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NOTES & COMMENTS

EXAMINING OKLAHOMA'S MATERNAL PREFERENCE DOCTRINE: *GORDON v. GORDON*

I. INTRODUCTION

In the last decade, sex discrimination has been subjected to varying degrees of constitutional review. Therefore it is not surprising that statutory influences on familial relationships which rely upon the differences in sex are being challenged on this basis. Thus a statute which creates a presumption that, all other things being equal, the mother shall be preferred over the father as the legal custodian of a young child may be attacked under the fourteenth amendment as a denial of equal protection.

Recently, one such statute¹ withstood an equal protection review in *Gordon v. Gordon*.² This note will analyze the decision rendered by the Oklahoma Supreme Court in this case. In so doing, it will be necessary to examine the application of this statute and the level of scrutiny by which its constitutionality should be judged. Initially, however, it is necessary to consider the factual setting of the case as

1. OKLA. STAT. tit. 30, § 11 (1971). The statute appears as follows:

§ 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.

2. 577 P.2d 1271 (Okla. 1977). Justices Irwin, Berry, Simms, and Doolin concurred with Chief Justice Hodges. Justice Williams joined Justice Barnes who concurred in part and dissented in part. Vice Chief Justice Lavender dissented.

well as the historical precedents within Oklahoma for the court's decision.

Following a line of Oklahoma cases,³ the decision in *Gordon* reversed the trial court which had awarded custody of a three year old child to the father despite absence of proof of the mother's unfitness. The court maintained that, although the testimony revealed that each parent was equally capable of fulfilling the needs of the child, the mother would presumptively be better able to further the best interests of the child⁴ pursuant to title 30, section 11 of the Oklahoma Statutes,⁵ commonly referred to as the "maternal preference doctrine". Despite the father's contention that the statute inherently denied him equal protection through a gender-based distinction, the court declined to find that a suspect classification, mandating strict judicial scrutiny, had been created.⁶ Conversely, the court adhered to the belief that the statute was based upon a rational distinction⁷ which supported the presumption and could only be overcome by evidence that the mother was an unfit parent. While the court acknowledged landmark decisions of the United States Supreme Court regarding sex discrimination,⁸ its analysis, although lacking substantial support, concluded that the statute was reasonably related to the pronounced legislative objective.⁹ Additionally, the court stated that the post-trial special master's award of temporary custody to the mother was correct on the basis of the facts presented at that time and that further consideration of those facts was not needed at this time to determine visitation rights and child support requirements.¹⁰

3. See e.g., *Conrad v. Conrad*, 443 P.2d 110 (Okla. 1968); *Earnst v. Earnst*, 418 P.2d 351 (Okla. 1966); *Irwin v. Irwin*, 416 P.2d 853 (Okla. 1966); *Roemer v. Roemer*, 373 P.2d 55 (Okla. 1962); *Kuykendall v. Kuykendall*, 290 P.2d 128 (Okla. 1955).

4. 577 P.2d at 1277.

5. OKLA. STAT. tit. 30, §11 (1971).

6. 577 P.2d at 1277.

7. *Id.* The court substantiated this decision on the basis of *Cox v. Cox*, 532 P.2d 994, 996 (Utah 1975), which found wisdom in traditional family patterns holding that the children should be in the care of their mother.

8. See *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

9. The objective is basically the maintenance of the child's "best interests". 577 P.2d at 1276.

10. *Id.* at 1277.

II. APPLICATION OF THE MATERNAL PREFERENCE DOCTRINE IN OKLAHOMA

Title 30, section 11 of the Oklahoma Statutes provides guidelines for judicial determination of custody or guardianship of minor children. 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. Alternatively, if the child is at an age which requires education and preparation for business, the father should be awarded custody.¹¹ This statutory language indicates that the "best interests" of the child¹² is the primary concern, while the determination of which parent should be entitled to custody is secondary. The Oklahoma courts have repeatedly emphasized the importance of the "best interest" concept in considering the question of custody of minor children by regarding the welfare of the child as the paramount concern.¹³ The right of a parent to the custody of a minor child has been viewed as being subject to the court's perceptions of the advancement of the child's welfare.¹⁴

11. Although the entire statute may be constitutionally questionable, this paper will only evaluate the subsection which prefers the mother as the custodial parent of a child of tender years.

The issues raised in OKLA. STAT. tit. 30, § 11(2) are similar to those discussed in relation to the maternal preference rule. A presumption which assumes a father will necessarily be more able to provide educational guidance or business preparation could be factually disputed and would be subject to the same constitutional arguments discussed in the text.

12. In 1925, Judge Cardozo enunciated the best interests theory which presently pervades most child custody legislation throughout the United States. He stated:

The chancellor in exercising his jurisdiction . . . does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child. . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child," or as between one parent and another. . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.

Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925).

13. See *Conrad v. Conrad*, 443 P.2d 110 (Okla. 1968); *Earnst v. Earnst*, 418 P.2d 351 (Okla. 1966); *Perry v. Perry*, 408 P.2d 285 (Okla. 1965).

