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Family Law--Custody of Children

William Edward Hudson
University of Kentucky

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court has balanced the prejudicial effect of prior convictions against their probative value to elicit the soundest of presently proposed rules.

James T. Hodge
Kenneth Gregory Haynes[90]

FAMILY LAW—CUSTODY OF CHILDREN.—Randall Floyd James, age seven, was taken by his divorced father to live with Randall's aunt and uncle due to the illness of Randall's grandparents, with whom the son and father were living. Randall's father later advised the aunt and uncle that he was going to remarry. This news upset the aunt and uncle and they asked Randall's father to sign a contract relinquishing custody of Randall to them. The father refused to sign the contract. After repeated efforts to regain custody, during which time he was prevented on numerous occasions from seeing his son, the father instituted this proceeding in December of 1966. The Jefferson Circuit Court, Chancery Division, awarded custody to the aunt and uncle. The father appealed. *Held*: Reversed.[1] The natural parent is entitled to the custody of his child unless it is shown that the natural parent is unsuitable to have custody. *James v. James*, 457 S.W.2d 261 (Ky. 1970).

Deborah Mandelstam, age six, was placed in the custody of a rabbi of a local Jewish temple, as a result of divorce proceedings in Fayette Circuit Court between her parents. The chancellor found that the mother was of such a mental condition that it would not be

(Footnote continued from preceding page)
that limited the prosecution to only disclosing whether the defendant had been convicted of a felony and nothing more, it has been said:

> The aim of protecting the witness from needless exposure of his past is sought to be accomplished in Florida by means of imposing restrictions upon the examination procedure, rather than upon the definition of crimes within the rule. If the witness admits the bare fact of his past conviction at the outset, he is shielded from further questioning. In practical effect, however, this procedure neither aids the jury nor protects the witness. Mere knowledge that the witness has been convicted of a crime —perhaps murder, perhaps a traffic violation—will more probably mislead than assist the jury. At the same time, the reputation of the witness is subjected to doubts and suspicions that may be more damaging than full revelation of his actual record. 15 FLA. L. REV. 220, 228 (1962).

[90] Mr. Haynes is a former staff member of the *Kentucky Law Journal*, and is a 1970 graduate of the University of Kentucky College of Law.

[1] The record did not contain any specific finding of fact as to whether the natural parent was fit. The case was remanded on the procedural issue of burden of proof, and findings as to the fitness of the parent or the best interests of the child were left to the lower court.

in the best interests and welfare of Deborah to remain with her mother.[2] The chancellor, while not finding in so many words that the father was unfit to have custody, did find that the best interests of the child required that she be placed in the custody of a third party.[3] The father appealed. *Held*: Affirmed. A specific finding that a parent is unfit is not necessary in order to award custody of a child to a third person if it is in the best interests of the child. The best interests of the child required that Deborah be placed in the custody of a third party and not in the custody of her father. *Mandelstam v. Mandelstam*, 458 S.W.2d 786 (Ky. 1970).

The origin of the law's role in deciding custody disputes is usually traced to the concept of *parens patriae*[4] and the duty of the court to protect the child who is unable to protect himself.[5] The early common law gave the primary right of custody to the father.[6] Custody could not be taken from the father unless he intentionally "kept the child in such degraded conditions that the child himself might become delinquent."[7] Awarding custody of the child to the mother upon the death of the father began to erode the father's primary right to custody. With the enactment of joint custody statutes by many of the states, the father's exclusive right to custody was virtually legislated out of existence. Joint custody statutes[8] award custody of children jointly to the father and mother, *e.g.*:

> The father and mother shall have the joint custody . . . of their children who are under the age of eighteen. If either of the parents dies, the survivor, if suited to the trust, shall have the custody . . . of the children who are under age of eighteen. . . .[9]

These joint custody statutes have been used to arrive at a presumption in favor of the natural parents as against third parties attempting to obtain custody from the natural parents. However,

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[2] Mandelstam v. Mandelstam, 458 S.W.2d 786, 787 (Ky. 1970).

[3] *Id.* at 788.

[4] Johnstone, *Child Custody*, 1 KAN. L. REV. 37 (1952):

> The doctrine of *parens patriae* is sometimes invoked by courts to justify the states' action in custody cases. This is an old equity concept by which the state exercises its sovereign power of guardianship over persons under disability including children. When children are not being properly cared for by their parents or if children become delinquent, the state, through its courts, may use its *parens patriae* powers and make custody changes. *Id.* at 41-42.

