May 2018

Campbell v. Campbell: Requiring Adherence to the Correct Legal Standard in Child Custody Proceedings - the "Best Interest of the Child"

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**CAMPBELL v. CAMPBELL: REQUIRING ADHERENCE TO THE CORRECT LEGAL STANDARD IN CHILD CUSTODY PROCEEDINGS—THE “BEST INTEREST OF THE CHILD”**

I. INTRODUCTION

Should a divorce court be permitted to consider evidence of a parent's misuse of legal process when rendering a child custody decree? In *Campbell v. Campbell*¹ the Maine Superior Court concluded that Mrs. Campbell had sought an ex parte protection from abuse order² against her husband in an effort to gain a tactical advantage in the custody proceeding—she did not need protection from abuse. The court then awarded Mr. Campbell custody of the children, on the basis of Mrs. Campbell's misuse of legal process.³ Yet, by focusing its attention upon one parent's conduct, the superior court deviated from what was supposed to be its central focus—the best interest of the children.

In the appeal of *Campbell v. Campbell*⁴ the Maine Supreme Judicial Court, sitting as the Law Court, considered for the first time whether and to what extent a court should include one parent's unsuccessful prosecution of a protection from abuse complaint as relevant evidence when awarding parental rights and responsibilities in a divorce proceeding. The Law Court concluded that the evidence may be relevant and refuted the position advanced by the Maine Attorney General⁵ that any such evidence should be excluded.⁶

This Note will show that the Law Court's unanimous decision appropriately focused upon the correct legal standard in child custody cases: the best interest of the child. The court applied a legitimate interpretation of the best interest of the child standard as established in both Maine case law and Maine statutory law. The court

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⁴. 604 A.2d 33 (Me. 1992).
⁶. *Campbell v. Campbell*, 604 A.2d at 37 n.5.
determined that a parent’s willful, tactical misuse of a protective order may provide relevant evidence, if it indicates that the parents’ future ability to cooperate with one another has been diminished. The Law Court reasoned that if the parents’ ability to cooperate is impaired, the children’s best interests could be adversely affected.  

This Note will explain how the Law Court’s analysis recognized the divorce court’s critical responsibility as parens patriae to focus upon the best interests of the children in awarding parental rights and responsibilities. This Note will also explain how the Law Court’s emphasis upon the parents’ ability to cooperate was consistent with the legislative intent underlying the codification of Maine’s best interest of the child standard.

Next this Note will address how the Campbell court established a high standard of proof and an explicit four-part definition of relevant evidence as threshold requirements for the appropriate introduction of evidence of misuse of a protective order. By imposing these requirements, the Law Court properly balanced the judiciary’s duty to focus upon the welfare of the children against the potential negative impact of a policy that might deter spouses from seeking protection from abuse orders.

Finally, this Note will discuss how the Campbell court’s directive to the lower court to link its rationale to the statutory definition of the best interest of the child standard signals the need for legislative reform. The Legislature should amend the best interest of the child standard to require that when a judge renders a custody determination she identify explicitly which statutory factors she takes into account and the relative weight she assigns to each factor.

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7. Id. at 34.
9. See infra note 64.
10. See infra note 57 and text accompanying note 66.
11. The Law Court specifically held that:

[T]he parent’s action is relevant to the divorce court’s consideration only if the court finds by clear and convincing evidence both 1) that the parent willfully misused the protection process in order to gain a tactical advantage in the divorce proceeding, and 2) that in the particular circumstances of the divorcing couple and their children, that willful misuse tends to show that the acting parent will after the divorce have a lessened ability and willingness to work with the other parent in their joint responsibilities for the children.

Campbell v. Campbell, 604 A.2d at 34.
II. BACKGROUND

A. The Development of the “Best Interest of the Child” Standard

By statute, Maine courts are granted sole authority to determine parental rights and responsibilities in divorce proceedings. The primary consideration for the court is the present and future well-being of the children. The foundation for this central focus upon the children was established in Maine law in 1888. In Stetson v. Stetson the Law Court stated that “the great governing principle for the guidance of the court is the good of the child.” This proposition has come to be known as the “best interest of the child” standard, and it continues to serve as a basis for judicial decision-making today. The standard is rooted in the common law doctrine of parens patriae, which holds that “the State has the right and duty to control the custody of a minor child as it deems appropriate for the child’s welfare, once the child has become a subject of the jurisdiction of a court.”

The Law Court has reaffirmed its adherence to the best interest of the child standard on numerous occasions. Recently in Lee v. Lee the court stated: “The paramount consideration for the court at the time of a divorce is the present and future welfare and well-being of the child.” Another often quoted passage incorporates the parens

