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Domestic Relations-Child Custody-Reasonable Visitation or Divided Custody

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> The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.[72]

Without the exclusionary rule, there may be no effective way to protect fourth amendment rights;[73] if so, abandoning the exclusionary rule may mean disregarding the fourth amendment, an important part of the nation's charter of existence.

Logically the basic defect in *Stone v. Powell* is the Court's refusal to overrule *Mapp*'s holding that the exclusionary rule is constitutionally required.[74] As long as the exclusionary rule is deemed to be based on the Constitution, there is no logical reason to distinguish it from other rights reviewable in habeas corpus proceedings.[75] However, the Court may be reluctant to dispose of the *Mapp* holding because of fear that without it there will be no remedy for fourth amendment violations. In the words of *Mapp*, failure to enforce the exclusionary rule ". . . is to grant the [fourth amendment] right but in reality to withhold its privilege and enjoyment."[76]

STEPHEN C. SCOTT

DOMESTIC RELATIONS—CHILD CUSTODY—REASONABLE VISITATION OR DIVIDED CUSTODY?

In re Marriage of Powers[1]

Patricia Powers filed suit for dissolution against her husband, Robert, after ten years of marriage. The trial court awarded primary custody of the couple's child to Mrs. Powers. The husband was given "temporary custody"[2]

72. 367 U.S. 643, 659 (1961).

73. The failure of tort remedies to deter illegal searches led to adoption of the exclusionary rule. *Id.* at 651-53. Some scholars have pointed to the Canadian tort remedy for illegal searches as an alternative to the exclusionary rule, but it is not clear the Canadian remedy serves as a practical deterrent in Canada. Canon, *supra* note 71, at 692 n.53. Chief Justice Burger's proposal in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 422-23 (1971), for an administrative tribunal to award compensation for violations of fourth amendment rights would seem to be more workable, but it is difficult to imagine even such a professional tribunal routinely awarding appropriate damages to "morally unworthy" prisoners who were convicted through the introduction of illegally seized evidence.

74. 367 U.S. at 649.

75. *See* text accompanying notes 41-42 *supra.*

76. 367 U.S. at 656.

1. 527 S.W.2d 949 (Mo. App., D. St. L. 1975).

2. *Id.* at 952. Technically, the award would not qualify as temporary custody under § 452.380, RSMo 1975 Supp. This section contemplates a temporary custody

of his son two and one-half weekends a month, one day during each week, three weeks during the summer, and on some holidays.

Mrs. Powers appealed the decree alleging that the trial court abused its discretion by granting the husband excessive visitation privileges. The basis of her position was that her son's best interests would not be served by frequently being shifted back and forth between his parents. She also asserted that the award deprived her of her son's company.[3] The Missouri Court of Appeals, St. Louis District, held that the trial court did not abuse its discretion in making the award and affirmed its decision.[4] More specifically, the appellate court found that the "temporary custody" allowed by the decree was in the child's best interest. Refusing to characterize the award as one providing for "unprecedented and unreasonably excessive" shifts in custody, the court concluded that the custody arrangement only provided the father with "reasonable visitation rights."[5]

By statutory directive the courts are to consider custody arrangements in dissolution based on the best interest of the child.[6] In 1973, the legislature enacted guidelines for courts to use in determining the best interests of the child.[7] However, these guidelines are not exclusive and remain vague because of the varying situations arising in child custody cases.[8] Consequently, court decisions are relevant in understanding the rationale used to determine the types of custody arrangements which are beneficial to the child.

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order being granted prior to a final decree. However, the court never discusses the inappropriateness of the label. Rather, the court discusses the decree as if Mr. Powers had been granted visitation rights. Thus, for clarity, the term visitation will be used throughout this paper instead of temporary custody.

3. *Id.* at 952-53.

4. *Id.* at 952.

5. *Id.* at 953.

6. § 452.120, RSMo 1969 provides:

> In all proceedings for divorce or other proceedings in which shall be involved the right to custody and control of minor children, . . . the rights of the parents shall be equal, and neither parent as such shall have any right paramount to that of the other parent, but in each case the court shall decide only as the best interests of the child itself may seem to require.

