

# “Mother Knows Best”: Judicial Deference and the Child’s Best Interest

By Steven N. Peskind

On May 22<sup>nd</sup>, 2003, the Illinois Supreme Court in a unanimous decision in the case of *In re Marriage of Collingbourne*,<sup>1</sup> conclusively resolved a dispute among the appellate courts of this state concerning removal of minor children in Illinois. While the decision directly concerned the issue of removal, it also serves as a declaration of court policy which transcends the narrow issue of removal. *Collingbourne*, when read together with another recent and important Illinois Supreme Court family law case, *Wickham v. Byrne*,<sup>2</sup> confirms the court’s deferential policy in favor of the rights of custodial parents as against the state, third parties and even non-custodial parents.

## ***Collingbourne*:**

In *Collingbourne*, Soryia Collingbourne filed a petition in Kane County seeking leave to remove her son to Massachusetts so she could marry a man who lived in Massachusetts. He could not move due to business commitments. After a full trial the trial court granted the removal. Interestingly and in hindsight presciently, Trial Judge Stephen Sullivan specifically held that while there were no direct benefits to the child emanating from the move, it was nevertheless in the child’s best interest that the move be allowed. He based his decision on the extraordinary enhancement to the mother’s quality of life if the move were permitted.

The father, Geoff Collingbourne appealed to the Second District Appellate Court. He argued that Second District Court precedent required proof of direct benefits to a child as a prerequisite to a move outside of the State. Since the trial court found there to be no direct benefits to the child, the decision should be invalidated and the trial court’s judgment reversed.

In 1988 the Illinois Supreme Court issued its landmark decision in *In re Marriage of Eckert*<sup>3</sup> which set forth the factors trial courts should consider in evaluating a removal petition. The Second

District Appellate Court had disallowed removal petitions in all but one case since the Supreme Court decided *Eckert*. In that solitary case, *In re Marriage of Gratz*<sup>4</sup>, the Court allowed a removal to Arizona where a child had a severe allergic condition which improved when the child was in Arizona. All other holdings (excluding one parentage case) by the Second District Court in the preceding 14 years had denied petitions to remove a child.

In *Collingbourne*, the Second District in a 2-1 decision reversed the trial court’s decision allowing Soryia Collingbourne permission to remove the minor child from Illinois<sup>5</sup>. The court found that the trial court’s decision was against the manifest weight of the evidence. In so concluding, the court acknowledged that the move may have provided indirect benefits to the child, but nevertheless those benefits were insufficient to support the trial court’s decision in this regard. In a sharply worded dissent, Justice Bowman rebuked the majority for failing to defer to the findings of the trial court and accused the majority of essentially substituting its judgment for that of the Trial Court.

A petition for leave to appeal to the Illinois Supreme Court was filed on behalf of Soryia Collingbourne. The essence of the plea to accept the appeal was based upon the fact that the Second District Court was out of step with all of the other districts concerning removal actions; that the Second District’s interpretation of *Eckert*, which required a showing of direct benefits, was incorrect. All of the other districts in the state regularly permitted removals based upon enhancement to the quality of life to the custodial parent. The Petitioner urged the Illinois Supreme Court to resolve the discrepancy concerning the inconsistent interpretation of the *Eckert* decision and reverse the Second District Appellate Court’s harsh and unrealistic interpretation of *Eckert*.

The Supreme Court granted the

petition for leave to appeal and rendered its landmark decision on this very thorny and emotional issue. From a cursory reading of the *Collingbourne* decision, it is clear that the case abolishes the draconian second district policy that required a showing of direct benefits in order to succeed in a removal petition. In her well-written opinion, Chief Justice McCormack ridicules the notion that *Eckert* required such a showing:

Indeed, absurd results would occur were we to accept the contrary argument advanced by Geoff that a custodial parent wishing to remove a child from Illinois must prove that the child will experience a “direct” benefit as a result of the move, and that proof the child will reap “indirect” benefits as a result of the enhancement in the quality of life for the custodial parent is insufficient to meet this burden. First, as stated, Geoff’s position ignores the fact that the best interests of the child cannot easily be severed from the interests of the custodial parent with whom the child resides, and upon whose mental and physical well-being the child primarily depends. Because the principal burden and responsibility of child rearing falls upon the custodial parent, there is a palpable nexus between the custodial parent’s quality of life and the child’s quality of life.<sup>6</sup>