13. 80 Me. 488, 15 A. 60 (1888).
14. Id. at 485, 15 A. at 61.
16. See Lee v. Lee, 595 A.2d 408, 412 (Me. 1991); Lane v. Lane, 446 A.2d 418, 419 (Me. 1982); Ziehm v. Ziehm, 433 A.2d at 729 (Me. 1981); Cyr v. Cyr, 432 A.2d 793, 796 (Me. 1981); Costigan v. Costigan, 418 A.2d 1144, 1146 (Me. 1980); Osier v. Osier, 410 A.2d 1027, 1030 (Me. 1980); Pendexter v. Pendexter, 363 A.2d 743, 748 (Me. 1976) (Dufresne, C.J., concurring); Rousell v. State, 274 A.2d 909, 925-26 (Me. 1971); Buzzell v. Buzzell, 235 A.2d 828, 831 (Me. 1967); Dumais v. Dumais, 152 Me. 24, 27, 122 A.2d 322, 324-25 (1956); Appeal of D’Aoust, 146 Me. 443, 444, 82 A.2d 409 (1951); Grover v. Grover, 143 Me. 34, 37, 54 A.2d 637, 638-39 (1947); Stanley v. Penley, 142 Me. 78, 81, 46 A.2d 710, 711 (1946); Merchant v. Bussell, 139 Me. 118, 122, 27 A.2d 816, 818 (1942) (illustrating the Law Court’s consistent application of the “best interest of the child” principle).
17. 595 A.2d 408 (Me. 1990).
18. Id. at 412 (referring to the court’s proper focus upon the best interest of the child).
patriae aspect of the best interest standard: "In making custody determinations the trial judge must decide as a 'wise, affectionate and careful parent' what custody arrangement will be in the child's best interest." These statements indicate that the welfare of the children, not the interests of the parents, remains the overriding consideration of the court.

Although the Law Court has indicated since 1888 that the best interest of the child is the fundamental question in custody proceedings, it did not clearly identify the specific factors a divorce court should consider in rendering a decision until the 1980 case of Costigan v. Costigan. The Costigan court outlined a list of factors, such as the age of the child, the relationship of the child with his parents, and the child's preference, as important issues for courts to address when hearing child custody cases.

In 1984, subsequent to this identification of explicit criteria by the Law Court in Costigan, the Maine Legislature enacted substantial revisions to Title 19 on Domestic Relations Law, which included the codification of the best interest of the child standard. The stan-

20. See, e.g., Sheldon v. Sheldon, 423 A.2d 943, 946 (Me. 1980) ("[N]o court should attempt to accommodate any continuing animosity of the parents. The court's task is not to grant one parent a victory over the other . . . [but its] concern is with the child . . . .")
21. Stetson v. Stetson, 80 Me. 483, 15 A. 60 (1888) (indicating that the best interest of the child is the governing principle for the court in rendering custody decisions).
22. 418 A.2d 1144, 1146 (Me. 1980) (holding that the trial judge did not abuse his discretion in ordering a change of custody).
23. In Costigan the Law Court wrote that the judge could take into account the following factors in determining the child's best interest:

[T]he age of the child, the relationship of the child with his parents and any other persons who may significantly affect the child's best interests, the wishes of the parents as to the child's custody, the preference of the child (if old enough to express a meaningful preference), the duration and adequacy of the current custodial arrangement and the desirability of maintaining continuity, the stability of the proposed custodial arrangement, the motivation of the competing parties and their capacity to give the child love, affection and guidance, and the child's adjustment to his present home, school and community.

Id.
24. ME. REV. STAT. ANN. tit. 19, § 752(5) (West Supp. 1992-1993). See infra the text accompanying note 26 for the pertinent text of this statute. This provision became effective on July 25, 1984. The legislative history of this section reveals that the best interest of the child standard was incorporated into current law by P.L. 1983, ch. 813. This chapter was based upon L.D. 2466 (111th Legis., 2d Sess. 1984). The Statement of Fact for L.D. 2466 indicates that the Legislature recognized that the best interest of the child standard had already been developed by Maine courts, but felt that the standard should be defined in statutory form, with the specific factors for judges to consider clearly outlined. The Statement of Fact also noted that factors concerning the parents' ability to cooperate should be added to the list of considera-
standard directs the court to consider specific factors, which the Legislature has deemed important, when awarding parental rights and responsibilities. Many of these factors are similar to those adopted by the Law Court in Costigan. Although Maine’s approach of adopting a list of statutory factors which constitute the best interest of the child standard is analogous to that taken in section 402 of the Uniform Marriage and Divorce Act, Maine’s factors are more numerous and detailed than those outlined in the uniform law. Maine’s statute reads as follows:

5. Best Interest of the Child. The court, in making an award of parental rights and responsibilities with respect to a minor child, shall apply the standard of the best interest of the child. In applying this standard, the court shall consider the following factors:

A. The age of the child;
B. The relationship of the child with the child’s parents and any other persons who may significantly affect the child’s welfare;
C. The preference of the child, if old enough to express a meaningful preference;
D. The duration and adequacy of the child’s current living arrangements and the desirability of maintaining continuity;
E. The stability of any proposed living arrangements for the child;
F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;
G. The child’s adjustment to the child’s present home, school and community;
H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;
I. The capacity of each parent to cooperate or learn to cooperate in child care;

Section 402 of the Uniform Marriage and Divorce Act outlines five broad factors that judges must consider when determining custody awards:

§ 402. [Best Interest of the Child]
The court shall determine custody in accordance with the best interest 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.

J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;
K. The effect on the child if one parent has sole authority over the child's upbringing;
K-1. The existence of a history of domestic abuse between the parents; and
L. All other factors having a reasonable bearing on the physical and psychological well-being of the child.

The Law Court has held that although the statute does not require the lower court to articulate detailed findings regarding each of these factors, there must be an indication in the record that the factors were considered. However, beyond noting that the statute was taken into account, there is no requirement that the judge identify in her decision which factors she considered and the relative weight she assigned to each factor.

B. The Applicable Standard of Review

It can be concluded from the foregoing discussion that Maine's "best interest of the child" approach grants the courts broad discretion in determining custody awards. The Law Court explained in Costigan v. Costigan that "[t]he delicate balancing [of the child's best interests] is left to the sound discretion of that judge who has the singular opportunity to observe the individuals involved and therefore is in the best position to act on behalf of the State as a..."

