of biological necessity which only the mother can fulfill. The old axioms of mothers being "natural" guardians and more suited to the special responsibility of child rearing furthers outmoded stereotypes. The mechanical preference bears no rational relationship to the goal of furthering the "best interests" of the child, and it may in fact

actually work against the child's interests if by its application a court avoids careful consideration of the relative merits of both parents as potential custodians of the child.

If the tier-two, strict scrutiny analysis were to be applied to the "tender years" preference embodied in Oklahoma law, there is little doubt that the Fourteenth Amendment's equal protection clause would be sufficient to invalidate the preference. While the state might be able to assert that there is a "compelling interest" in protecting the welfare of the child, it would be hard pressed to demonstrate that there are no less drastic means to accomplish the valid legislative ends. It is difficult to conceive of more drastic means short of an iron-clad statutory preference for maternal preference to deny the father custody of the minor children, and the state could just as well achieve its valid goal by a case-by-case evaluation of the relative merits of the two parents. Certainly under a strict-scrutiny analysis, a compulsory presumption could not be justified by any claim to administrative convenience.

While the Oklahoma Supreme Court in Gordon v. Gordon, supra, indicated that the current state-law doctrine could withstand any level of equal protection analysis, and while it can be argued that this is an erroneous conclusion on both tier one and tier two, the most likely

basis for a successful attack on the statute in federal court would come under tier one-and-a-half which requires the state to demonstrate that the means adopted substantially further the valid legislative purpose (in this instance, protection of the welfare of the child).

Even if the state were successful in convincing the court that there was some rational basis for the statutory preference (contrary to the assertion above that not even this is accurate in light of the romantic view of "mother love" embodied in the law), more would be required to withstand the more careful scrutiny required by tier one-and-a-half. It should be remembered that hearings on child custody are already a fact of life in Oklahoma divorce law and that either parent may challenge the other's fitness to be awarded custody, even though the "tender years" doctrine provides a clear statutory preference for the mother if all other things are equal. This situation is closely analagous to that in Orr v. Orr, supra, which struck down one-way awards of alimony under the Alabama statute. Recalling Justice Brennan's language in that case,

> Under the statute, individualized hearings . . . already occur . . . . There is no reason, therefore to use sex as a proxy for need.[34]

The identical argument can be made with regard to

child custody decisions. Individualized hearings already take place, and sex is not a constitutionally suitable substitute for careful judicial weighing of the evidence before making a ruling on the merits of the respective claims advanced by the parents.

Even as the "tender years" doctrine embodied in the Oklahoma statute and case law is discriminatory against men, the clause relating to children of an age requiring education and preparation for business discriminates against women. The law presumes, again with all other factors being "equal," that the father is better suited to be custodian at this point in the child's development. To rely upon such a presumption in light of recent developments which have seen more and more women move into the business and professional worlds is just as offensive to equal protection of the laws as is the "tender years" doctrine. It also originated in the stereotype of women being suited only for remaining at home in the "domestic sphere."[35] Again, such statutory presumptions are no substitute for individualized hearings on the merits.

Turning to child support obligations in Oklahoma, Okla. Stat. tit. 10, § 4, imposes the primary responsibility for child support on the father. The mother bears only a secondary responsibility. Even if a divorce decree has given sole custody to the mother,

the father remains obligated to provide primary support. This is true even in face of the statutory language which provides,

> The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inqdequate, the mother must assist him to the extent of her ability.

In Lairmore v. Lairmore, 617 P.2d 892 (Okla. 1980), the Oklahoma Supreme Court simply ruled that this statute was not applicable to child support proceedings arising out of divorce actions insofar as it imposed the support obligation on the custodial parent. Thus, the father continued to be primarily responsible for the financial support of his children even after divorce.

Two cases, however, have indicated that the Oklahoma appellate courts are willing to allow trial courts to inquire into the ex-wife's financial condition when determining the level of the support obligation to be imposed on the father. West v. West, supra, included the ex-wife's property and her financial capacity as factors to be considered in the support judgment, and Walsh v. Walsh, 460 P.2d 122 (Okla. 1969), upheld a trial court's reduction of support payments when the financial status of the ex-wife was substantially enhanced by an inheritance.