In rejecting the direct benefit requirement, the court specifically recognized that “the best interests of the child cannot easily be severed from the interests of the custodial parent with whom the child resides, and upon whose mental and physical well-being the child primarily depends.”<sup>7</sup> The court in reaching this decision relied on the 4<sup>th</sup> District case of *In re Marriage of Eaton*, “since a court has no power to require the non-custodial parent to remain in Illinois, or to require members of the extended family to remain in Illinois,

some deference is due to the custodial parent who has already determined the best interests of her child *and* herself are served by remarriage and removal. The best interests of children cannot be fully understood without also considering the best interests of the custodial parent.”<sup>8</sup>

Thus the Illinois Supreme Court has now established a policy which recognizes the importance of examining the best interest of a child through the prism of the custodial parent’s enhanced quality of life. A closer reading of Justice McMorrow’s opinion shows that the court grants substantial deference to the custodial parent’s decisions concerning the child’s best interests. *Collingbourne*, which recognized the “palpable nexus” between the interests of the custodial parent and the child, read in conjunction with the high court’s other recent and significant family law decision *Wickham v. Byrne*<sup>9</sup>, reflects a policy by the court which disfavors courts micromanaging the affairs of parents.

#### **Wickham:**

In *Wickham v. Byrne*<sup>10</sup> the Illinois Supreme Court held that 750 ILCS 5/607(b)(1) was unconstitutional as it infringed on parents’ rights to make decisions regarding their children’s best interests. The *Wickham* decision consisted of a consolidated appeal of two cases in which a single surviving parent sought to bar the parents of a deceased spouse from obtaining visitation rights pursuant to 750 ILCS 5/607(b)(1). Previously, in *Lulay v. Lulay*<sup>11</sup> the Court held that the statute was unconstitutional as applied where both parents sought to bar the visitation.

In *Wickham*, which was a consolidated action, a maternal grandmother sought visitation rights with her granddaughter after her daughter had died. The father objected and sought to dismiss the petition challenging the constitutionality of the Illinois grandparent visitation statute. The father relied on the United States Supreme Court decision of *Troxel v. Granville*<sup>12</sup> and *Lulay v. Lulay*. The trial court denied the father’s motion to dismiss a hearing and an appeal ensued.

In the consolidated case, *Langman v. Langman*,<sup>13</sup> paternal grandparents sought visitation of their grandchildren after the death of their son. After a full hearing, the trial court allowed grandparent visitation. The appellate court reversed, holding that

the statute was unconstitutional as applied. Both appeals were consolidated before the Illinois Supreme Court.

The Illinois Supreme Court held that the rights of a custodial parent to make decisions involving the best interest of her child, without undue state interference, is constitutionally mandated. In doing so, the Court relied on the United States Supreme Court’s pronouncement of policy concerning presumptions in favor of the decision-making rights of parents set forth in *Troxel v. Granville*.<sup>14</sup> Accordingly the court invalidated 750 ILCS 5/607(b)(1) as unconstitutional on its face since it violates a parent’s rights to determine who his or her child would associate with:

Section 607(b)(1) contains a similar flaw to the statute at issue in *Troxel*. Section 607(b)(1) permits grandparents, great-grandparents, or the sibling of any minor child visitation if “the court determines that it is in the best interests and welfare of the child.” 750 ILCS 5/607(b)(1) (West 2000). Like the statute in *Troxel*, section 607(b)(1), in every case, places the parent on equal footing with the party seeking visitation rights. Further, like the statute in *Troxel*, section 607(b)(1) directly contravenes the traditional presumption that parents are fit and act in the best interests of their children. The statute allows the “State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Troxel*, 530 U.S. at 72-73, 120 S.Ct. at 2064, 147 L.Ed.2d at 61. Section 607(b)(1) exposes the decision of a fit parent to the unfettered value judgment of a judge and the intrusive micro-managing of the state.