28. Id.; Shirley v. Shirley, 489 A.2d 845, 847 (Me. 1984); Huff v. Huff, 444 A.2d 396, 398 (Me. 1982); Lane v. Lane, 446 A.2d 418, 420 (Me. 1982); Harmon v. Emerson, 425 A.2d 978, 983 (Me. 1981); Cooley v. St. Andre's Child Placing Agency, 415 A.2d 1084, 1086 (Me. 1980) (illustrating the broad discretion granted to the courts by the best interest standard).

The courts are afforded full equity jurisdiction, granted by the Maine Legislature, to make custody determinations:

By P.L. 1874, Ch. 175, the Legislature granted to the Supreme Judicial Court "full equity jurisdiction, according to the usage and practice of courts of equity, in all...cases where there is not a plain, adequate and complete remedy at law." The District Court is given original jurisdiction concurrent with that of the Superior Court "of actions for divorce, annulment of marriage or judicial separation and of proceedings under Title 19..." 4 M.R.S.A. § 152. By the provisions of 19 M.R.S.A. § 752, either Court making an order of nullity of divorce is empowered to also make an order "concerning the care, custody and support of the minor children of the parties..." Thus, the general equity powers of the Superior Court flow to the District Court by force of the "concurrent jurisdiction" provision of § 152. Because of the impact of § 752, either Court in making a custody determination under these statutory grants of jurisdiction has the "full equity jurisdiction" conferred upon the Superior Court.

Harmon v. Emerson, 425 A.2d 978, 984 n.6 (Me. 1981).
29. 418 A.2d 1144 (Me. 1980).
wise, affectionate and careful parent."³⁰

The aim of this grant of broad discretion is to achieve a fact-specific, individualized decision that rule-based standards, such as the "tender years doctrine,"³¹ cannot achieve. Yet, granting such substantial discretion to the lower court places a heavy burden upon the bench. As one jurist noted:

A judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders.

The lives and personalities of at least two adults and one child are telescoped and presented to him in a few hours. From this capsule presentation he must decide where lie the best interests of the child or, very often, which parent will harm the child least. The judge's verdict is distilled from the hardest kind of fact finding. From sharply disputed evidence, he must predict the future conduct of parents on his appraisal of their past conduct.³²

Once a divorce court has rendered its custody award, appellate courts are to afford the lower court's decision substantial deference. The Law Court has established that as long as there is rational or credible support in the record for the divorce court's custody determination, the judgment will not be overturned on appeal.³³ The Law Court has held specifically that an appellate court can review the custody award of a divorce court only for clear abuse of discretion or other error of law.³⁴ Moreover, the Law Court has repeatedly made clear that an independent evaluation of the evidence supporting a custody decision is an inappropriate function of an appellate court.³⁵ The practical effect of this structure—broad discretion coupled with great deference—is that a divorce court's decision-making authority is nearly omnipotent. This observation will be explored further

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30. *Id.* at 1147 (holding that the trial judge did not abuse his discretion in ordering a change of custody).

31. The "tender years doctrine" is the presumption that infants and very young children are best placed in their mother's custody. See Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. Fam. L. 423, 434-35 (1977).


III. THE SUBJECT CASE: CAMPBELL v. CAMPBELL

In July 1989 Mr. Campbell commenced a divorce action in district court. Six days later Mrs. Campbell filed for removal to superior court. On August 2, 1989, before the pending divorce action had been heard by the superior court, she brought a separate protection from abuse claim against Mr. Campbell in district court. The district court granted her an ex parte order that gave her immediate and exclusive custody of the children and possession of the marital home.

On January 30, 1990, after extensive hearings, the district court dismissed the protection from abuse proceeding. The court found that no credible evidence supported Mrs. Campbell's request for the order, and that she had signed a statement indicating that she was in danger of suffering physical abuse from Mr. Campbell when she knew it to be untrue. The divorce action was then heard in superior court. Finally, on November 26, 1990, the superior court awarded custody to Mr. Campbell, basing its decision upon Mrs. Campbell's "inappropriate offensive use of the ex parte protection from abuse process."

36. See infra notes 67-82 and accompanying text.
40. This order was later modified to give Mr. Campbell shared custody of the children. Campbell v. Campbell, 604 A.2d at 34-35.
41. The district court stated in part:
   Leatrice Campbell has employed what is becoming a standard strategy in contested custody cases: seek an ex parte order for protection from abuse to gain custody of the children, transfer the divorce case to the Superior Court in order to delay its resolution, and hope that the case takes long enough to conclude that she can successfully argue the status quo to keep the children in her custody thereafter. Unfortunately, in this case her protection from abuse action is unsupported by credible evidence, so I am left with the problem of having to decide what to do with children whose custodial parent has abused process in order to gain their custody. . . . She [Mrs. Campbell] sought an ex parte abuse order because she wanted custody of her children, who were then with Mr. Campbell, and not because she wanted or needed any protection from abuse.
43. Campbell v. Campbell, 604 A.2d at 35 n.2.

Judge Alexander stated further that:
As used, or abused in this case, [the protection from abuse process] was perverted into an offensive weapon providing tactical advantage, dominant custody and a drain on the litigating resources of the other party.
Mrs. Campbell appealed this decision, thereby presenting the Law Court with the question of whether the superior court's focus upon one parent's misuse of the protection process as a determinative factor in the custody award was appropriate. Mrs. Campbell argued that the superior court erred by weighing her use of the protection from abuse process, or "litigation tactics," as a determinative factor in awarding custody. Moreover, she contended, the court lacked any evidentiary foundation to support its determination that her conduct during the litigation process had any impact upon the children.