14. *Adams v. Adams*, 294 P.2d 831 (Okla. 1956); *In re Davis*, 206 Okla. 405, 244 P.2d 555 (1952). See *Gordon v. Gordon*, 577 P.2d at 1277, where the Court stated: "[T]his statute is not concerned entirely with the 'rights' of parents to their children. In addition to, and far beyond, their rights, the paramount purpose of the statute is to serve the welfare and best interests of children." However, the Oklahoma courts have suggested that they consider the claims of both parents, under their natural rights, to custody of the children in a divorce action. *Sullins v. Sullins*, 280 P.2d 1009 (Okla. 1955). In a proposed change of custody care, the best interest of the child should be the paramount guide, but rights and desires of father and mother should be given consideration where both are shown to be qualified and worthy to have such custody. *Mahan v. Moore*, 198 Okla. 67, 175 P.2d 345 (1947). Unfortunately, the claimed equality of treatment to-

The Child's Best Interests

The problem with the courts' strong adherence to both the "best interests" axiom and the wording of the statute is that the preference for the mother and the welfare of the child are seen as synonymous. The illogical merging of the two principles is best exemplified in *Irwin v. Irwin*¹⁵ which raises the love of a mother to a quality divine in origin. The rhetoric of *Irwin*, plus the fact that the mother receives custody of the children in well over ninety percent of all divorces,¹⁶ illustrates that Oklahoma courts equate the best interests of the child with a mother's right to custody. An arbitrary doctrine such as Oklahoma's maternal preference rule inhibits inquiry into the true best interests of the child.¹⁷

Citing a decision of the Supreme Court of Utah,¹⁸ the court in *Gordon* found that the welfare of children *is* furthered by adherence to

ward both fathers and mothers becomes suspect in view of the language of the custody statute itself and its actual application by the courts.

15. 416 P.2d 853 (Okla. 1966).

[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 intrusted with their care and custody.*

Id. at 858.

16. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101, 102 (1962).

17. See Foster & Freed, *Child Custody*, 39 N.Y.U.L. REV. 423, 441 [hereinafter cited as Foster & Freed]; UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1971), which sets forth the standards for court determination of custody, as follows:

§ 402. (Best Interest of Child) The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

See also Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51 (1973) [hereinafter cited as Podell, Peck & First]. The preference of the child in custody disputes is only one aspect of the best interests test. However, in most cases the child's welfare will be best served if placed with the preferred parent. Foster & Freed, *supra* note 17, at 442, 443. The child's preference also raises interesting constitutional questions related to the area of children's rights. Traditionally, the parents' wishes have been equated with the child's wishes; but, particularly in custody disputes, children are emerging as autonomous, independent beings whose personal interests demand attention. See Baskin, *State Intrusion Into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1390 (1974).

18. Cox v. Cox, 532 P.2d 994 (Utah 1975).

the traditional notion that essential biological differences make mothers better custodians than fathers.¹⁹ By this finding, the Oklahoma court clings to the concept that theoretical ties of love and affection supersede established, associational ties which current writers in the behavioral sciences recognize as essential prerequisites for realistic love.²⁰ Awarding custody of children to a mother on the basis of an anachronistic concept²¹ that mothers by their unique nature have psychologically healthy bonds of love toward their children creates a preference based on theory, not on the actual, realistic relationship between a parent and child. In contrast to this questionable presumption, an increasing trend toward awarding custody to fathers illustrates a

19. *Gordon v. Gordon*, 577 P.2d at 1277. *Warren v. Warren*, 365 P.2d 974 (Okla. 1961). "Mother love" must be recognized as a major factor in cases dealing with children of tender years. *Kuykendall v. Kuykendall*, 290 P.2d 128 (Okla. 1955). If a mother is a fit person to care for her children, the courts will not deprive her of them. See also *Blackwood v. Blackwood*, 204 Okla. 317, 229 P.2d 602 (1951), which held that where the mother was a fit custodian, the court had a duty to award exclusive custody to her. In *Roemer v. Roemer*, 373 P.2d 55 (Okla. 1962), although there was competent expert evidence to show that the father would have been a proper person to have custody of the son, the trial court was found not to have abused its discretion in awarding custody to the mother.

20. *Foster & Freed*, *supra* note 17, at 437.

21. The popular theories before the 1960's concerning maternal deprivation, however, did at one time lend some scientific credibility to the assumptions made by the Oklahoma statute. J. Bowlby, *MENTAL CARE AND MENTAL HEALTH* (1952). The author also states:

[W]hen deprived of maternal care, the child's development is almost always retarded physically, intellectually, and socially—and symptoms of physical and mental illness may appear . . . Skeptics may question whether the retardation is permanent and whether the symptoms of illness may not easily be overcome. The retrospective and follow-up studies make it clear that such optimism is not always justified and that some children are gravely damaged for life. This is a sombre conclusion which now must be regarded as established.

Id. at 11. See also Bradbrook, *The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes*, 11 *FAM. L.J.* 562, 563 (1973) [hereinafter cited as Bradbrook]. The flaw with the studies emerges, though, when it is pointed out that such studies are one-sided and present no information about "paternal" deprivation. Therefore, the maternal deprivation studies should be viewed as data dealing with the question of "parental" deprivation in general. *Id.* at 563. If one accepts the conclusion that maternal deprivation by itself will have detrimental effects on a child, one must assume the father is incapable of undertaking the "mothering function" which indeed is what the legislature and courts have done in implementing the maternal preference statute in child custody disputes. Such an interpretation ignores the more recent evidence that "mothering" is not necessarily a biological function, that deprivation of a father's time and affection also may have detrimental effects on a child, and that courts should not mechanically assume a mother is more able to devote time and attention to a child's mental and physical welfare, given the present sociological climate of this country. As women have begun to loosen the traditional ties that bound them only to the role of homemaker and mother, so too have men begun to be less bound to the role of "breadwinner" and more cognizant of the fact that being a loving, involved parent is a worthwhile endeavor. See *Watts v. Watts*, 350 N.Y.S.2d 285, 290 (1973). Mothering is a function which can be and often is independent of the sex of the person providing it. Yarrow, *Maternal Deprivation: Toward an Empirical and Conceptual Re-Evaluation*, 58 *PSYCH. BULL.* 475-79 (1961). "The prenatal tie of a child to its mother is biological, but after birth the tie is socially and culturally prescribed." Lott, *Who Wants the Children?*, 28 *AM. PSYCH.* 573, 581 (1972).