199 Ill. 2<sup>nd</sup> 320-321. Thus the court found that 750 ILCS 5/607(b)(1) was unconstitutional on its face.

#### **Analysis:**

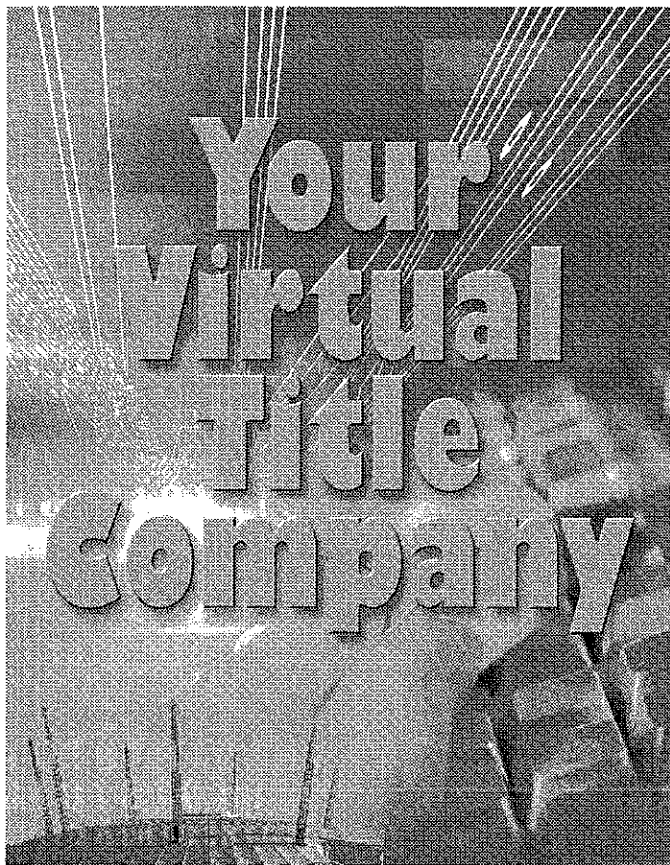
When read together, *Collingbourne* and *Wickham* suggest that the Illinois Supreme Court is promulgating a policy of deference to a custodial parent’s decision making rights vis-a-vis the State, third parties, and even the non-custodial parent. In both of these decisions the court

enunciates a laissez faire policy that a “custodial parent knows best.” While a parent’s rights to make decisions involving his or her child are not absolute, the court has insisted that the neither the State, third parties, or the non-custodial parent may rely on the courts to overrule parenting decisions except in extraordinary circumstances.

This position is consistent with the trend in the United States Supreme Court as well. As noted above, the Illinois Supreme Court relied on the United States Supreme Court’s *Troxel* opinion as a basis for its decision in *Wickham*. *Troxel v. Granville*.<sup>15</sup> In *Troxel*, the Court struck down a Washington State statute which permitted visitation rights to persons other than parents. The specific litigants in *Troxel* were grandparents who petitioned the court to order visitation with their grandchildren over their mother’s objection. The grandparents’ son, the children’s father, had died and the children’s mother wished to restrict their visitation. She challenged the statute as an unconstitutional interference with her parental decision making rights. The Washington State Supreme Court agreed and held that the statute unconstitutionally infringed on parents’ fundamental right to rear their children. The court reasoned that the United States Constitution permits a state to interfere with this right only to prevent harm or potential harm to a child.

Justice O’Connor, writing for the majority, affirmed the lower court. She began her analysis by noting that “The liberty interest...of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the Court.”<sup>16</sup> The Washington statute, which afforded no consideration of the parent’s preference concerning the child’s associations, allows a court to overturn any parental decision by a fit custodian concerning visitation. Accordingly, the statute impermissibly invaded the parent’s natural and constitutionally protected rights of decision making. “...So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”<sup>17</sup>

The strong affirmation by both the Illinois Supreme Court and the United States



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Supreme Court of a custodial parent's rights finds support in a University of Chicago Public Law and Legal Theory Working Paper published by Professor Emily Buss entitled "Children's Associational Rights? Why Less is More"<sup>18</sup>. In her paper, Professor Buss concludes that despite the fact that maintenance of children's relationships with third parties is often in their best interest, a legal system that compels those relationships over the objections of the custodial parent, does a disservice to the children it is seeking to serve.