This section was repealed by Laws 1973, p. 470 A, effective January 1, 1974. The new section is now section 452.375, RSMo 1976 Supp., which provides:

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

7. *See* statute quoted note 6 *supra.*

8. V.M. v. L.M., 526 S.W.2d 947, 949 (Mo. App., D. St. L. 1975). The court states as follows: "There is no exact formula for the determination under this worthy but nebulous standard." *Contra,* 1 BNA FAM. L. REP. at 2025 (Transfer Binder 1974-75).

The three districts of the Missouri Court of Appeals traditionally have rejected divided custody arrangements. The courts shun "experiments" which provide for the child's custody being frequently shifted back and forth from one parent to the other.[9] Although the children should have the benefit of both parents, divided *custody* is not approved.[10] However, this has not been translated into discouragement of liberal and frequent visitation privileges for the non-custodial parent. The question which arises is how to differentiate between visitation, which provides for beneficial association with both parents, and divided custody.

The distinction remains less than clear because of the appellate court's refusal to adopt a rigid philosophy which consistently dictates custody awards. Presently, there are two contrasting views with regard to the feasibility and desirability of divided custody. Those authors who believe that the courts should be more inclined toward dividing custody argue that frequent association with both parents promotes and maintains parental interest in the child, and therefore, serves the best interest of the child.[11] This view has been adopted by the North Carolina legislature.[12]

In contrast, some authors are opposed to any formalized custodial arrangements in both parents. For example, the authors of *Beyond the Best Interest of the Child*[13] contend that the "non-custodial parent should not have legally enforceable rights to visit the child." They argue that visitation privileges in the non-custodial parent are detrimental to the child because these visits impair the security of the ongoing relationship between the child and the custodial parent.[14] Texas, while recognizing the non-custodial parent's visitation rights, is firmly committed to providing the child with a secure environment with one parent.[15] Consequently, the appellate courts frequently reverse custody decrees which provide the non-custodial parent with extensive visitation privileges.[16]

The Missouri position is between these two extremes. The statutory scheme enacted in 1973 envisions one custodian with liberal visitation privileges given to the non-custodial parent.[17] The custodial parent is vested

9. *E.g.*, Irvine v. Aust, 193 S.W.2d 336, 342 (St. L. Mo. App. 1946) *cited in* Schumm v. Schumm, 223 S.W.2d 122, 126 (St. L. Mo. App. 1949).

10. *See, e.g.*, Johnson v. Johnson, 526 S.W.2d 33 (Mo. App., D. St. L. 1975). *See also* J. Speca & R. Wehrman, *Protecting the Rights of Children in Divorce Cases in Missouri*, 38 UMKC L. REV. 1, 6-15 (1969).

11. Note, *Divided Custody of Children After Their Parents' Divorce*, 8 J. FAMILY L. 58 (1968). But, this author criticizes courts which refuse to modify a divided custody award when presented with evidence that it is disadvantageous to the child. Flanagan v. Flanagan, 195 Or. 611, 247 P.2d 212 (1952).

12. N.C. GEN. STAT. § 50-13.2(b) (Supp. Vol. 2a 1975).

13. J. GOLDSTEIN, A. FREUD, A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD (1973).

14. *Id.* at 38.

15. Martin v. Martin, 132 S.W.2d 426 (Tex. Civ. App. 1939).

16. *See, e.g.*, Heard v. Bell, 434 S.W.2d 222 (Tex. Civ. App. 1968).

17. *Compare* the wording of § 452.375, RSMo 1976 Supp. (custody determinations) *with* § 452.400, RSMo 1975 Supp. (visitation rights). *See also* § 452.405, RSMo

with the right to determine questions concerning the child's upbringing.[18] The child's need for security is also protected by stringent requirements concerning modification of a custody decree.[19] But, visitation privileges of the non-custodial parent are protected by the statute, unless he or she is unfit.[20] After the *Powers* decision, it is evident that the Missouri courts will refuse to adopt the label of divided custody, but the judiciary will continue to be inclined toward promoting the non-custodial parent's interest in the child by awarding liberal visitation privileges when the appropriate factual situation exists.[21]

The appellate court's apparent inconsistency in labeling specific decrees as providing for reasonable visitation or divided custody may be explained by three factors. First, the appellate court is reluctant to modify or reverse a custody award. The trial judge is in a unique position to observe the

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1975 Supp. where the custodian is generally allowed to determine the child's upbringing. *Infra* at notes 43, 45.