recognition in some jurisdictions that the best interests of the child cannot logically be equated with automatic custody in the mother.²²

The Father's Burden of Proving Unfitness

In conjunction with erroneously equating a child's "best interests" with a mother's preferred right to custody, Oklahoma courts have construed the statute as requiring that, in order for the father to obtain custody, he must clearly show that awarding custody to the mother would actually work to the child's detriment. In effect, the courts have ignored the equal footing language of the statute.

Irwin, which is cited in *Gordon*, elevates this construction to a judicial pronouncement "[t]hat this case is a proper one for application of the above mentioned statutory preference of the mother (as it pertains to children of tender years) and of the rule which requires it to *clearly appear* that she is 'an improper person' before being deprived of that preference."²³ Such interpretations of the statute virtually eliminate any practical significance of the phrase "other things being equal." The mother's position becomes superior to the father's, and he must prove other things are not equal, by showing the mother's parental incompetence.²⁴ Realistically, although a father may be an adequate and quite competent custodian for his children and could serve their best interests, preference is given the mother unless he can prove her to be unfit.

Proving a mother's unfitness is extremely difficult and often results in court proceedings which, because of a prolongation of the bitterness and hostility frequently present in a divorce action, work against rather than foster the best interests of the child.²⁵ Oklahoma courts speak in generalities about fitness and provide little guidance as to what specific

22. "In 1967, over 15,200,000 wives worked outside the home and the number of two income families is ever growing to meet higher costs of educating children, provide health care and keep up with the American standard of living." Rawalt, *Litigating Sex Discrimination Cases*, 3 FAM. L. Q. 44 at 44 n.1 (1970). For an extensive list of recent cases in which custody was awarded to the father, see Foster & Freed, *supra* note 17, at 436-37 n.64.

23. *Irwin v. Irwin*, 416 P.2d 858 (Okla. 1966); *accord*, *Waller v. Waller*, 439 P.2d 952 (Okla. 1968).

24. The *Gordon* decision in effect announced that a mother must be shown to be unfit before custody will be awarded to a father. "The gender preferences of 30 O.S. 1971, §11, are intended to direct the trial court's determination of custody only when the scales are relatively balanced between the attributes of both parents, and the statute should be used only in such a situation." 577 P.2d at 1277.

25. Comment, *The Father's Right to Child Custody in Interparental Disputes*, 49 TUL. L. REV. 189, 203 (1974).

evidence will meet this high standard.²⁶ In *Roemer v. Roemer*,²⁷ for instance, the defendant father introduced undisputed psychiatric, testimony that he was a proper person to provide nurturing and love for his son and might better serve his emotional growth. The testimony also indicated that the mother appeared to be rejecting the child. The mother was not characterized as a moral degenerate, however, and the court awarded her custody of the child.

Exactly what guidelines Oklahoma courts apply in determining the question of "fitness" remains unclear.²⁸ The standard is an elusive thread tightly intertwined with the presumption favoring the mother. In many states, the criteria considered by a judge often fails to include relevant factual, medical, psychological and social evaluations.²⁹ Similarly, the Oklahoma courts' failure to consider such pertinent evaluations result in an onerous burden for the father seeking custody. He must challenge the mother's parental fitness before his own qualifications are placed on an equal footing in consideration of the child's best interest.

III. THE CONSTITUTIONALITY OF THE MATERNAL PREFERENCE DOCTRINE

The maternal preference rule embodied in the Oklahoma statute is discriminatory on its face and discriminatory as applied by the courts. Because of the arbitrary nature of the maternal preference presumption, the lack of any rational relation between the statute and the best interests of a child, and the nature of the interests involved in custody determinations, the statute should be susceptible to challenge under the constitutional standards of equal protection.³⁰

26. The language of the courts often reads like the vague standard in *Waller v. Waller*, 439 P.2d at 956, which 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."

27. 373 P.2d 55 (Okla. 1962).

28. The Oklahoma Supreme Court in *Irwin* agreed with the *Shrout v. Shrout*, 244 Or. 521, 356 P.2d 935 (1960), relied on by the defendant-father, which stated that a mother's moral transgressions were relevant in determining what is best for the children, and whether she would be a fit guardian. However, the court qualified this aspect of "fitness" by pointing out that "adultery, like rape and bribery, is easy to charge but often difficult to prove." *Irwin v. Irwin*, 416 P.2d 853, 857 (Okla. 1966). See *Brim v. Brim*, 532 P.2d 1403 (Okla. 1975). The court took custody of a three year old child away from a white mother because of her sexual relationship with a black man in her home. The court refused to rule on her fitness per se, but couched its decision in terms of the welfare of the child.

The courts have broad discretion with only common sense as a guide, and may consider facts such as excessive drinking, illicit affairs, emotional instability, or financial status when determining fitness of a child's prospective custodian. Podell, Peck & First, *supra* note 17, at 61-6.

