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Over the last 30 to 40 years, sweeping changes have occurred in societal attitudes toward divorce. These changes have been reflected in the laws governing divorce and child custody as well as in the increasing rate of divorce in the United States. Just as divorce laws have changed, making the divorce process much less difficult, there have also been dramatic changes in custody and visitation statutes. From the mid-1800s until the 1960s, maternal preference was the general rule in the large majority of judicial custody decisions. During this period, the mother's "natural ability" to nurture the child was considered as a primary factor in custody decisions. This attitude was especially prominent with regard to younger children or children of the "tender years." This "tender years doctrine" developed in some jurisdictions through legislation and in others through judicial opinion. Reference was frequently made in judicial opinions to the mother's "natural superiority" in caring for children. There was little public controversy regarding this attitude since it seemed to reflect societal values at that time. Thus, from the second half of the nineteenth century until the 1960s, legal norms dictated that custody of children belonged with the mother unless she was incapable of providing appropriate care, usually due to mental illness or moral depravity as evidenced by adultery.[1] A finding of inability to care for the children was usually related to a finding of fault in the divorce proceedings.

In the 1950s and 1960s, there was a subtle shift in the tender years doctrine and maternal preference. Less emphasis was being placed on the mother's natural superiority in judicial opinions. The courts began to emphasize the "best interests of the child," giving more discretion to judges to consider other factors in custody decisions. In many jurisdictions, however, "the best interests of the child" standard was simply another name for the "tender years doctrine" since most courts held that maternal custody was usually in the best interests of the child. This shift in legal thought, however, did open the door for the consideration of other factors. This situation resulted in slightly more frequent assignment of custody to fathers although this shift was far from substantial.[2]

In the 1970s, social attitudes were again shifting. The preference for maternal custody was being questioned on several fronts. More and more women were entering the workforce as both part-time and full-time employees. Thus, differences between men and women were being reduced with regard to their roles in the family. In addition, the feminist movement was questioning the assumption that only women could do housework and raise children. As a result, fathers were becoming more involved in the parenting process at the same time that divorce was becoming more frequent. During this period, two opposing positions were often considered by the courts when determining the best interests of the child with regard to custody decisions. According to the traditional viewpoint, children need a stable home life and, therefore, should not be shuttled back and forth from parent to parent on a regular basis. The parent with whom the child lives should have almost exclusive responsibility for raising the child, with only occasional visitation with the noncustodial parent. This position, which had been used for many years, was supported by many mental health professionals at the time and was reflected in the book entitled *Beyond the Best Interests of the Child* by Goldstein, Freud, and Solnit.[3] Goldstein et al. also held that there should be no court-ordered visitation and that visitation with the noncustodial parent should be solely at the discretion of the custodial parent. This publication was frequently cited in judicial decisions as well as in the legal literature.

The alternative viewpoint, which was emerging in the 1970s, reflected parental desires for joint custody or a more equal sharing of time with and responsibility for the children following divorce. This position reflected changing middle-class lifestyles as well as demands from fathers' groups for more active participation in the parenting process. As a result of pressure from parents' groups, joint custody legislation was passed rather quickly and with little public opposition in the late 1970s and early 1980s. This legislation provided equal access to children for both mothers and fathers. At about the same time, states were also passing gender neutral custody legislation, which eliminated maternal preferences and the tender years doctrine. There was a great deal of opposition to joint custody in the legal and, to a lesser extent, the mental health communities. As indicated above, this approach ran counter to the opinions of some in the mental health community. There was also a great deal of resistance from both attorneys and judges since joint custody represented a dramatic change in the traditional approach to this situation.[4]

At the present time, all states have provisions for gender

Footnotes

1. Jay Folberg, Joint Custody and Shared Parenting (1979).
2. Herbert Jacob, Silent Revolution: The Transformation of Divorce Law in the United States (1988).
3. Joseph Goldstein et al., Beyond the Best Interests of the Child (1979).
4. Jacob, *supra* note 2.

neutral custody laws and joint custody arrangements. Since maternal custody is no longer automatic, and distinctions between maternal and paternal roles have been blurred over the past 30 years, judges must now consider a number of issues that were not relevant in the past. There has been a great deal of speculation in the legal literature, however, that many judges still have a preference for maternal custody.[5]

In approximately 90% of divorces involving minor children, the parents reach agreement on custody and visitation arrangements. This agreement is then approved by the court. In the remaining 10% of the cases, custody is contested and the decision must be made by the court. Judges are expected to make their decisions in the best interests of the child. This standard, however, gives judges a tremendous amount of discretion in making these decisions. Clearly, every judge has his or her own set of opinions and presumptions regarding custody issues, which affect rulings. A number of authors have suggested that judges are frequently free to impose their own personal values due to the indeterminacy of the substantive standards that apply in custody decisions.[6] These conclusions are based primarily on case law. Case law itself, however, is not necessarily representative of judicial attitudes in general, since published cases represent only a small minority of actual decisions.