Mr. Campbell's position was that the applicable standard of review—abuse of discretion—required the Law Court to defer to the superior court's judgment. He argued further that the superior court appropriately discharged its responsibility by considering all relevant factors under Maine's "best interest of the child" standard and thus the court's conclusions were rational and did not constitute an abuse of discretion.

The Maine Attorney General presented two primary arguments on behalf of the State as Amicus Curiae. First, the Attorney General argued that the superior court erred by penalizing a parent for what it considered to be unwarranted litigation tactics, rather than focusing upon the best interests of the children. Second, the Attorney General argued that the important public interest in safeguarding domestic violence victims' statutory right to seek protection from abuse orders should forbid the Law Court from allowing consideration of any evidence of misuse of the protection process in the allocation of parental rights and responsibilities.

The Law Court began its analysis of the case by reiterating that,
pursuant to Maine statutory law, the best interest of the child standard is the controlling consideration in custody cases. Then the court explained that it had to evaluate the thirteen statutory factors that together constitute the best interest of the child standard and determine whether one parent's misuse of the protection process may be relevant to one or more of these factors. Since this determination required novel statutory interpretation, the Law Court vacated and remanded the case to the superior court for reconsideration in light of the guidelines set forth in its opinion.

First, the court determined that evidence of tactical actions by a parent during the litigation process is only relevant to custody determinations if those actions tend to show that the children's best interests will be negatively impacted after the divorce. The court reasoned that affording any greater weight to the parent's conduct would inappropriately impose punishment, something that has nothing to do with divorce decrees or advancing the best interests of the children.

Next, the Law Court unequivocally stated that the divorce court's decision on remand should articulate specifically what relevance Mrs. Campbell's tactical actions had to any of the statutory factors outlined in section 752(5)—the applicable legal standard. The superior court must link her conduct to the statute to determine whether it constitutes relevant evidence. The Law Court determined that the evidence was potentially relevant to three factors; those factors were H through J, which provide:

H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;


52. *Id.*
53. The Law Court’s remand to the Superior Court was correct procedurally, since the court has held on numerous occasions that a *de novo* evaluation of the evidence supporting a custody decision is an inappropriate function for an appellate court. See *supra* text accompanying note 35.
55. *See id.* (citing Huff v. Huff, 444 A.2d 396, 398 (Me. 1982) (stating divorce court erred by awarding custody to mother because of father’s contempt of court)).
57. Maine law defines “relevant evidence” broadly, entrusting the court with substantial discretion: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Me. R. Evid.* 401. *See Latremore v. Latremore*, 584 A.2d 626, 631 (Me. 1990); *Gurski v. Culpovich*, 540 A.2d 764, 766 (Me. 1988); *Bourette v. Dresser Indus., Inc.*, 481 A.2d 170, 174 (Me. 1984); *State v. Gagnon*, 383 A.2d 25, 31 (Me. 1978); *Perlin v. Rosen*, 131 Me. 481, 483, 164 A. 625, 626 (1933). *See also Richard H. Field & Peter L. Murray, Maine Evidence,* § 401.1 at 4-1 to 4-7 (3rd ed. 1992) (construing *Me. R. Evid.* 401 broadly).
I. The capacity of each parent to cooperate or learn to cooperate in child care;  
J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods.  

The court reasoned that litigation tactics could be linked as relevant evidence to each of these factors addressing the parents' ability and willingness to cooperate in carrying out their joint responsibilities for the children.

Then, the Law Court established that only after a thorough inquiry could a divorce court conclude that there is a demonstrable nexus between a parent's misuse of the protection from abuse process and the children's best interest after the divorce. Specifically, the Law Court stated that the divorce court must conduct an independent examination of the family circumstances and the context of the litigation proceedings between the parents; it also must afford each party the opportunity to present evidence and argument.

Finally, because it realized that allowing evidence of misuse of the protection from abuse process could deter victims of domestic violence from seeking protective orders, the Law Court imposed a safeguard. The court held that a divorce court is required to "articulate findings of precisely defined foundational facts," proven by the heightened standard of clear and convincing evidence, before it considers a parent's misuse of the protection process in a custody award. Then the court outlined the four specific foundational facts that must be met in order to satisfy Maine's legal definition of relevant evidence:

The divorce court shall find and expressly state the following foundational facts: (1) the parent prosecuting the protection proceeding
had no reasonable ground for it; (2) that parent knew or ought to have known there was no reasonable ground for it; (3) that parent's primary purpose in the protection proceeding was to gain a tactical advantage in the divorce action; and (4) that parent's action in the particular circumstances of the divorcing couple and their children supports a reasonable inference that during the children's minority after the divorce that parent will be less able and willing to work with the other parent in carrying out their joint responsibilities for the children.66

By adopting this requirement, the Law Court created an important threshold test that must be satisfied before a litigant's misuse of the protection from abuse process can be introduced as relevant evidence in a custody proceeding.