29. Foster & Freed, *supra* note 17, at 438.

30. Another constitutional challenge to this statute arises under the due process clause of the fourteenth amendment. This may be accomplished by using the irrebuttable presumption doctrine. This doctrine maintains that due process is violated where a legislative classification is

The Oklahoma statute undeniably treats men and women differently with respect to child custody. In determining whether this classification can withstand constitutional scrutiny, it must be

overbroad or underinclusive, and the presumption created by the statute is irrebuttable. See Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644, 645 (1974) [hereinafter cited as Bezanson]. The terminology employed with this analysis parallels the language of equal protection analysis, except that the result is said to be based on a conclusive or irrebuttable presumption. The main advantage of this analysis is that the court can avoid many policy decisions which it would be forced to make under an equal protection review. The disadvantage is that, if fully applied, the doctrine could invalidate all questionable classifications and require that opportunities for individual exemptions from the challenged statutes be allowed. *Id.* at 656-58; see generally Note, 87 HARV. L. REV. 1534 (1974). "This remedy, (required hearing) does not prevent the state from discriminating on the basis of the criteria chosen by the legislature. It only requires that the individual be allowed to challenge the discrimination." *Id.* at 1548. The Oklahoma statute qualifies for review under this doctrine. Recent cases decided on "conclusive" presumption grounds indicate another available avenue for achieving equality under the law. Although there is increasing dissatisfaction with the irrebuttable or conclusive presumption doctrine among constitutional scholars, the Supreme Court has continued recently to apply the doctrine in sex discrimination cases. Following *Stanley v. Illinois*, 405 U.S. 645 (1972), other cases have employed this type of due process analysis. In *Vlandis v. Kline*, 412 U.S. 441 (1973), a Connecticut statute for tuition payment purposes in the state university system presumed that the classification of students as residents or non-residents remained the same throughout their school attendance. The Court held the statutory presumption to be in violation of due process because the eligibility for a lower tuition payment was predicated upon a student's residence, but a student was not allowed to introduce any evidence to prove the fact of residence.

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) involved a mandatory pregnancy leave rule requiring pregnant teachers to quit teaching five months before the expected birth of the child and preventing their return for at least three months after its birth. The Court characterized the regulations as imposing a penalty on teachers who decided to have children. The mandatory termination provisions were said to "contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary." *Id.* at 644. Because the rules arbitrarily intruded into the area of marriage and family, they violated the due process clause of the fourteenth amendment.

The Court in *United States Department of Agriculture v. Murray*, 413 U.S. 508 (1973), summarized the value of the irrebuttable presumption analysis: "[W]e must assess the public and private interests affected by a statutory classification and then decide in each instance whether individualized determination is required or categorical treatment is permitted by the Constitution." *Id.* at 519.

In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court struck down an Illinois statute which presumed an unwed father to be unfit to raise his children by weighing the governmental function against the private interest affected by the state action and then holding that custody schemes were subject to the requirements of the due process clause. The *Stanley* Court stated, "[P]rocedure by presumption is always cheaper and easier than the individualized determination. But when . . . the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly [jeopardizes] important interests of both parent and child. It therefore cannot stand." 405 U.S. at 656-57. The classification of the statute was fatally imprecise since all unmarried fathers are not necessarily unfit guardians. Similarly, to presume conclusively that a mother is a more fit guardian than a father in a custody dispute arising out of a divorce action establishes an imprecise classification. Although it may be argued that the statute does not deem fathers "unfit," and thus bar custody altogether, the inference is that they are "less fit," and the actual effect of that inference overburdens either parent's basic civil right, a substantial interest in the upbringing of children. The inaccurate perceptions of the legislature of who is qualified to "mother" children are aligned with what is perceived as advancing the welfare of a child. These two presumptions combine to form a statute which must fail for overbreadth. Bezanson, *supra* note 30 at n.34.

evaluated under the equal protection analysis set forth by the Supreme Court. The traditional minimal scrutiny analysis comes into play when neither a fundamental right nor a suspect classification is involved.³¹ The standard of review known as strict scrutiny is triggered by the presence of a fundamental interest or suspect classification. This standard requires that the state show a compelling interest to justify use of a classification treating persons differently. One commentator has stated that "[t]he Warren Court's strict scrutiny repeatedly asked whether the means were necessary and whether less drastic measures were available to achieve the same purpose."³²

A third basis of analysis is emerging as the Court strives to formulate a doctrine applicable to gender-based discrimination cases. This standard, acknowledged as the "substantial interest" test, demands that legislative classifications have a substantial relationship to legislative purposes.³³

The majority of the decisions which have found sexually discriminatory laws unconstitutional have focused on discrimination against women. However, discrimination as a denial of equal protection can also operate against men, particularly in the area of family law, where judicially recognized interests are at stake.³⁴ The Supreme Court of Oklahoma in *Gordon* summarily rejected any constitutional challenge to the statute in question by suggesting that the custodial preference embodied in the statute represents an instance "where the sex-centered generalization actually comports [*sic*] to fact,"³⁵ and is constitutional under any standard of review. However, a more thorough analysis of the three standards of review reveals that the view of the Oklahoma

31. Justice Warren, in describing the traditional minimal scrutiny approach to equal protection, has stated:

[The Equal Protection Clause] permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); see also, Gunther, *The Supreme Court—1971 Term, Foreword: In Search of Evolving Doctrine on A Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 19-20 (1972) [hereinafter cited as Gunther].