Even though these two cases permit trial court analysis of the mother's financial status, they do not require such examination. The constitutional issue presented by the Oklahoma support obligation's automatically being placed on the father again is one of equal protection and the use of sex as a proxy for a reasoned factual determination. Orr v. Orr, supra, is even more closely in point when it comes to the support obligation. Just as in an alimony award, the support obligation requires an assessment of the financial status of the father, and it would not be burdensome to require a similar investigation of the mother's financial condition.

Whether the constitutional analysis presented here in terms of tier-one-and-a-half ultimately prevails in federal court challenges to Oklahoma child custody and support laws will by necessity be a question to be settled in the future. The discussion of the Oklahoma cases, however, indicates that the third hypothesis is confirmed. Oklahoma certainly has not taken the initiative in applying Fourteenth Amendment equal protection analysis to the state's child custody and support law. If anything, the Gordon case, supra, simply brushed past the issue with a mere assertion that the law of the state could withstand any type of equal protection analysis (without any reasoned support).

The Oklahoma Supreme Court's summary rejection of the equal protection argument did not go unchallenged, however. In Boyle v. Boyle, 615 P.2d 301 (Okla. 1980), Justices Hodges, Doolin, and Opala rejected the majority contention that the Oklahoma custody statute is not a gender-based discrimination statute.

> The trend in legislation, legal commentary, and judicial decisions is to abandon fixed rigidity of the tender years presumption in favor of a flexible and unbiased consideration based solely on the best interest of the children coupled with an analysis of the individual characteristics, qualifications, and relationships of the involved parents and children.
>
> The gender preference rule is sexually discriminatory on its face and discriminatory as applied by the courts. It is unconstitutional as a denial of equal protection to both sexes. Although Gordon found the statute to be constitutional under any standard of review, in actuality, it denies equal protection under every standard. The statute is arbitrary, and under enlightened psychological and pragmatic considerations not only does it bear no rational relationship to the objective it seeks to accomplish, it also fails to withstand the test of strict scrutiny.[36]

Because of the 6-3 vote in Boyle v. Boyle, however, the position advanced in the above quotation is a distinctly minority view in the Oklahoma appellate courts, and the Boyle case stands as the most recent decision with which to confirm the third hypothesis of this study.

D. Summary

It was not until the 1970's that the United States Supreme Court made progress with regard to the elimination of laws in the United States which unconstitutionally discriminated on the basis of sex under the Fourteenth Amendment. Beginning with Reed v. Reed, supra, the Court began to examine statutes based on gender classification in a different light than previous discrimination claims. While whe Court was not, and still is not, ready to give these classifications the most severe judicial scrutiny which is accorded to classifications based on race, illegitimacy, and alienage, it has afforded a higher standard of review than the mere "tier one" minimum scrutiny test. This new tier one-and-a-half standard is a mixture of tier one and tier two elements which requires the gender-based classification to substantially further a legislative goal.

It is not surprising, therefore, that statutes concerning family and marital law that classify on the basis of gender are being challenged under the Fourteenth Amendment's equal protection clause.

With regard to the Oklahoma law concerning both child custody and the support obligation, three hypotheses were presented and examined. It was first hypothesized that Oklahoma is not in the lead among

states in adopting alternatives to the traditional sole maternal custody award. Okla. Stat. tit. 30, § 11 on its face gives preference to one sex over the other and case law also establishes the fact that Oklahoma courts disapprove of, and are hesitant to grant, a custody award which differs from the sole maternal custody award. While there have been a few recent exceptions (particularly by one judge), these cases contain language that indicates the decision was based on the "inequality" of the parties and not on an attempt to bring about an abrupt change in judicial policy.

The second hypothesis, that appellate courts are reluctant to intervene and overturn trial court decisions on custody awards and support payments was confirmed by a solid line of cases. Without exception, case law takes the position that absent a ruling which cannot be supported by the evidence, given due deference to the trial judge, the appellate courts will not intervene.