18. § 452.405(1), RSMo 1975 Supp. provides:

> Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court after hearing, finds, upon motion by the non-custodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development impaired.

19. § 452.410, RSMo 1975 Supp. provides:

> The court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child.

While flexible in the determination of the original decree, the Missouri courts have traditionally been reluctant to modify a decree. By court decision, an award would not be modified unless the person seeking a change in the original decree could show a change in circumstances and that the child's best interests would be served by modification. *See, e.g.*, I— v. I—, 482 S.W.2d 523 (Mo. App., D.K.C. 1972). The Missouri courts have not yet decided if the new statutory requirements limit the circumstances which may justify a modification. MeinKing v. MeinKing, 529 S.W.2d 440, 444 (Mo. App., D.K.C. 1975). *But see* McFadden v. McFadden, 509 S.W.2d 795, 798 (Mo. App., D. St. L. 1974). *See also* L. Hudak, *Seize, Run, and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts*, 39 MO. L. REV. 521 (1974).

20. § 452.400, RSMo 1975 Supp. provides:

> (1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger the child's physical health or impair his emotional development.
>
> (2) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical health or impair his emotional development.

21. 527 S.W.2d at 953. The *Powers* court refers to the Tuesday night custody with approval noting that this will encourage the father's interest in his son's school work.

demeanor, character, and sincerity of the witness.[22] Therefore, the trial court's findings as to the credibility of the witnesses will not be questioned on appeal.[23] Notwithstanding appellate review of the evidence,[24] the appellate court will not disturb the trial court's custody award unless it is "clearly erroneous,"[25] and the welfare of the child requires a different result.[26]

The second factor which influences the appellate court in determining the suitability of the custody arrangement is the interaction of the parties involved.[27] When there is evidence that the parties are unable to amiably adapt, frequent visitation privileges of substantial duration will not be allowed. The case of *Wood v. Wood*[28] is illustrative. The trial court in *Wood*

22. *E.g.*, Feltman v. Feltman, 514 S.W.2d 353 (Mo. App., D. St. L. 1974); E— (S—) v. E—, 507 S.W.2d 681 (Mo. App., D.K.C. 1974); Ramos v. Ramos, 232 S.W.2d 188 (St. L. Mo. App. 1950).

23. *In re* Zigler, 529 S.W.2d 909 (Mo. App., D. St. L. 1975); R. L. S. v. J. E. S., 522 S.W.2d 5 (Mo. App., D.K.C. 1975) *cited by In re* Powers, 527 S.W.2d at 952; McFadden v. McFadden, 509 S.W.2d 795 (Mo. App., D. St. L. 1974). MO. SUP. CT. R. 73.01 dictates this result. The rule outlines procedures to be used in a trial by court. The rule states that on appellate review "due regard shall be given to the opportunity of the trial court to have judged the credibility of the witnesses." MO. SUP. CT. R. 73.01(3)(b).

24. *Compare,* Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. En Banc 1976) *with In re* Zigler, 529 S.W.2d 909 (Mo. App., D. St. L. 1975); *In re* Powers, 527 S.W.2d 949, 954 (Mo. App., D. St. L. 1975); J—G—W— v. J—L—S—, 414 S.W.2d 352 (Spr. Mo. App. 1967); Rone v. Rone, 20 S.W.2d 545 (Spr. Mo. App. 1929).

25. *In re* Powers, 527 S.W.2d at 952. *Accord,* Feltman v. Feltman, 514 S.W.2d 353 (Mo. App., D. St. L. 1974); H—B— v. R—B—, 449 S.W.2d 890 (St. L. Mo. App. 1970). *See also* R.L.S. v. J. E. S., 522 S.W.2d 5, 7 (Mo. App., D.K.C. 1975) where the court states that the trial court's decision will be affirmed unless the evidence is "palpably insufficient to sustain the findings." This changing standard was the result of a 1974 modification of MO. SUP. CT. R. 73.01 as adopted March 29, 1974 (to be effective January 1, 1975). The new rule deletes the words "the judgment shall not be set aside unless clearly erroneous." MO. SUP. CT. R. 73.01(d). Interpreting the 1974 revision and clarifying its effect, the Missouri Supreme Court En Banc said that "the use of the words *de novo* and *clearly erroneous* was no longer appropriate . . . ." Instead, the supreme court said that the trial court's judgment or decree will be sustained by the appellate court "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." But, in applying this standard, the supreme court directed the appellate courts to "exercise the power . . . with caution." Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. En Banc 1976).