32. Gunther, *supra* note 31, at 21.

33. *Id.*

34. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972). *Stanley* recognized the right of a parent to the care and comfort of his children. The privacy interests of a family and the rights of parents to make decisions regarding their own children are a few of the substantial interests which are central to family law issues.

35. *Gordon v. Gordon*, 577 P.2d at 1277, citing *Craig v. Boren*, 429 U.S. 190 (1976).

Supreme Court is not supported by current constitutional theories nor by scholars in the area of family law.

Minimal Scrutiny

The dearth of legislative history in Oklahoma precludes an investigation into the recorded purposes of this statute. However, a fair inference with respect to the purpose of the statute, based on its emphasis on the "best interests of the child" doctrine, would be that Oklahoma lawmakers subscribed to the widely accepted theory that a child's mental and temporal welfare are of utmost importance.³⁶ Certainly, the legislature, having a strong interest in the welfare of the state's children often articulated under the doctrine of *parens patriae*, would not disclaim this purpose. The opinion in *Gordon* categorically stated that the classification of the Oklahoma statute serves the objective of assuring that children of divorced parents will be placed with the parent best able to care for them.³⁷ However, application of even the minimum constitutional standard of review to the statute reveals an absence of any rational relationship between the maternal preference/tender years doctrine and the purpose of the legislature.³⁸

The old theories of maternal deprivation can now be read as general indications of the effects of "parental" deprivation. This interpretation is increasingly valid in a society which recognizes that "mothering" is not necessarily a function of biology.³⁹ Consequently, a mechanical preference for the mother bears no reasonable relationship to furtherance of the ideal "best interests of the child." The concept that "mothers are 'natural' guardians of children . . . is merely a corollary of the axiom that a woman's place is in the home and that child rearing is her special responsibility."⁴⁰

Continuing to enforce rigidly the legislative assumption that sex must be the determining factor of a parental role often ignores the

36. See notes 12-14, *supra* and accompanying text.

37. 577 P.2d at 1276.

38. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). See also Comment, *The Tender Years Presumption: Do the Children Bear the Burden?*, 21 S.D.L. REV. 332, 346 (1976).

39. Mead, *Some Theoretical Considerations on the Problem of Mother-Child Separation*, 24 AM. J. ORTHOPSYCH. 471 (1954). "[T]he insistence that child and biological mother . . . never be separated . . . is a new and subtle form of anti-feminism in which men—under the guise of exalting the importance of maternity—are tying women more tightly to their children than has been thought necessary since the invention of bottle feeding and baby carriages." *Id.* at 477. Comment, *The Father's Right to Child Custody in Interparental Disputes*, 49 TUL. L. REV. 189, 200, n.66.

40. Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. REV. 617, 627 (1974) [hereinafter cited as Johnston].

child's real welfare. Moreover, the statute lacks any redeeming rationality since the maternal preference rule negates any arguable operation in a child's favor by forcing the father to prove the mother's unfitness in order to assert his rights to custody, even though he may be the more suitable parent.

Seemingly influenced by this changing notion of roles in American society the Supreme Court, in *Reed v. Reed*,⁴¹ carefully applied what many scholars have argued was the rational relationship test to an Idaho statute discriminating against women as estate administrators by mandatorily preferring men over women. The justices disposed of the argument that administrative convenience was a legitimate state objective and declared that the statute was unconstitutional. To give preference to males over females "merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary choice forbidden by the equal protection clause of the fourteenth amendment."⁴² Preferring mothers in custody disputes has the advantage of efficiency as did the statute in *Reed*, since fairly weighing the information about both parents and rendering a decision in the interests of the child is a burdensome task. However, efficiency is no longer a constitutionally valid reason for upholding an arbitrary and irrational classification.⁴³

The Court in *Reed*, also acknowledged that the family was an appropriate province for some state regulation, and stated that whatever the state's interest in "avoiding intrafamily controversy," it could not achieve this end "solely on the basis of sex."⁴⁴ Despite the legitimacy of state regulation of familial relations, the Oklahoma statute questioned in *Gordon* creates an impermissible distinction between the male and female parent.

Strict Scrutiny

Arguably, the Oklahoma statute qualifies for a more rigorous standard of review than mere rationality. "For classifications regarded as 'suspect' and for rights ranked as 'fundamental' the strict scrutiny standard applies, a standard requiring the proponent of the classification to

41. 404 U.S. 76 (1971). See Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV. 159-160 [hereinafter cited as Getman].

42. *Reed v. Reed*, 404 U.S. 76, 76 (1971).

43. *Id.* Cases prior to *Reed* had upheld administrative convenience over challenges to gender based classifications. See *Hoyt v. Florida*, 368 U.S. 57 (1961); *Muller v. Oregon*, 208 U.S. 412 (1908); see also Getman, *supra* note 41, at 159-160.