IV. DISCUSSION

A. The Law Court Focused upon the Appropriate Legal Standard: The Best Interest of the Child

The Law Court's holding in Campbell, as described above, represents a careful effort to reconcile two seemingly competing policy objectives—admitting all evidence relevant to ascertaining a child's best interest, while at the same time safeguarding a parent's legal right to exercise the protection from abuse process. After examining Maine's statutorily-defined best interest of the child standard, the court reasonably concluded that evidence of one parent's misuse of the protection from abuse process may be relevant to a divorce court's award of parental rights and responsibilities. The Law Court therefore refuted what it described as the "absolutist position" advanced by the Attorney General—the position that any such evidence should be excluded from divorce hearings.67

66. Id.
67. The Office of the Attorney General did not view its position as "absolutist." The Attorney General's purpose in submitting an Amicus Brief was twofold. First, the Attorney General hoped to direct the Law Court's attention away from the lower court's emphasis upon one parent's conduct and re-focus the analysis upon the best interest of the children. Second, the Attorney General sought to ensure that the proper role of the protection from abuse process was safeguarded. The Office of the Attorney General has indicated that it is satisfied with the outcome in Campbell on both issues. Telephone Interview with Christopher C. Leighton, Deputy Attorney General, State of Maine (Jan. 21, 1993); Telephone Interview with Anita M. St. Onge, Assistant Attorney General, State of Maine (Jan. 22, 1993).

It is interesting to note that originally the Law Court indicated that it would decide the Campbell case based on the parties' briefs. After the Attorney General came forward and submitted an amicus brief, however, the court offered the parties, and the Attorney General, time for oral argument. Thus, the Attorney General's Office may be responsible, in part, for elevating the status of the Campbell controversy. Telephone Interview with Christopher C. Leighton, Deputy Attorney General, State of Maine (Jan. 21, 1993); Telephone Interview with Anita M. St. Onge, Assistant Attorney General, State of Maine (Jan. 22, 1993).
Although the Law Court appeared to dismiss the Attorney General’s position in a footnote, it did in fact incorporate two key aspects of the Attorney General’s argument in its decision. First, the Law Court reaffirmed the principle that custody decisions must be based upon the best interest of the children. Second, the Law Court developed a threshold relevancy test to ensure that a litigant is not penalized in a child custody proceeding for a good faith invocation of the protection from abuse process.

The Campbell court reviewed a divorce court’s opinion which, as it was written, appeared punitive; Mr. Campbell received custody of the children because of the litigation tactics Mrs. Campbell utilized. Yet, as explained in the background discussion above, since a court’s authority over divorce and custody decisions is defined by statute, the divorce court was in fact required to base its custody determination upon relevant Maine statutory law—specifically, the best interest of the child standard. Thus, the Law Court appropriately re-oriented its approach away from the overriding focus by the divorce court upon one parent’s conduct during trial. The Law Court focused its attention precisely where it belonged—upon the best interest of the children.

Against this framework, the Campbell court considered whether there was a reasonable link between any of the statutory factors that comprise the best interest of the child standard and the superior court’s rationale. The Campbell court implicitly recognized that by codifying specific factors which constitute the legal definition of the best interest of the child standard, the Legislature narrowed the courts’ traditional broad discretion as parens patriae. Since the superior court did not indicate how its rationale applied to the statute, the Law Court offered guidance as to how this connection could be drawn. The Law Court recognized that a plausible link could indeed exist between the proffered evidence, the misuse of the protective process, and the governing legal standard, the best interest of the child. The Law Court specifically determined that one parent’s misuse of the protection from abuse process could be considered relevant to section 752(5) factors H through J, which address the parents’ capacity and willingness to cooperate with one another after the divorce. Beyond stating that this connection could exist, however, the Law Court did not explain the reasoning behind its statutory interpretation—why and how it concluded that abuse of process

68. Campbell v. Campbell, 604 A.2d at 37 n.5.
69. See Brief of the State of Maine, Department of the Attorney General as Amicus Curiae at 4, 6, 8-9, and 13, Campbell (No. OXF-90-595).
70. See supra note 12.
72. See supra text accompanying note 58.
could be probative of the parents’ ability to cooperate.\textsuperscript{73}

Perhaps the Law Court reasoned that the connection is obvious. One parent’s tactical resort to the protection from abuse process clearly suggests that the parents’ “capacity” and “willingness” to cooperate in child rearing has been diminished. A litigant who asks a court to intervene and order that her husband stay away from her is unlikely to then willingly cooperate with her spouse on issues regarding child rearing. Surely, in the most egregious cases this will be true.

Although this connection to the statute is logical, a potential danger exists: a divorce court may place excessive weight upon this analysis, and thus the significance of the evidence could be overstated. The Law Court’s line of reasoning assumes that the conduct of the parties during the litigation process is indicative of how the parties will relate to one another after the process is completed. Yet, the confrontational, emotionally charged nature of divorce and custody proceedings is likely to influence the parties’ conduct during the litigation process. Thus, conduct that occurs in the midst of the divorcing process may not be indicative of the parents’ future ability to cooperate in child rearing. Therefore, divorce courts should be wary of placing undue emphasis upon such evidence when evaluating what is in the best interest of the children.

Despite this potential drawback, the Law Court’s focus upon the cooperation elements of the statute is both supported by, and consistent with, the legislative intent behind section 752(5). The legislative history of this section reveals that the Legislature did indeed consider the parents’ ability to cooperate to be important—both during, and after, the process of divorcing. The Commission to Study the Matter of Child Custody in Domestic Relations Cases prepared a report for the 111th Legislature, which formed the basis of section 752(5). In its report the Commission specifically stated that “[a]dding new factors concerning the capacity of parents to cooperate and assure a child’s contact with both parents expresses a policy of favoring parents working together in the best interest of a child. These additional factors also indicate the behavior expected

\textsuperscript{73} The result of the Campbell case on remand seems to indicate that the parents’ ability to cooperate had not been substantially impaired; within three months after the date of the Law Court’s decision, the parties arrived at a joint custody agreement through mediation. Campbell v. Campbell, No. CV-90-16 (Me. Super. Ct., Oxf. Cty., May 29, 1992) (Bradford, J.).