Judges' assumptions regarding various issues related to custody decisions have been assessed through the use of judicial surveys in research done by the present author. In one study, Louisiana judges' preferences for various custody and visitation arrangements, as well as some of the factors considered in these decisions, were examined.[7] A similar study was completed with Quebec Superior Court judges.[8] In a third study, a variety of issues dealing with Louisiana judges' attitudes regarding custody issues were examined.[9]

THE SURVEY OF JUDGES

The purpose of the present study was to further assess judicial assumptions regarding custody decisions, specifically as they relate to the maternal preference issue. Several authors have suggested that maternal preference may still be the rule in

5. Joan B. Kelly, *Current Research on Children's Post-divorce Adjustment,* 31, FAM. & CONCILIATION CTS. REV. 29 (1993).
6. Robert J. Levy, *Custody Investigations in Divorce Cases,* 76, AM. B. FOUND. RES. J. 713 (1985).
7. Leighton E. Stamps et al., *Judicial Attitudes Regarding Custody and Visitation Issues,* 25 J. DIVORCE & REMARRIAGE 23 (1996).
8. Leighton E. Stamps & Seth Kunen, *Attitudes of Quebec Superior Court Judges Regarding Child Custody and Visitation Issues, 25* J. DIVORCE & REMARRIAGE 39 (1996).
9. Leighton E. Stamps et al., *Judges Beliefs Dealing With Child Custody Decisions,* 28 J. DIVORCE & REMARRIAGE 3 (1997).

many courts, with children of most ages, but especially when children of the "tender years" (young children) are involved, in spite of gender neutral custody laws in all jurisdictions.[10] This type of presumption could be justified if the judge assumes that mothers are superior to fathers as parents, especially with younger children. Thus, given this assumption, it would be in the child's best interests to be placed in the custody of the mother. The impact of the age of the judge was also assessed in the present research. It was hypothesized that older judges may be more inclined to favor maternal preference, while younger judges may tend to view mothers and fathers on a more equal basis.

In the present study, judges hearing custody cases in Alabama, Louisiana, Mississippi, and Tennessee were surveyed by mail. The number of judges responding in each age bracket was as follows:

30-39	5
40-49	60
50-59	47
60-69	26
70-79	7
No age listed	4

Because of the small numbers in the 30-39 and 70-79 brackets, they were excluded from the analysis. A list of items was constructed to measure the judges' beliefs with regard to maternal preference in custody decisions. The judges were asked to respond to each item on a scale of 1 - 5, with 1 indicating "Strongly Agree" and 5 indicating "Strongly Disagree." These items, shown below, were grouped into five pairs, with one item of each pair referring to the mother and an identical item referring to the father. The results were evaluated by examining the distribution of the judges' responses, divided by age groups. In the following tabulation, judges' responses of 1 or 2 were listed under "Agree," and responses of 4 or 5 were listed under "Disagree." Responses of 3 were considered "Neutral" or "Undecided" and were not listed below. The numbers under each category indicate the percentage of judges who gave that response.

A response of "Agree" to the "a" version of each item above indicates a preference for the mother, while a response of "Agree" to the "b" version indicates a preference for the father. The reverse holds with regard to the "Disagree" category. A response of "Disagree" to the "a" version indicates a preference for the father while a response of "Disagree" to the "b" version indicates a preference for the mother.

When examining the "Agree" column for items 1-4, the results show far more "Agree" responses for mothers than for fathers, which is indicative of a fairly consistent tendency toward maternal preference by the judges. There is also a definite pattern showing stronger signs of maternal preference with older judges, compared to younger judges. Some of these findings are highlighted in the following paragraphs.