44. 404 U.S. at 77.

demonstrate that a compelling state interest justifies it."⁴⁵ Irrespective of the language of *Gordon* denouncing sex as a suspect classification, the fact that existing Oklahoma law denies one parent the right to raise his child should require a careful examination of the legislative purposes and means, and the state should be precluded from making any effective "administrative convenience" argument. It is the presence of a fundamental interest which would arguably bring the statute under strict scrutiny analysis.⁴⁶ The Supreme Court has frequently emphasized the importance of the family and the essential right to conceive and raise one's children.⁴⁷ In *Stanley v. Illinois*,⁴⁸ where a putative father sought custody of his illegitimate children, the Court virtually recognized the custody of one's children as a fundamental right by stating that the father's interest in retaining custody was "cognizable and substantial."⁴⁹

Within the framework of both parents' rights to their children, the parent of either sex should have equal treatment and consideration in a custody determination. The state has traditionally asserted an interest in the regulation of family relationships which purportedly justifies classification of individuals.⁵⁰ However, the private interest of the parents overrides the state interest in family matters.⁵¹ Furthermore, the equality demanded provides a more adequate effectuation of the state's goal in finding the most appropriate guardian, from the standpoint of child's welfare, than does the preferential presumption now in force.⁵²

45. Ginsberg, *Gender in the Supreme Court*, 1975 SUP. CT. REV. 11. [hereinafter cited as Ginsberg].

46. Recognized fundamental rights include the right to vote, *Carrington v. Rash*, 380 U.S. 89 (1965); the right to interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); the right of a parent to the comfort of his child, *Stanley v. Illinois*, 405 U.S. 645 (1972).

47. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

48. 405 U.S. 645 (1972).

49. *Id.* at 652.

50. *Labine v. Vincent*, 401 U.S. 532, 538 (1971). The state was allowed to deny inheritance rights to illegitimate children as an aspect of its "power to make rules to establish, protect, and strengthen family life. . ."

51. *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972).

52. *Foster & Freed*, *supra* note 17, at 441. Qualifications of both parents in regard to custody would be evaluated and the burden of proving a mother's unfitness would be lifted. The language of Justice Brennan in *Frontiero*, although used in making reference to discrimination against women, is applicable when arguing for either sex where gender based discrimination surfaces:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .' And what differentiates sex from such non-suspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic

Another significant case bearing on an analysis of the Oklahoma statute is *Weinberger v. Wiesenfeld*,⁵³ an unanimous Supreme Court decision declaring unconstitutional the portion of the Social Security Act⁵⁴ which granted benefits to a deceased husband's widow and minor children, but which extended no such benefits to a widower. Although the decision did not actually delineate which standard of review was being applied, the case was decided subsequent to *Frontiero v. Richardson*,⁵⁵ and the Court held that "the gender based distinction . . . is indistinguishable from that invalidated in *Frontiero*."⁵⁶ The classification was found to be based on an archaic and overly broad generalization. Enabling a surviving parent to remain at home to care for a child was shown as the purpose of the statute; however, the classification established by the statute discriminated against some surviving children solely on the basis of the gender of the surviving parent.⁵⁷ The Court in effect sought role neutrality in the statute and accomplished it by striking down a gender classification, while arguing for a functional description, i.e., sole surviving parent.⁵⁸

An obvious analogy can be drawn between the statute in *Weinberger* and the Oklahoma statute. Citing *Stanley*, the Court in *Weinberger* proclaimed that "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised,' [which] undeniably warrants deference and, absent a powerful countervailing interest, protection."⁵⁹ The father in a custody dispute against the mother should be placed on an equal footing with the mother to afford protection of his fundamental right to rear his children and to prevent discrimination among the plethora of children whose interests are at stake in custody disputes, but whose interests may be overlooked when custodial preference is statutorily awarded to the mother.

frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Frontiero v. Richardson, 411 U.S. 677, 686-87 (plurality opinion) [emphasis added]. Therefore, there does exist an alternative means less restrictive and more advantageous with respect to the best interests of the children involved in custody proceedings; that is, equal consideration of both parents in the selection process of a minor child's custodian.

53. 420 U.S. 636 (1975).

54. 42 U.S.C. § 402(g) (1971).

55. 411 U.S. 677 (1973).

56. 420 U.S. at 642.

57. *Id.* at 651.

58. See Ginsberg, *supra* note 45, at 14.

59. 420 U.S. at 652.

In *Frontiero v. Richardson*,⁶⁰ a plurality of the Court embraced the argument that sex is an inherently suspect classification because "the sex characteristic frequently bears no relation to ability to perform or to contribute to society."⁶¹ The Court struck down a statute which allowed male Air Force officers to claim their wives as dependents but denied female officers the same right unless they could prove they provided more than fifty percent of their husbands' support.

Although a majority of the United States Supreme Court has hesitated in finding sex a suspect classification, if strict scrutiny was applied to the Oklahoma statute in question based upon sex as a suspect classification, as suggested in *Frontiero*, the statute would most certainly fail the test. A similar Oklahoma statute,⁶² which discriminated against wives in the right to sue for loss of consortium, was struck down as unconstitutional by the Tenth Circuit Court of Appeals. In that case, *Duncan v. General Motors Corp.*,⁶³ the Court relied directly on *Frontiero*, proclaiming sex to be a suspect classification and noting that husband and wife "both have equal rights in the marriage relation, and both should receive equal protection under the law."⁶⁴

Admittedly, the state has a compelling interest in providing well-qualified guardians for minor children, but an arbitrary preference for mothers over fathers can no longer be viewed as a legitimate distinction between the sexes.

The Intermediate "Substantial Relationship" Test

Hesitancy in recognizing sex as a suspect classification and dissatisfaction with traditional equal protection analysis has characterized the mood of the Supreme Court with regard to gender-based classifica-

60. 411 U.S. 677 (1973).