26. The appellate courts presume that the child is with the right parent based upon the trial court's decree. E— (S—) v. E—, 507 S.W.2d 681, 684 (Mo. App., D.K.C. 1974); Yount v. Yount, 366 S.W.2d 744 (K.C. Mo. App. 1963).

27. *In re* Powers, 527 S.W.2d at 953. This emphasis suggests that there are few inclinations of appellate judges that are transformed into maxims. For example, the Court of Appeals, Kansas City District, cited *M—L— v. M—R—*, 407 S.W.2d 600 (Spr. Mo. App. 1966) for the proposition that "the *only* rigid, inflexible and unyielding principle in child custody cases is that the welfare of the child is paramount and supreme. . . ." I— v. I—, 482 S.W.2d 523, 528 (Mo. App., D.K.C. 1972) (emphasis added). The Missouri cases are contrasted in Annot., 92 A.L.R.2d 695 (1963).

28. 400 S.W.2d 431 (St. L. Mo. App. 1966); *first appeal,* 378 S.W.2d 237 (St. L. Mo. App. 1964).

awarded each parent full custody in alternating years. The arrangement proved to be disharmonious and resulted in repeated litigation. Both spouses sought modification of the decree expressing a belief that the instability of the custody arrangement was disadvantageous to the child. In reviewing the modification award of the trial court, the court of appeals stated that "except for good reason, the child should not be shifted periodically from one home to another."[29] The *Powers* court distinguished *Wood* on the rationale that Mr. Powers had only been awarded reasonable visitation rights and not alternating periods of full custody.[30]

The disdain for frequent shifts in custody has been expressed when the alternating periods of custody involved less time than a year. In these cases there were also indications that the child was or would be upset by the arrangement. In *Draper v. Draper*[31] the court refused to sanction alternating custody every six months for two pre-school aged children. According to the wife's motion to modify, the oldest child, age three and a half, became "nervous and ill when transferred from one home to another." Similarly, the court in *J—G—W— v. J—L—S—*[32] disallowed the children's weekend visits with their mother on the rationale that they were too frequent. An influential factor was that the children were disturbed with the visits and the court found that they were being subjected to the "bickering and backbiting" of the parents. A mandatory summer visit with a father in Missouri was reversed in *Emerson v. Emerson*[33] when the court granted the mother permission to move the child to the Philippines. The court concluded that the parents were incapable of sharing "amicable divided custody."

The appellate court has upheld awards providing for visitation periods of reasonable frequency or duration when the facts did not indicate discord between the parties. In *Westerman v. Westerman*[34] a trial court's award of alternating custody of a three and one-half year old child every six months was affirmed. The court was of the opinion that the father was a man of good character and his proposed living arrangements for his daughter would stimulate her development. The court of appeals in *Baker v. Baker*[35] instructed the trial court to award the father visitation privileges every other

29. *Id.* at 437.

30. *In re* Powers, 527 S.W.2d at 953.

31. 364 S.W.2d 27 (K.C. Mo. App. 1962). The court states as follows: "Children, generally, and except for good reasons, should not be shifted every few months from one home to another." *Supra* at 30.

32. J—G—W— v. J—L—S—, 414 S.W.2d 352, 359 (Spr. Mo. App. 1967).

33. Emerson v. Emerson, 419 S.W.2d 291 (K.C. Mo. App. 1967).

34. 153 S.W.2d 825 (St. L. Mo. App. 1941). *Accord,* Childres v. O'Neal, 476 S.W.2d 799 (Ark. 1972).