JUDICIAL VIEWS ON MATERNAL PREFERENCE

ITEM NO.	AGE	AGREE	DISAGREE
1.a. Mothers are better parents than fathers due to more experience raising children.	40-49	14	45
	50-59	21	32
	60-69	28	24
1.b. Fathers are better parents than mothers due to more experience raising children.	40-49	0	63
	50-59	0	76
	60-69	0	71
2.a. Mothers are the preferred custodian when children are under the age of 6.	40-49	36	26
	50-59	35	31
	60-69	71	4
2.b. Fathers are the preferred custodian when children are under the age of 6.	40-49	0	56
	50-59	1	66
	60-69	1	68
3.a. Children of all ages show better adjustment when living with the mother.	40-49	3	49
	50-59	10	39
	60-69	16	20
3.b. Children of all ages show better adjustment when living with the father.	40-49	0	52
	50-59	0	66
	60-69	0	63
4.a. Mothers, by nature, make better parents than fathers.	40-49	5	39
	50-59	28	38
	60-69	46	17
4.b. Fathers, by nature, make better parents than mothers.	40-49	0	68
	50-59	6	70
	60-69	0	84
5.a. A mother who has performed most of the child's nurturing and maintenance activities would be favored in custody decisions.	40-49	97	3
	50-59	85	7
	60-69	96	0
5.b. A father who has performed most of the child's nurturing and maintenance activities would be favored in custody decisions.	40-49	95	0
	50-59	90	2
	60-69	81	4

10. Laura E. Santilli & Michael C. Roberts, *Custody Decisions in Alabama Before and After the Abolition of the Tender Years Doctrine,* 14 LAW & HUM. BEHAV. 123 (1990).

In examining Item 1, the percentage of judges agreeing that mothers are better parents than fathers due to greater experience, increases as the age of the judge increases. The percentage of judges disagreeing with the statement decreases as the age of the judge decreases. None of the judges felt that fathers were better parents than mothers due to greater experience.

Item 2 deals with the tender years doctrine, regarding custody of younger children. The percentage of judges agreeing that mothers are the preferred custodians of younger children increased dramatically with the age of the judge, with 36% of the youngest judges agreeing and 71% of the oldest judges agreeing. Only 2% of the judges in the entire sample felt that fathers are the preferred custodians for younger children.

On Item 3, only a small minority of judges agreed that children show better adjustment while living with the mother. Even on this item, however, the percentage agreeing was greatest for the oldest judges. None of the judges agreed that children showed better adjustment while living with the father.

On Item 4, the judges were asked whether fathers or mothers made better parents. With regard to mothers, there was a definite age trend, with only 5% of the youngest judges agreeing that mothers make better parents than fathers, while 46% of the oldest judges agreed with that statement. Only 6% of the entire sample agreed that fathers make better parents than mothers, with no age differences evident.

Item 5 deals with the primary caretaker standard. Judges were asked if the parent who had performed most of the child's care-taking activities would be favored in custody decisions. The judges in all age groups overwhelmingly agreed, whether that parent was the mother or father. Even on this Item, however, there was a slight tendency toward maternal preference among the oldest age group. When the question referred to a mother who had done most of the care-taking activities for the child, 96% of the oldest judges agreed that she would be favored in custody decisions. When the same question referred to a father who had done most of the child care, only 81% of the oldest judges agreed that the father would be favored in the custody decision.

The findings of maternal preference in the present study are consistent with various reviews of appellate cases as well as the opinions of a number of professionals in both the mental health and legal fields, all of which indicate that maternal preference still plays a definite role in many custody determinations. For example, Melton et al. concluded that maternal preference still remains the norm in many jurisdictions, after reviewing appellate decisions in South Carolina, Tennessee, and Virginia.[11] Emery described maternal preference as one of the "unarticulated values," "implicit norms," or "rules of thumb" used in many jurisdictions to guide judicial decisions in custody cases.[12] Dotterweich and McKinney reviewed state bar association studies of gender bias from Maryland, Missouri, Texas, and Washington. In summarizing the results of surveys of judges in these states, they concluded that maternal preference is still common among judges. On one item used in these surveys, judges were asked "Are custody awards made based on the assumption that young children belong with their mothers?" The results indicated that 44% of the judges answered "Always or Usually" indicating support for the tender years doctrine and maternal preference by almost half of the judges. Item 2 in the present study dealt with the same issue, with 42% of all judges agreeing that children under the age of 6 should be with their mothers. Dotterweich and McKinney also reported that judges were asked, "Do courts give fair consideration to fathers?" Thiry-three percent of the judges answered "Always or Usually," indicating that two-thirds of the judges believed that fathers *do not* usually get fair consideration in the courts.[13]

These types of assumptions held by judges often seem consistent with certain societal norms. In many groups within the United States, there is still a strong belief that mothers should raise the children, while the role of the fathers should be secondary.