The third and final hypothesis was that Oklahoma appellate courts have been reluctant to strike out on their own and apply Fourteenth Amendment equal protection analysis to correct inequalities in the state's law regarding child support and custody. The Oklahoma Supreme Court in Gordon v. Gordon, supra, summarily rejected any argument that the "tender years" doctrine was unconstitutional under the Fourteenth Amendment's equal

protection clause. The decision met with a good deal of disapproval from legal commentators and from three Supreme Court justices in a later case. The discriminatory language against females with regard to the custody award when children reach the age for education and preparation for business, and the support obligation which places the primary obligation on the father with only secondary liability on the mother, are still awaiting authoritative appellate interpretation in the state courts under equal protection analysis.

In general, it appears that dissent is growing but that Oklahoma custody and child support laws are still discriminatory on their face and as applied when considered in light of the decisions of the United States Supreme Court since Reed v. Reed, supra. By no means can it be argued that the Oklahoma appellate courts have moved forward on their own to apply Fourteenth Amendment equal protection analysis to gender-based classifications in the state's law of child custody and support. The analysis of the case law presented in this chapter confirms the third hypothesis.

FOOTNOTES

[1]C. Pritchett, The American Constitution 546 (1977).

[2]Bradwell v. Illinois, 83 U.S. (16 Wall.) 131 (1873).

[3]Goesaert v. Cleary, 335 U.S. 464 (1948).

[4]Pritchett, supra note 1.

[5]Buck v. Bell, 274 U.S. 200, 208 (1927).

[6]Goesaert v. Cleary, supra note 3.

[7]Shapiro v. Thompson, 394 U.S. 618 (1969).

[8]Pritchett, supra note 1.

[9]Lebine v. Vincent, 401 U.S 532 (1971).

[10]Graham v. Richardson, 403 U.S. 365 (1971).

[11]United States v. Carolene Products Co., 304 U.S. 144, 158 (1938).

[12]Johnston, "Sex Discrimination and the Supreme Court," 23 U.C.L.A. L. Rev. 235 (1975).

[13]Guenther, as quoted in Weiner, "Child Support: The Double Standard," 6 Fla. St. L. Rev. 1317 (1980).

[14]Weiner, supra note 13, at 1330.

[15]Id.

[16]Schlesinger v. Ballard, 419 U.S. 498, 511 (1975).

[17]Reed v. Reed, 404 U.S. 71, 76, 77 (1971).

[18]Johnston, supra note 12.

[19]Frontiero v. Richardson, 411 U.S. 677 (1973).

[20]Id. at 692.

[21]Kahn v. Shevin, 416 U.S. 351 (1977).

[22]Geduldig v. Aiello, 417 U.S. 484 (1974).

[23]Orr v. Orr, 440 U.S. 268, 281, 282 (1979).

[24]Id. at 279.

[25]Conrad v. Conrad, 443 P.2d 110 (Okla. 1968); Earnest v. Earnest, 418 P.2d 351 (Okla. 1966); Gordon v. Gordon, 577 P.2d 271 (Okla. 1978).

[26]Hunt v. Hunt, 315 P.2d 957 (Okla. 1957).

[27]Bruce v. Bruce, 141 Okla. 160, 285 P. 30 (1930).

[28]Gordon v. Gordon, supra note 25.

[29]Foster & Freed, "Joint Custody," Trial, May, 1979, at 27.

[30]Note, "The Father's Right to Custody in Intra-parental Disputes," 49 Tul. L. Rev. 189, 203 (1974).

[31]Waller v. Waller, 439 P.2d 952, 952 (Okla. 1968).

[32]Park v. Park, 610 P.2d 826 (Okla. Ct. App. 1980).

[33]Rice v. Rice, 603 P.2d 1125, 1128 (Okla. 1979).

[34]Orr v. Orr, supra note 23.

[35]Bradwell v. Illinois, supra note 2.

[36]Boyle v. Boyle, 615 P.2d 301, 304 (Okla. 1980).

CHAPTER IV

REFORMS

Child custody and support laws have been enacted in every state to protect minor children. Unfortunately, however, those laws generally have been ineffective and discriminatory. Oklahoma has been no exception to this rule rule.