61. *Id.* at 684-87. Although *Frontiero* may be considered a breakthrough in the area of sex discrimination in that a plurality of the Court embraced the view of sex as a suspect classification, a majority was not yet willing to take this approach because of the far reaching implications. However, many lower courts have recognized the suspect nature of gender classifications and have relied directly upon the *Frontiero* decision, or at least agreed with such an approach while noting the plurality opinion. For cases which accept *Frontiero* without qualification, see *Duncan v. General Motors Corp.*, 499 F.2d 835, 838 (10th Cir. 1974); *Andrews v. Drew Municipal School Dist.*, 371 F. Supp. 27, 35-36 (N.D. Miss. 1973); *Ballard v. Laird*, 360 F. Supp. 643, 647-48 (S.D. Cal. 1973); *Tang v. Ping*, 209 N.W.2d 624, 627 (N.D. 1973). For cases in support of *Frontiero*, noting the lack of precedential value, see *Johnston v. Hodges*, 372 F. Supp. 1015, 1018 (E.D. Ky. 1974); *Gilpin v. Kansas High School Activities Ass'n., Inc.*, 377 F. Supp. 1233 (D. Kan. 1974); *Weisenfeld v. Secretary of Health, Education & Welfare*, 367 F. Supp. 981, 990-91 (D. N.J. 1973); *Stern v. Massachusetts Indemn. & Life Ins. Co.*, 365 F. Supp. 433 (E.D. Pa. 1973). See also note 65, *infra*.

62. OKLA. STAT. tit. 32, § 15 (1971).

63. 499 F.2d 835 (10th Cir. 1974).

64. *Id.* at 838.

tions.⁶⁵ Alternatively, the Court has applied the emerging model of review which blends strict and minimal scrutiny in requiring a substantial relationship to legislative purposes when a statute is constitutionally challenged.⁶⁶ "The more modest interventionism, [by contrast] would permit the state to select any means that substantially furthered the legislative purpose."⁶⁷ With this approach, the means rather than the legislative ends undergo constitutional scrutiny. Although the language in *Reed* made reference to the traditional minimal scrutiny standard, many constitutional scholars feel the approach was means oriented⁶⁸ and that for the first time gender-based classifications were receiving somewhat closer scrutiny.⁶⁹ As discussed previously in relation to *Reed*, the quarrel with the Oklahoma statute does not focus on the legitimate state goal of providing for a child's best interests in selecting the most appropriate guardian to foster his welfare. Rather, the

65. Since *Frontiero*, the Court has been unable to sustain a pattern in its method of tackling gender-based claims of discrimination and consequently has handed down some recent decisions which can be characterized as retreats from the emerging scheme, or at least inconsistencies in the overall picture. In *Kahn v. Shevin*, 416 U.S. 351 (1974), the Court upheld a Florida law granting real property tax exemptions to widows but not widowers. The majority accepted the argument that the statute was remedial and under the *Reed* standard bore a fair and substantial relation to that stated objective. *Id.* at 353-55. The decision did not deal with the assertion that remedial legislation such as the Florida tax exemption for widows reinforces the double standards which limit women's opportunities. See *Ginsberg*, *supra* note 45, at 6. Arguably, *Kahn* should be read narrowly and be limited only to questions involving taxation. The Court implied such an interpretation in saying "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the states have large leeway in making classifications." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)." 416 U.S. at 359.

Geduldig v. Aiello, 417 U.S. 484 (1974), was a similar retreat from the stricter review the Court had begun to employ in sex discrimination cases. Here the Court disallowed a claim under California's disability insurance program for work loss because of normal pregnancy. Declining to view the statute as sex-based, the Court reasoned that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-97. Commentators suggest that the Supreme Court's opinion grew out of an "assessment of childbirth not as a short-term medical episode, but as an integral part of a long term process, a process commencing with pregnancy and ending year later when child-rearing work is done." See *Ginsberg*, *supra* note 45, at 10. See generally *Johnston*, *supra* note 40, at 678-80.

Another step backward was taken when the Court handed down *Schlesinger v. Ballard*, 419 U.S. 498 (1975). Here, the Navy's mandatory discharge requirement for male officers who failed to be promoted was a shorter term than the thirteen year leeway allowed female officers before discharge for lack of promotion. The discrepancy was allowed to stand, however, since the Court found a rational basis for the classification. *Id.* at 508. See also *Califano v. Goldfarb*, 430 U.S. 199 (1977), citing *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero v. Richardson*, 411 U.S. 677 (1973). The Court concluded that the Social Security Act survivor's benefits were awarded discriminatorily because widowers had to prove at least 50% dependency on their deceased wives' income while widows received their husbands' benefits regardless of dependency.

66. See *Gunther*, *supra* note 31, at 19-20.

67. *Id.* at 21.

68. See *Gunther*, *supra* note 31, at 30; see also *Getman*, *supra* note 41, at 163.

69. *Ginsberg*, *supra* note 45, at 3.

argument centers on the means by which the state attempts to further that goal through its statutory discrimination between the parents. This middle tier standard of review provides the most appropriate vehicle for a constitutional challenge in spite of the holding in *Gordon*.⁷⁰ Under the "substantial relationship" standard, the method of appointing guardians enunciated in the Oklahoma statute cannot logically be said to "significantly" relate to legislative purposes.⁷¹

Stanton v. Stanton,⁷² citing *Reed* as controlling, took judicial notice of the changing roles of women in American society.⁷³ The Court consequently found that the different ages of majority for boys and girls in regard to parental support obligations violated the equal protection clause. Quoting from *Reed*, the Court noted that "[a] classification 'must be reasonable, not arbitrary, and must rest upon sound ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"⁷⁴ In conclusion, the Court stepped beyond strict adherence to one particular standard of review and announced it "unnecessary . . . to decide whether a classification based on sex is inherently suspect"⁷⁵ because the age differential between male and female failed to survive an equal protection attack "under any test—compelling state

70. 577 P.2d at 1276.