As Professor Mnookin noted: “Adjudication usually requires the determination of past acts and facts, not a prediction of future events. Applying the best-interests standard requires an individualized prediction: with whom will this child be better off in the years to come?” Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEM P. PROBS. 226, 251 (1975). The outcome in the Campbell case seems to emphasize the point that the judge’s ability to make such predictions about future behavior is limited.
of parents involved in a custody case."74 The parents' ability to cooperate was also specifically outlined in the Statement of Fact when the legislation was introduced.76 In addition, Maine is not alone in this focus upon cooperative parental behavior. At least seven other states77 have "friendly parent provisions." Thus, the Law Court's determination that evidence of misuse of the protection from abuse process could be linked to the cooperation elements of the best interest of the child standard is a reasonable finding.

As the foregoing discussion indicates, the Law Court was confronted with two sensitive issues in the Campbell case: the welfare of children, as well as the potential negative policy impact of deterring victims of domestic violence from seeking protective orders—the second concern raised by the Attorney General. Although domestic violence is a real and serious problem,76 as recognized by

74. REPORT OF THE COMMISSION TO STUDY THE MATTER OF CHILD CUSTODY IN DOMESTIC RELATIONS CASES, REPORT TO THE 111TH LEGISLATURE, at 10 (Feb. 1984) (emphasis added). See supra note 24 for additional legislative history.


78. The single greatest danger faced by a woman in the United States is assault by her husband or male partner. More women sustain injuries every year from abuse than from auto accidents. According to the FBI, at least 25 percent of all women in the U.S. will be battered two times or more by their
the Maine Legislature, a court’s primary consideration in a child custody case must be the welfare of the children. The Law Court’s careful analysis effectively addressed both issues.

First, the court determined that since evidence of one parent’s abuse of the protective process may be “predictive of post-divorce detriment to the children’s best interests,” it could not exclude all such evidence as the Attorney General suggested. Next, the Law Court demonstrated how such evidence could be linked to the statutory best interest of the child standard, as explained above. Then, the Law Court imposed a safeguard that addressed the concern raised by the Attorney General regarding the protection from abuse process; the court narrowed divorce courts’ discretion by creating a four-part relevancy test.

The Campbell court ruled that in order for the divorce court to consider misuse of the protection process in a custody award, the court must first meet a four-part threshold test to satisfy Maine Rule of Evidence 401. This test, the court held, requires that precisely defined foundational facts be proven by the standard of clear and convincing evidence. The test essentially requires that the proponent of the evidence establish that the parent did not actually fear abuse from her spouse, and that she sought a protection from abuse order for purely tactical purposes relating to the custody determination.

Therefore, under this new requirement, unless the moving party can establish that the parent intentionally misused the protection from abuse process, the evidence will not be admissible, and the judge will not be able to proceed to link the misuse of the protective order to the best interest of the child. This safeguard should effectively address the concerns raised by the Attorney General: the evidence will only be admissible in the most flagrant instances of misuse of process. Thus, the Law Court’s decision represents a principled attempt both to fulfill the duty of parens patriae and to avoid discouraging victims of domestic violence from seeking protec-

husbands or male partner during their lifetimes.


79. Maine’s Protection From Abuse Act is codified at Me. Rev. Stat. Ann. tit. 19, §§ 761-770B (West 1981 & Supp. 1992-1993). This law was substantially amended by P.L. 1989, ch. 862; the Statement of Fact for L.D. 2458, the bill introducing the proposed amendments, stated: “The bill is designed to reflect clearly the position that the victims of domestic abuse need the prompt assistance of the courts and law enforcement agencies to overcome the abuse they are suffering and that the victims are in no way responsible for the actions of the abuser.” L.D. 2458, Statement of Fact (114th Legis. 1990).

80. Campbell v. Campbell, 604 A.2d at 37.
81. Id. See supra note 57 for the language of M.R. Evid. 401.
82. Campbell v. Campbell, 604 A.2d at 37.

https://digitalcommons.mainelaw.maine.edu/mlr/vol45/iss2/8
B. The Campbell Court’s Use of the Best Interest Standard Illustrates the Need for Statutory Reform

Since Maine has codified the best interest of the child standard, it would appear that the standard has evolved from a broad principle defined on a case-by-case basis by the courts, to a more clearly outlined standard, defined by the Legislature for the courts’ application. A careful reading of the Campbell decision, however, illustrates that this is not the case. The Law Court seemed to have to remind the lower court that, since Maine has codified the best interest of the child standard, the lower court should link its rationale to the applicable factors outlined by the Legislature.

Although the statute lists thirteen factors that judges should consider in rendering custody decisions,83 the Legislature never identified the normative values underlying each factor. Also, despite the fact that “best” is a relative term, the Legislature never assigned a preference of one factor over another. Instead, the statute represents a list for the court’s consideration when exercising its broad discretion in arriving at child custody determinations—the statute itself provides little real guidance.84

This grant of broad discretion leaves the court with an enormous task. Since the legislative definition of “best interest of the child” is largely indeterminate,85 it will be up to the judge to apply the factors as she sees fit, relying upon some unidentified set of value judgments as to what exactly is “the best interest of the child.”86 In essence, the judge is forced to functionally define and redefine what the “best interest of the child” means, on a case-by-case basis, given

83. See supra text accompanying note 26.
84. As Black and Cantor noted:

[N]othing in the training of judges, from law school through courses for new judges, instructs them [on] how to do it [apply the best interest standard].