Okla. Stat. tit. 30, § 11 which provides the rules to be applied in custody awards is arbitrary and confusing. Too many "tests" which have been, and still are, commonly employed render the statute almost meaningless as a guide to the court. The "best interest" test which is found to be the paramount concern or test is accompanied by the "tender years" doctrine which may call for a diametrically opposed pattern of reasoning. The statute is contradictory in that its language provides that neither parent is entitled to the child as a matter of right but with another clause providing that when all other things are equal, the mother is entitled to a child of tender years. If, however, the child is of an age to require education and preparation for business then the father should be entitled to custody. These

presumptions hardly put each parent on an equal footing with the other parent. The discrimination of the statute on its face as it applies to each parent is dependent upon the age of the child; however, as sole maternal custody is the traditional award, it is arguable that even when the child is past "tender years" (whenever that may be) the father will not receive custody anyway.

In determining an award of custody of a child the proper relationship of the child, the parents, and the state must be recognized and maintained. The objective and the "test" employed should be that which is in the best interest of the child. The rights of both parents should be equal and superior to those of the state or any other person. The rights of the parents as well as the "best interest" of the child should be considered.

Obviously, according to the literature, children are better off if the parents can agree to share child-rearing responsibilities and physical custody. Even if parents cannot agree, the children's need for love and influence from both parents does not disappear in face of the parents' inability to agree. Therefore, it can be justifiable to award joint custody (if it is found not to inhibit the best interests of the child). The lead of some courts in promoting joint custody through awards of it even when the parents cannot agree should be followed.

For these reasons, it is suggested that joint custody be the statutory preference and awarded unless there is clear evidence that it would not be in the best interests of the child to do so. The determination of the appropriateness of joint custody would be the task of the trial court judge. The most important factors of a joint custody determination should be worked out by the parents and presented to the court for approval. Dealing with unresolved details (particularly logistics) should be handled in a manner similar to that currently used for visitation. The decree should require "reasonable" actions on the part of both parents but leave the details in their hands absent a showing of abuse on the part of one parent or the other.

For those problems which present themselves at a later time, and on which the parents cannot agree, the custody decree would provide that these shall be determined by the court. Family conciliatory counseling should be provided within the judicial system at all stages of the process, whether at the time of the initial decree or at some later stage involving modification of the court's original order.

While the literature suggests that joint custody actually decreases the need for further adjudication, in some cases there may actually be an increase in the rate of returning to court. If so, the potential

benefits to the concerned families (parents and children alike) should offset the increased quantity of litigation by an improved quality of the custody arrangement.

A proposed statute which would accomplish many of these goals was drafted by Taussig and Carpenter.[1] While it may not be the perfect solution, it certainly is superior to the Oklahoma statutory and case law in that the "best interests" of the child and parents are to be considered, there is no gender-based constitutionally suspect classification system, and joint custody is made the presumed norm rather than a novel exception in child custody awards. The language of this proposed statute may be found in Appendix A.

When joint custody cannot be awarded because of circumstances which are demonstrated by clear evidence to make such an award contrary to the best interests of the child, sole custody may be the only alternative. In this instance, however, there is no place for gender-based preference. Sex cannot be used as a proxy for a careful weighing of all the facts, including the conduct of the parents toward the child and their interaction as it affects the child. As the United States Supreme Court noted in Orr v. Orr, supra, detailed hearings already are a fact of life in these matters. The time has come to remove sexual stereotypes from the law of custody. The parents' respective claims to

custody over their child or children deserve more than a reflex based on tradition which in turn is based on a view of men and women as suited only for mutually exclusive roles in life.

Just as Oklahoma custody doctrine is outmoded and discriminatory, especially in light of recent social science findings, so are the support obligation aspects of the law of the state. The imposition of primary liability on the father perpetuates a double standard which might have been justified at one point in history but is no longer consistent with the facts. The financial responsibilities of a family are increasingly borne by men and women alike.

While women's earnings are still less than those of men when considered as a whole, these conditions are becoming more equalized. The present situation certainly warrants replacement of the double standard in child support with a case-by-case analysis of individual circumstances and an equitable apportionment of the support obligation. One way to accomplish the legitimate goal of supporting the child without relying on a sex-based stereotype would be to make use of a pro rata contribution by each parent based on earning capacity. As was the case with custody, such an approach is constitutionally preferable to a legal obligation on the part of either parent which may not be consistent with

the facts in any particular divorce situation.

Given the demonstrated reluctance of the Oklahoma appellate courts to take steps on their own to implement a more equitable standard in child custody and support obligation cases, the model statute provided in Appendix A together with similar legislation dealing with the support obligation may well be the best way to deal with the problem in Oklahoma. Such reform is long overdue, and it should be made an important issue on the legislative agenda.