The fact that older judges exhibit a greater tendency toward maternal preference seems to make intuitive sense. Since judges are given a great deal of latitude in deciding that which is in the best interests of the child, it does not seem unusual that a judge's personal experiences and beliefs may play a role in those decisions regarding child custody. Judges who are currently in their 60s would have grown up primarily during the 1930s and 1940s when divorce was rare and family roles were fixed, with mothers caring for children and doing housework, while fathers were employed to provide income for the families. The beliefs that children belonged with the mother were widely accepted within American society during that era and were also reflected in court cases at that time. These attitudes regarding family roles, established during childhood, and reinforced by society in general at the time, are difficult to change later in life.

Judges who are currently in their 40s and 50s grew up primarily during the 1950s to 1970s. That time in our history was a period of dramatic cultural change, with many women entering the work force, resulting in drastic changes in family structure and roles. The divorce rate also increased dramatically, with many children living in single-parent homes. Many of these judges have had firsthand experience with working mothers, fathers taking an active role in child care, single-parent homes, and a general blurring of the roles between men and women.

A judge could justify this belief of maternal preference if he/she believed that mothers, in general, are better parents than fathers and that awarding custody to the mother is usually in the best interests of the child. This belief appears to be prevalent among a substantial proportion of judges both in the present study as well as in other studies. Although mothers are the primary custodial parent in 80% to 85% of all divorces involving children, the psychological literature indicates that children's overall adjustment following divorce does not differ between those living with custodial mothers versus custodial

11. Gary B. Melton et al., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS (1997).
12. Robert Emery, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT (1999).
13. David Dotterweich & Michael McKinney, *National Attitudes Regarding Gender Bias in Child Custody Cases, 38* FAM. & CONCILIATION CTS. REV. 208 (2000).

fathers. This finding holds true even with infants and young children.[14] Thus, the research literature does not appear to support the presumption that maternal preference is usually in the best interests of the child. Given the findings of equal parenting abilities for mothers and fathers, it would seem that the best interests of the child would be served through a gender neutral assessment of the family as called for in state laws.

CONCLUSIONS

Judges' attitudes and opinions can affect custody arrangements in a number of ways. The most obvious impact occurs in contested cases when judges must make the final decisions, based on the information presented to the court. Judges' attitudes can also have an impact on the process outside of the courtroom. Approximately 90% of custody matters are settled before the parents come to court. Although these arrangements are considered voluntary, the negotiations are always completed in the context of that which is permitted within the legal system, or as Mnookin and Kornhauser have described, "Bargaining in the shadow of the law."[15] A more accurate description might be "bargaining in the shadow of the law and the judges' assumptions." Thus, if an attorney is aware of the attitudes of a particular judge or a group of judges regarding various custody-related issues, this information will have a very definite impact upon the advice that is given to the client with regard to decisions either to reach an agreement out of court or continue through the legal process in which a judge will make the custody decision. It has even been suggested that a judge's known attitudes may affect the recommendations of court-ordered custody investigations by mental health professionals, as the investigator sometimes tries to present recommendations that are consistent with a judge's previous rulings.[16] Thus, the attitudes of a judge can reach well beyond the decisions that are actually made by the court in disputed cases.

The indeterminancy of statutes dealing with divorce and custody issues allows the judiciary a great deal of flexibility in dealing with the widely varying circumstances of individual families. At the same time, this flexibility places tremendous responsibility upon the court to define the "best interests" for a given family. The manner in which a particular judge may define "best interests" will depend on the assumptions that the judge is making about child development and parent-child relationships. These assumptions may be based on information from various sources. These sources may include the judge's own family experiences, going back to his or her own childhood, the judge's experience as a parent, "common sense" derived from a variety of life experiences, the judge's participation in continuing education and self-study dealing with child development, information derived from mental health experts who have testified in the court, tradition and precedents from the legal system, and many other possible sources. Given the results of the present study, indicating that judges' attitudes about custody issues may vary depending on their generation and previous experiences, it may be worthwhile for all judges dealing with these types of cases to examine their own assumptions and determine how these assumptions relate to current sources of information and research on this topic.

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14. MARK BORNSTEIN, HANDBOOK OF PARENTING (1995).
15. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 YALE L. J. 950 (1979).
16. Levy, *supra* note 6.