Professor Buss' opposition to granting associational rights to third parties is essentially pragmatic. She believes that as a general rule, parents can be trusted to make these types of decisions in their child's best interests. "... parents can generally be expected to do a particularly good job of identifying and protecting their children's own interests. Parents' extensive knowledge about their children and their strong emotional attachment to them put them in a particularly strong position to champion their children's interests."<sup>19</sup>

While Professor Buss recognizes

parents cannot always be counted on to make decisions based upon the best interests of the child, neither the court, child's representatives nor expert witnesses as surrogate decision makers have any greater ability to decide best interests regarding associational rights and therefore a model of deference should be observed:

But in associational cases, there is no claim of high public stakes, nor is there broad societal consensus about universally applicable standards of conduct. Rather, the cases call for the making of difficult individualized judgments about the relative value of relationships to children's long-term development. It is these sorts of soft judgments...that the alternative surrogates will be ill prepared to make.<sup>20</sup>

In concluding that the detriments of enforcing associational rights of children outweigh the benefits to them, Professor Buss provides insight into the dramatic cost of family law litigation:

...litigation over children's

upbringing, and over a child's relationships with various family members, comes at a serious emotional, financial, and temporal cost to children and their families. Litigation disrupts schedules, escalates tensions and publicizes the family's disputes. It undermines parental authority by calling into question the parent's judgments and, at least potentially, forcing the parent to tolerate relationships that she opposes.<sup>21</sup>

The Illinois Supreme Court is implicitly attempting to ameliorate these costs by its decisions in *Collingbourne* and *Wickham*. These two cases when read together transcend the relatively restricted areas of child removal and grandparent visitation. When distilled to their essence, both decisions recognize parents' abilities and rights to make decisions concerning the best interest of their children. Invariably, conflicts in this regard will arise. However, it would appear that the court is directing trial courts to determine the best interests of the child with a deferential eye towards the decision-

making skills of the parent primarily charged with the responsibilities of day to day care for a child. One could almost conclude that the high court suggests the same standard of review by a trial court regarding a custodial parent's decisions that an appellate court would employ concerning a trial court ruling, that is: whether the custodial parent's decision concerning his or her child is an abuse of discretion.

What is further noteworthy about these two decisions is that the Court's conclusions are a reaffirmation of certain underlying principles in the Illinois Marriage and Dissolution of Marriage Act (IMDMA), which became Illinois Law in 1977. The IMDMA was based on the Uniform Marriage and Divorce Act of 1970 and the Illinois statute for the most part adopted the Uniform Acts provisions regarding custody and visitation.

Section 608 of the IMDMA specifically provides that except as agreed in writing at the time of the custody decree, the custodial parent may determine the child's upbringing including the child's "education, healthcare, and religious training" unless the absence of some restriction would significantly endanger a child's emotional development. This section, which is almost identical to section 408 of the model act, is designed to limit occasions for disputes and promote deference to the custodial parents' decision-making rights. In their comments concerning this section, the Commissioners note:

This section states an important rule designed to promote family privacy and to prevent intrusions upon the prerogatives of the custodial parent at the request of the non-custodial parent...in the absence of parental agreement, the court should not intervene solely because a choice is made by the custodial parent is thought by the non-custodial parent (or by the judge) to be contrary to the child's best interest.

The Commissioners' comments made over thirty years ago, appear to be an almost identical recitation of the reasoning at the core of both *Collingbourne* and *Wickham*. Sometimes the more things change, the more they stay the same. The high court is reminding lower courts and litigants of the fact that family privacy and the decision-making rights of a primary custodian are sacrosanct and not to be disturbed by the state, third parties and even non-primary

custodians except in very extraordinary circumstances. Simply put, lowering the level of conflict benefits children more than a court's second-guessing the custodial parents judgment.