FOOTNOTES

[1]Taussig & Carpenter, "Joint Custody," 56 N.D.L. Rev. 233 (1980).

SELECTED BIBLIOGRAPHY

A. Cases

Bill v. Bill, 290 N.E.2d 749 (Ind. Ct. App. 1972).

Bradwell v. Illinois, 83 U.S. (16 Wall.) 131 (1873).

Bruce v. Bruce, 141 Okla. 160, 285 P. 30 (1930).

Conrad v. Conrad, 443 P.2d 110 (Okla. 1968).

Cordilla v. Taylor, 181 Okla. 20, 71 P.2d 373 (1937).

Craig v. Boren, 429 U.S. 190 (1976).

Duncan v. Duncan, 449 P.2d 267 (Okla. 1969).

Frontiero v. Richardson, 411 U.S. 677 (1973).

Geduldig v. Aiello, 417 U.S. 484 (1974).

Gilbert v. Gilbert, 460 P.2d 929 (Okla. 1969).

Gilcrease v. Gilcrease, 176 Okla. 237, 54 P.2d 1056 (1936).

Gordon v. Gordon, 577 P.2d 1271 (Okla. 1978).

Hoyt v. Florida, 368 U.S. 57 (1961).

Hunt v. Hunt, 315 P.2d 957 (Okla. 1957).

Irwin v. Irwin, 416 P.2d 852 (Okla. 1966).

Kahn v. Shevin, 416 U.S. 351 (1974).

Kirchberg v. Feenstra, 101 S.Ct. 1195 (1981).

Lairmore v. Lairmore, 617 P.2d 892 (Okla. 1980).

Michael M. v. Superior Court of Sonoma County, 101 S.Ct. 1200 (1981).

Minor v. Happersett, 88 U.S. (21 Wall.) 163 (1875).

O'Brien v. O'Brien, 485 S.W.2d 674 (Mo. Ct. App. 1972).

Orr v. Orr, 440 U.S. 268 (1979).

Park v. Park, 610 P.2d 826 (Okla. Ct. App. 1980).

Reed v. Reed, 404 U.S. 71 (1971).

Rice v. Rice, 603 P.2d 1125 (Okla. 1979).

Roemer v. Roemer, 373 P.2d 55 (1962).

Schlesinger v. Ballard, 419 U.S. 498 (1975).

Scott v. Scott, 203 Okla. 60, 218 P.2d 373 (1950).

Smith v. Smith, 396 P.2d 1016 (Okla. 1964).

Stanton v. Stanton, 421 U.S. 7 (1975).

Strauder v. West Virginia, 100 U.S. 303 (1880).

Taylor v. Louisiana, 419 U.S. 522 (1975).

Tschauner v. Tschauner, 206 Okla 586, 245 P.2d 448 (1952).

United States v. Carolene Products Co., 304 U.S. 144 (1938).

Waller v. Waller, 439 P.2d 952 (Okla. 1968).

Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

Wengler v. Druggists Mutual Insurance Co., 100 S.Ct. 1540 (1980).

West v. West, 268 P.2d 250 (Okla. 1954).

B. Books

W. Blackstone, 1 Commentaries (1765).

H. Clark, Handbook on the Law of Domestic Relations (1968).

J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973).

M. Roman & W. Haddad, The Disposable Parent (1969).

C. Articles

Bratt, "Joint Custody," 67 Ky. L.J. 271 (1978/1979).

Conti, "Child Support: His, Her, or Their Responsibility," 27 De Paul L. Rev. 707 (1976).

Daniels, "Domestic Relations--Child Custody--Reasonable Visitation or Divided Custody?" 42 Mo. L. Rev. 136 (1977).

Dover, "Financial Equality in Marriage and Parenthood: Sharing the Burdens as Well as the Benefits," 29 Cath. U.L. Rev. 733 (1980).

Folberg & Graham, "Joint Custody of Children Following Divorce," 12 U. Cal. D.L. Rev. 523 (1979).

Foster & Freed, "Joint Custody," Trial, May, 1979, at 27.

Foster & Freed, "Joint Custody: Legislative Reform," Trial, June, 1980, at 23.