. . . Judges could just as easily have no standard at all. It would be as helpful to them to be simply told before trial, “Do your best.”

85. Although the Law Court referred to “best interest of the child” a dozen times in two pages of its opinion, the court never defined what was meant by this phrase. See Campbell v. Campbell, 604 A.2d at 36-37.
86. Affording judges such discretionary decision making power with this indeterminate standard that does not identify the underlying values the statute hopes to preserve, could lead to the judges’ supplying their own personal preferences and biases as to what is best for the child. For an excellent discussion of the inherent difficulties that the indeterminate nature of the best interest standard presents see Mnookin, supra note 73. See also Carl E. Schneider, Discretion, Rules, and Law: Child Custody and the UMDA’s Best-Interest Standard, 89 Mich. L. Rev. 2215 (1991); Elizabeth Scott & Andre Derdeyn, Rethinking Joint Custody, 45 Ohio St. L.J. 455, 466-67 (1984); David L. Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 Mich. L. Rev. 477, 488-89 (1984).
the unique circumstances of each family, while applying her own as-
seSSment of what factors are important.

In addition, since child custody cases are so fact-specific, appellate
courts grant substantial deference to lower court decisions.87 As ex-
plained in the background section above, a lower court’s decision
will be reviewed only for a clear abuse of discretion or other error of
law.88

The fact that the lower court judges have been granted such broad
discretion is not problematic, per se. Indeed, it is generally recog-
nized that the judge’s role in rendering child custody decisions is
inherently difficult and complex, and that many judges develop an
“expertise” in this area of family law through experience. However,
this structure of broad discretionary power, given such substantial
deference by reviewing courts, is problematic since a degree of ac-
countability is missing.

The structural safeguard against abuse of power developed within
the judicial branch is the process of appellate review. Yet, in the
context of child custody determinations, because the standard of re-
view is so high, a lower court’s ruling is rarely disturbed. Therefore,
since the lower court’s discretion is so broad and the standard of
review is so deferential, a judge’s authority in rendering a child cus-
tody award is almost omnipotent: it is difficult to abuse broad
discretion.

Yet, our legal system is premised upon the idea of accountabil-
ity—through rational decision making, judges document their opin-
ions so they may be evaluated, analyzed, and applied in the future.
The potential for nearly omnipotent decision making authority in
child custody cases becomes apparent when one considers that there

87. Some commentators have expressed concern over this degree of discretionary
authority. As Professor Atiyah noted:

[I]f all principle is to be abandoned, and everything left to the discretion of
a single trial judge, the whole value of the case by case methodology of the
common law will be lost. For that reason I confess to feeling great anxieties
at the signs in a number of recent cases that discretionary power to do what
seems just and equitable [is] to be exercised solely by a trial judge, with
virtually no appellate supervision unless manifest errors of principle are
made.

Schneider, supra note 86 at 2294 (quoting P.S. Atiyah, Common Law and Statute

Professor Glendon similarly observed:

As case law begins to develop under a grant of discretion, appellate courts
also have an important role to play. Rather than automatically deferring to
the “sound discretion” of the trial judge, they should, especially in the early
application of a new grant of discretion, carefully examine lower court deci-
sions to promote coherence, continuity and predictability in the case law.

Schneider, supra note 86 at 2294 (quoting Mary Ann Glendon, Fixed Rules and Dis-
creption in Contemporary Family Law and Succession Law, 60 Tul. L. Rev. 1165,
1196 (1986)).

88. See supra text accompanying notes 33-35.
is no legislative mandate that the lower court judge identify in her
decision precisely which statutory factor(s) she considered, and the
relative weight she assigned to each, when determining what was in
the "best interest of the child." The only mandate is that the judge
indicate in the record that the statute was considered. Consequently, this requirement could be met by a broad reference to the
best interest of the child standard alone.

As Mr. Justice Holmes once wrote: "The history of what the law
has been is necessary to the knowledge of what the law is." Yet in
child custody cases, since judges are not required to explain precisely how and why they arrived at their decisions, this objective is
frustrated. If "[l]aw is experience developed by reason and cor-
rected by further experience," as Dean Pound said, then a lower
court should be required to explicitly identify the criteria that
weighed significantly in its custody decision. As Dean Pound
explained:

Reason and reasoning are not the same thing. Reasoning does not
as such necessarily lead to a reasonable result, nor is it necessarily
guided by reason. Whether reasoning is reasonable depends on
what it starts from, how it is carried on, and to what end. It is
often mere association, superficial connection of one idea with an-
other, without any real discussion and appraisal of essential points
of connection.