71. In *Weber v. Aetna Casualty Co.*, 406 U.S. 164 (1972), the Court invalidated a Louisiana workmen's compensation law which denied death benefits to illegitimate children of a decedent, while allowing the benefits for legitimate children. The classification between legitimate and illegitimate children bore no "significant" relationship to the purpose of supporting dependent children generally. There, as in this situation involving the Oklahoma statute, the state interest in regulating family relationships was acknowledged but the form of regulation was not acceptable. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Reinforcing general stereotypes about the social roles of men and women repeatedly shown to be outdated, and denying fathers equal treatment where the right to custody of one's children is involved, are means imposed by the Oklahoma statute, bearing no substantial relationship to the legislative end. Ginsberg, *supra* note 45, at 23.

72. 421 U.S. 7 (1975).

73. The Court noted:

A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding . . . The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.

Id. at 14-15.

74. 421 U.S. at 14.

75. *Id.* at 13.

interest, or rational basis, or something in between. . . ."⁷⁶ Relying upon *Stanton*, the argument against the validity of the Oklahoma statute gains momentum. A parent, mother or father, is still a parent, and a distinction between them cannot be rationally related to a determination of custody purportedly focusing on the welfare of the child.⁷⁷

IV. RECENT TRENDS

The 1973 New York decision, *State ex rel. Watts v. Watts*,⁷⁸ was a concise explication of the practical and constitutional flaws of the statutory presumption favoring the mother in custody disputes. This case, in which the mother and father were each suing for custody of the couple's three children, held that "sound application of the 'best interests of the child' criteria requires that the court not place a greater burden on the father in proving suitability for custody than on the mother."⁷⁹ *Garrett v. Garrett*,⁸⁰ cited by the New York court, points out that the maternal preference rule should be "softened by the realization that all things never are exactly equal"⁸¹ and that the essential considerations reside in the act of motherhood, not the fact of motherhood. Relying on *Frontiero*,⁸² the Court found the classification embodied in the maternal presumption rule to be "suspect" and unable to withstand the strictest judicial scrutiny. The presumption was analogized to *Danielson v. Board of Higher Education*,⁸³ in which a federal district court indicated the unconstitutionality of allowing child care leaves for mothers but not for fathers. The court in *Watts* stated that "arbitrary assumptions about which spouse is better suited to care for young children are no more permissible"⁸⁴ in custody determinations than they are in child care leave situations.

Prompted by Supreme Court decisions, many states have amended their domestic relations laws to achieve informed implementation of the "best interests of the child" doctrine, indicating an awareness and acceptance of contemporary views of child development and male and

76. *Id.* at 17.

77. In the recent case of *Craig v. Boren*, 429 U.S. 190 (1976), the Court struck down an Oklahoma law embodying an age differential for males and females for the purchase of 3.2% beer. Citing *Reed* as controlling, the Court found the statute was not "substantially related to achievement of the statutory objective." *Id.* at 204.

78. 350 N.Y.S.2d 285 (1973); *but see* *Arends v. Arends*, 517 P.2d 1019 (Utah, 1974).

79. 350 N.Y.S.2d at 286.

80. 464 S.W.2d 740 (Mo. App. 1971).

81. *Id.* at 742.

82. 411 U.S. 677 (1973).

83. 358 F. Supp. 22 (S.D.N.Y. 1972).

84. 350 N.Y.S.2d at 291.

female stereotypes.⁸⁵ Although these states have mooted the constitutional issues through legislative action, a constitutional challenge may be the appropriate in-road in those states which cling to inaccurate presumptions about social roles and the needs of children. The Constitution remains viable today because of its ability to reflect our cultural evolution.

Unfortunately, however, declaring an existing statute unconstitutional or effecting a statutory change through legislative action may not necessarily insure that the judicial decisions in custody disputes will abandon an inclination to favor mothers over fathers. Without more, a ban against utilization of the maternal preference doctrine is arguably unenforceable. The prospect of unenforceability requires consideration of how the suggested statutory change could be practically implemented.⁸⁶

V. CONCLUSION

Oklahoma's statutory approach to awarding custody of young children inhibits decisions founded upon what is best for the children. It also denies a father equality in court when his right to the guardianship of his children becomes a matter for judicial determination. The maternal preference statute in Oklahoma must submit to a constitutional challenge under any equal protection standard. Recent Supreme Court decisions questioning the validity of state legislative purposes or means when issues of gender-based discrimination arise can only serve to illustrate to Oklahoma that the time for change has arrived.

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85. Wisconsin, a recognized progressive leader in trends in the area of family law, revised its law in 1971 to read: "In determining the parent with whom a child shall remain, the court shall consider all facts in the best interest of the child and shall not prefer one parent over the other solely on the basis of the sex of the parent." WIS. STAT. ANN. § 247.24(3) (West Supp. 1977). Other states similarly have repealed provisions giving a mother preference over a father for the custody of children of tender years and have enacted laws expressly prohibiting discrimination against the father. See MICH. COMP. LAWS ANN. § 722.23 (Supp. 1977); CAL. CIV. CODE § 4600 (West Supp. 1977). See in connection with California's amendment, Comment, 4 PAC. L. J. 427 (1972); FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1977); MINN. STAT. ANN. § 518.17 (West Supp. 1977); COLO. REV. STAT. § 14-10-124 (Supp. 1976).

86. Foster & Freed, *supra* note 17, at 423.