Gouge, "Joint Custody: A Revolution in Child Custody Law?" 20 Washburn L.J. 328 (1981).

Grief, "Joint Custody: A Sociological Study," Trial, May 1979, at 32.

Koenig, "Joint Custody: A Viable Alternative?" 60 Mich. B.J. 170 (1981).

Henszey, "Visitation by a Non-custodial Parent: What is the 'Best Interest' Doctrine?" 15 J. Fam. L. 214 (1977).

Nielson, "Joint Custody: An Alternative for Divorced Parents," 26 U.C.L.A.L. Rev. 1084 (1979).

Note, "Best Interest of the Child: Maryland Child Custody Disputes," 37 Md. L. Rev. 641 (1978).

Note, "Child Custody: A Lawyer's Perspective," 52 Conn. L.J. 317 (1979).

Note, "The Tender Years Presumption in Child Custody Determination," 81 W. Va. L. Rev. 179 (1978).

Peck, "The Tender Years Doctrine in Kansas Child Custody Cases," 49 J. Kan. B.A. 22 (1980).

Poole, "Maternal Preference and the Double Burden: Best Interest of Whom?" 38 La. L. Rev. 1096 (1978).

Rabbino, "Joint Custody Awards: Toward the Development of Judicial Standards," 48 Fordham L. Rev. 105 (1979).

Radcliff, "Pennsylvania Child Custody: The Tender Years Doctrine--Reason or Excuse," 81 Dick. L. Rev. 776 (1977).

Ramey, Stender & Smaller, "Joint Custody: Are Two Homes Better than One?" 8 Women's L.F. 559 (1979).

Schiller, "Child Custody: Evolution of Current Criteria," 26 De Paul L. Rev. 242 (1977).

Schmehl, "Calculation of Child Support in Pennsylvania," 81 Dick. L. Rev. 793 (1977).

Solomon, "The Father's Revolution in Custody Cases," Trial, May, 1979, at 32

Taussig & Carpenter, "Joint Custody," 56 N.D.L. Rev. 223 (1980).

Weiner, "Child Support: The Double Standard," 6 Fla. St. L. Rev. 1317 (1980).

Weitzman & Dixon, "Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce," 12 U. Cal. D.L. Rev. 473 (1979).

APPENDIX

In cases of dissolution of marriage where are minor children, the trial court shall, unless it find that it would be detrimental to the child, award the right to make child-rearing decisions jointly to both parents.

The specific arrangement of the joint custody shall be by arrangement of the parties which the court shall accept and approve unless it finds that the agreement of the parties is unconscionable. A lack of agreement between the parents may be taken into account by the court in deciding whether to award joint child-rearing rights. Aspects not agreed upon by the parties shall be decided by the court.

In determining the unresolved details where joint custody is awarded, whether to award joint custody, and the arrangement and details of custody and visitation the court on hearing shall determine the matters consistent with the best interests of the child, parents, and society, in that order. The court shall consider all relevant factors; the wishes of the child's parents as to his custody; the wishes of the child as to his custodian; the interaction and inter-relationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interests; the child's adjustment to his home, school, and community; and the court shall not consider conduct

of a proposed custodian that does not affect his relationship to the child.

In cases where the parents have joint custody, they shall collectively determine the child's upbringing, including his education, health care, and religious training, subject to court supervision with power of modification.

VITA

Kelly Murphy Spurrier

Candidate for the Degree of

Master of Arts

Thesis: SEX DISCRIMINATION IN OKLAHOMA CHILD CUSTODY AND SUPPORT LAW

Major Field: Political Science

Biographical:

Personal Data: Born in Tulsa, Oklahoma, August 19, 1956, the daughter of Mr. and Mrs. E. E. Murphy

Education: Graduated from Cushing High School, Cushing, Oklahoma, in May, 1974; received Bachelor of Science degree in Political Science, Economics, and General Administration from Oklahoma State University in 1978; completed requirements for the Master of Arts degree at Oklahoma State University in December, 1981.

Professional Experience: Graduate teaching assistant, Oklahoma State University, Department of Political Science, 1979-1981.

Professional Organizations: Pi Sigma Alpha National Political Science Honor Fraternity; American Society for Public Administration; Phi Kappa Phi