In light of this mandate, one must question the courts' and litigants' use of the Illinois joint custody statute. Before 1982 Illinois subscribed to the tender years doctrine. This was a presumption that legal custody of young children should be granted to mothers. In 1982, Illinois adopted a joint custody statute that abolished this presumption. It also provided for joint legal custody in cases where the parties agreed to that arrangement. The statute was amended in 1986 to allow a court, without an agreement, to award joint custody. While the law places a difficult burden on a litigant seeking joint custody over the objection of the other parent, the court still may permit joint custody as a practical solution to a difficult contested custody case. Parties exhausted by expensive litigation may use joint custody by agreement to "split the baby." However, the question must be asked whether this statute serves the best interest of children when it is invoked solely as an accommodation. If consistent decision-making serves a child's best interests, one must rethink the notion that dual decision makers benefit a child except in the rare and extraordinary circumstance.

Indeed, as Justice McMorro indicated in *Collingbourne*, there is a "palpable nexus" between the interests of the primary custodian and the child because of the responsibilities that the parent assumes. As the Pennsylvania Superior Court articulated in *Gruber v. Gruber*, "The best interests of a child is more closely allied with the interests and quality of life of the custodial parent and cannot, therefore, be determined without reference to those interests."<sup>22</sup> The High Court's deference is not only consistent with the IMDMA's legislative intent, it is a wise edict of policy cognizant of the indivisible connection between the interests of the primary custodial parent and the child.

#### Conclusion:

The Illinois Supreme Court's decisions in *Collingbourne* and *Wickham* set forth a policy of court deference to the decision making rights of the custodial parent. The Court has stated that the "palpable nexus" between the custodial parent and the child

deserves greater recognition than competing rights of third parties and even non-custodial parents. In an area of law as litigious as family law, where even minor issues and disputes affecting children are brought before the Court, the High Court's policy directive will ultimately benefit children by severely limiting the issues that legitimately should be litigated. Trial courts need to apply this directive to all aspects of the law of custody in order to honor both the legislative and judicial imperative that recognizes and honors the decisions of the primary custodial parent, except in extraordinary circumstances. ■

<sup>1</sup> 204 Ill.2d 498, 791 N.E.2d 532 (2003)

<sup>2</sup> 199 Ill. 2d 309, 769 N.E. 2d 1 (2002)

<sup>3</sup> 119 Ill.App.2d 316, 518 N.E.2d 1041 (1988)

<sup>4</sup> 193 Ill. App.3d 142, 548 N.E. 2d 1325 (2d Dist. 1989)

<sup>5</sup> 332 Ill.App.3d 665, 774 N.E.2d 448 (2d Dist. 2002)

<sup>6</sup> 204 Ill.2d. at 526

<sup>7</sup> *Id.*

<sup>8</sup> (Emphasis in original.) 269 Ill. App. 3d 507, 514 (1995)

<sup>9</sup> 199 Ill. 2d 309, 769 N.E. 2d 1 (2002)

<sup>10</sup> *Id.*

<sup>11</sup> 193 Ill. 2d 455, 739 N.E. 2d 521 (2000)

<sup>12</sup> 530 U.S. 57, 120 S.Ct. 2054 (2000) The Court invalidated the State of Washington's visitation statute which generally extended visitation rights to third persons based upon the best interests of the child.

<sup>13</sup> 325 Ill.App. 3d 101, 757 N.E.2d 505 (3d Dist. 2001)

<sup>14</sup> 530 U.S. 57, 120 S.Ct. 2054 (2000)

<sup>15</sup> 530 U.S. 57 (2000)

<sup>16</sup> *Troxel* 530 U.S. at 65

<sup>17</sup> *Id.* at 68-69

<sup>18</sup> Emily Buss, <[www.law.uchicago.edu/academics/publiclaw/index.html](http://www.law.uchicago.edu/academics/publiclaw/index.html)> (March, 2003)

<sup>19</sup> *Id.* at 4-5

<sup>20</sup> *Id.* at 5-6

<sup>21</sup> *Id.* at 17

<sup>22</sup> 400 Pa.Super. 174, 583 A.2d 434 at 438 (Pa. Super. Ct. 1990)



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