35. 475 S.W.2d 130 (K.C. Mo. App. 1971). However, the trial court was reversed for splitting the children between the parents. The court stated that brothers and sisters should remain together unless it is necessary to disturb the "normal pattern of family relationship." But, the court instructed the trial court to grant the father visitation privileges recognizing his "rights" in the children. *Id.* at 133.

weekend and four weeks in the summer. The court has also approved awards where the child remained with one parent during the school year and the other during the summer.[36] The last award was explained in the following terms:

> With such a liberal division of custody, each of the parents will have an opportunity to impart the best of their experience . . . and at the same time continue to build the mutual love and respect which must exist between parent and child for the child's future growth and well-being . . . .[37]

Thus, the court recognized that where the parties can favorably interact both parents have responsibilities in the rearing of the child.

The court's desire to promote association with both parents is the third factor explaining the liberal visitation privileges enjoyed by Missouri parents. Fathers are considered fit to be the custodians of their children.[38] Consequently, the concept that the mother is presumed to be the most appropriate custodian to advance the best interest of the child of tender years has not been conclusively applied in Missouri.[39] In fact, the father's

36. Girvin v. Girvin, 471 S.W.2d 683 (St. L. Mo. App. 1971).

37. *Id.* at 686.

38. This position is statutorily dictated and has been so construed by the courts. *E.g.*, Baer v. Baer, 51 S.W.2d 873 (St. L. Mo. App. 1932); Abel v. Ingram, 223 Mo. App. 1087, 24 S.W.2d 1048 (Spr. Ct. App. 1930). Thus, the derogatory opinions expressed by the delegates to the ABA Convention are not officially recognized in Missouri. 1 BNA FAM. L. REP. at 2708-09 (Transfer Binder 1974-75). *See also* Miller, *Life With Father: A New Look at Divorce, Custody*, The Kansas City Times, April 13, 1976, at 6B. *But see* Annot., 70 A.L.R.3d 262 (1976).

39. Johnson v. Johnson, 526 S.W.2d 33 (Mo. App., D. St. L. 1975); M—L— v. M—R—, 407 S.W.2d 600 (Spr. Mo. App. 1966). However, in some cases there are flowering tributes to motherhood. For example, in *Keith v. Keith*, 95 S.W.2d 669, 672 (K.C. Mo. App. 1936), the court said that a child needs "above all else, the tender love and affection of a mother." The cases are collected in *Horst v. McLain*, 466 S.W.2d 187 (K.C. Mo. App. 1971). The present approach is to apply the presumption when "all things are equal." Tuter v. Tuter, 120 S.W.2d 203 (Spr. Mo. App. 1938). The districts are split on the appropriate standards to apply in determining if all things are equal. One line of cases requires the father to show that the mother was demonstrably unfit before he is given custody. *E.g.*, Horst v. McLain, 466 S.W.2d 187 (K.C. Mo. App. 1971); Paxton v. Paxton, 319 S.W.2d 280 (K.C. Mo. App. 1958). However, other cases have said that it was not an abuse of discretion to award the children to the father when neither parent was "shown to be an improper custodian." *E.g.*, Johnson v. Johnson, 526 S.W.2d 33 (Mo. App., D. St. L. 1975) *citing* Brand v. Brand, 441 S.W.2d 750 (Spr. Mo. App. 1969). *Accord*, Davis v. Davis, 354 S.W.2d 526 (Spr. Mo. App. 1962). The father has also been given custody when he was able to show that the mother was engaged in activity or possessed a characteristic which might be detrimental to the best interests of the child. Bolten v. Bolten, 507 S.W.2d 46 (Mo. App., D. K.C. 1974) (immature); McC. v. McC., 501 S.W.2d 539 (Mo. App., D. K.C. 1973) (pleasure seeking); Endicott v. Endicott, 435 S.W.2d 388 (K.C. Mo. App. 1968) (abusive to the child); Wood v. Wood, 400 S.W.2d 431 (St. L. Mo. App. 1966) (working full time); Schneider v. Schneider, 248 S.W.2d 59 (St. L. Mo. App. 1952) (pleasure seeking). When the mother's actions may be characterized as immoral, the courts are split. *Compare*, C.S. v. R.J.S., 488 S.W.2d 663 (Mo. App., D. St. L. 1973) *with* T— v. T—, 483 S.W.2d 84 (Mo. App., D. K.C. 1972) where the