Given the current state of Maine child custody law, since judges are
not required by statute to link their rationales specifically to the
best interest of the child standard, the parents, the bar, and possibly
the appellate courts, are often left to speculate as to the judge's ra-
tionale. As Mr. Justice Cardozo wrote: "The picture cannot be
painted if the significant and the insignificant are given equal
prominence." Imposing a requirement that when rendering custody awards
judges identify explicitly, in written opinions, which statutory fac-
tors were taken into account and the relative weight placed upon

89. See supra text accompanying note 26.
90. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 37 (1881).
91. Mr. Justice Stone's observation is worth consideration in this context: I can hardly see the use of writing judicial opinions, unless they are to em-
body methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an
excursion ticket, good for this day and trip only, they do not serve even as
protective coloration for the writer of the opinions and would much better be left unsaid.
H.F. Stone to Felix Frankfurter, Feb. 25, 1936 (The Stone Papers) reprinted in AL-
92. ROSCOE POUND, LAW FINDING THROUGH EXPERIENCE AND REASON 1 (1960).
93. Id. at 46.
94. BENJAMIN N. CARDOZO, LAW AND LITERATURE 8 (1931).
each factor, is not a novel idea. In fact, Minnesota, like Maine, has a statutory best interest of the child standard which lists factors for the judge to consider when making a custody determination. Minnesota goes one step further, however, by requiring the court to explain how the statutory factors weighed into its decision. The statute provides that "[t]he court may not use one factor to the exclusion of all others. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child." The Minnesota Supreme Court held that this provision requires the lower court judge to provide written findings and conclusions of law which constitute the grounds for the custody decision. The court indicated that "[s]uch findings would (1) assure consideration of the statutory factors by the family court; (2) facilitate appellate review of the family court's custody decision; and (3) satisfy the parties that this important decision was carefully and fairly considered by the court."

All three of the reasons outlined by the Minnesota Supreme Court could also be advanced in support of a similar mandate in Maine. Some may point to the fact that if a party would like a more detailed explanation after a decision is announced, the Maine Rules of Civil Procedure already allow a Rule 52(a) motion requesting additional findings of fact and law, provided the motion is filed within

95. This approach has been advanced by commentators in Michigan, Maryland, and New York. See Schneider, supra note 86 at 2296 (arguing that although trial courts should still be vested with discretion in custody cases, legislatures should require the courts to explicitly state the bases for their decisions); Hon. Bernard S. Meyer, Justice, Bureaucracy, Structure, and Simplification, 42 Md. L. Rev. 659, 688 (1983) (arguing that to improve understanding and to foster intelligent review of custody awards, legislatures should reduce the role of judicial discretion by requiring judges to spell out which statutory factors are considered in custody determinations and identify their relevance); Bernard S. Meyer and Stephen W. Schlissel, Child Custody Following Divorce: How Grasp the Nettle, 54 N.Y. St. B. J. 496, 501, 55 N.Y. St. B. J. 32, 38-39 (1982-1983) (arguing that the New York Legislature should narrow judicial discretion in custody cases by mandating that a trial judge state each statutory factor she considered, explain how her conclusions in relation to each factor affected the ultimate custody decree, explain why any statutory factors that she did not discuss were deemed irrelevant, and spell out any additional factors she considered under the statutory catch all provision).


97. Id.

98. Rosenfeld v. Rosenfeld, 249 N.W.2d 168, 171 (Minn. 1976). See also, Schneider, supra note 86 at 2294 n.212 (citing Rosenfeld as authority for proposition that courts should explain themselves in writing in child custody cases).

99. Rosenfeld v. Rosenfeld, 249 N.W.2d at 171.

100. Judge Cleaves referred to this rule, when asked by the Author if he felt a legislative amendment, requiring that a lower court judge explain which statutory factors weighed into his/her opinion, would be useful. Question and Answer Session with the Honorable Dana A. Cleaves, Chief Judge, Maine Administrative Court, following Judge Cleaves' comments on the Maine Family Court Project to University of
five days after the decision is announced. Moreover, some may argue that judicial economy will not be served by requiring further analysis.

These arguments are unpersuasive. Presumably the court has a tangible basis for its decision in mind when it announces the custody award; the only additional requirement would be that the judge put the basis for her decision down in writing. It makes sound policy sense to require that the judge automatically explain her rationale on paper, especially in light of the broad discretion the court is granted, as well as the deferential stance of Maine’s appellate courts. Imposing such a measure also makes sense as a legitimate procedural safeguard, which would preserve the discretionary character of the best interest of the child standard as currently codified, yet add a degree of accountability.

Moreover, judicial economy may be improved on appeal if lower courts offer more detailed rationales. In Campbell the Law Court had to look for a link between the lower court judgment and the statute. If the lower court had offered this link to begin with, the Law Court’s job would have been simpler. That is, the sole issue would have been the relevancy of the misuse of the protective order, in light of the potential policy impact of discouraging those who need protection from abuse orders from seeking to secure them.

V. Conclusion

This Note has argued that the Campbell decision is consistent with current Maine law. The Law Court applied a legitimate interpretation of Maine’s best interest of the child standard. If the court had prohibited the consideration of any evidence of misuse of the protection process, the potential negative policy impact of deterring...
victims of domestic abuse from seeking protective orders would have been improperly placed ahead of the court’s foremost duty—to determine the best interest of the children before the tribunal.

This Note has also demonstrated that the *Campbell* case is particularly significant because it indicates to Maine courts and the bar that a divorce court’s broad discretion as *parens patriae* is not without bounds. Since the Legislature has codified the best interest of the child standard, the rationale behind a judge’s custody award must be clearly linked to statutory law.

This Author recommends that the Maine Legislature take the Law Court’s directive one step further and amend the best interest of the child standard to require judges to identify in their written decisions which specific statutory factors were taken into account, and the relative weight assigned to each factor. As the Honorable Justice Frankfurter once wrote: “In law also, the emphasis makes the song.”104

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