[5] Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 n.3 (1963).

[6] 67 C.J.S. *Parent and Child* § 11 (1950).

[7] Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 676 (1942).

[8] For a partial list of states adopting joint custody statutes *see* 4 C. VERNIER, AMERICAN FAMILY LAWS 18 (1936).

[9] KY. REV. STAT. [hereinafter KRS] § 405.020 (1) (1960).

with the passage of the Guardianship of Infants Act, the welfare of the child began to take precedence over the presumption in favor of the natural parents.[10]

Child custody cases place a heavy burden on the court and the trial judge. "A judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders."[11] The court must decide who is qualified to take custody of the child. The trial court's duty is to

> . . . ascertain all the facts and to make such an investigation as in its judgment will assist in reaching a proper conclusion as to the person who is best qualified to furnish a proper environment and home for the child . . . The court should make such order as to the infant's custody as will properly safeguard its best interests and welfare.[12]

Although there is a vast amount of statutory and case law in child custody cases the trial judge has wide discretionary powers.[13] It is within the discretion of the trial court to decide custody matters as it thinks justice requires and such discretion will not be reversed unless abused.[14]

Custody disputes are usually a result of two parents attempting to obtain custody of their child after a divorce proceeding,[15] or between a natural parent and some third person. The court uses two tests in deciding custody disputes. These tests are the "parental right" test and the "best interest of the child" test.

The "parental right" doctrine raises a presumption that the natural parent is best suited to have custody of the child.

> The law raises a strong presumption that the child's welfare will best be subserved in the care and control of its parents. In every case the showing of such relationship in the absence of anything more, makes out a *prima facie* case for the parents which can be

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[10] 1925, 15 & 16 Geo. 5, c. 45 § 1.
Today the Guardianship of Infants Act of 1925 covers all minors and enunciates the principle that 'the court . . . shall regard the welfare of the infant as the first and paramount consideration.' Foster & Freed, *Child Custody*, 39 N.Y.U. L. REV. 423, 424 (1965).

[11] B. BOTEIN, TRIAL JUDGE 273 (1952).

[12] 43 C.J.S. *Infants* § 8 (1945).

[13] 27B C.J.S. *Divorce* § 310 (1959).
Within the restrictions imposed by statute the trial court is vested with a large discretion in determining what is for the child's best welfare and to whom the custody of the child should be awarded, and . . . unless such discretion is abused, the judgment will not be disturbed.

[14] Kelly v. Applewhite, 231 S.W.2d 974 (Tex. Civ. App. 1950).

[15] For an excellent discussion of child custody in Kentucky divorce cases see Note, *Child Custody in Kentucky Divorce Cases: 1940-1952*, 41 KY. L.J. 324 (1953).

> overcome only by the most solid and substantial reasons established by plain and certain proofs.[16]

The second test used in adjudication of child custody cases is the "best interest of the child" test. It has even been stated that the welfare of the child is the chief consideration,[17] and that the legal right of the parent is secondary to the best interest of the child.[18]

> In determining best interests courts evaluate any of a large number of factors including moral fitness of the competing parties; the comparative physical environments offered by the parties; the emotional ties of the child to the parties and of the parties to the child; the age, sex and health of the child; the desirability of maintaining continuity of the existing relationships between the child and the third party; and the articulated preference of the child.[19]

A duty to consider the best interest of the child is sometimes placed upon the court by statute.[20]

Since the child custody statutes raise a presumption that the parent is fit to have custody of his children, the burden of proof is usually on the other party claiming custody.[21] To overcome the prima facie case[22] made out by the parent just by proving that he or she is the natural parent, it must be established that the right to custody has been forfeited or that the parent is unfit.[23] To show that the parent has forfeited his natural right to custody "grave and compelling reason must be shown, such as neglect, abandonment, incapacity, moral delinquency, instability of character or emotion or inability to furnish the child with needed care."[24] As a general rule child custody statutes do not confer upon the parent an absolute right to the custody of the child.[25] "Custody is properly refused to a parent who is shown un-

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[16] 39 AM. JUR. *Parent and Child* § 24 (1942).
[17] 24 AM. JUR. 2d *Divorce & Separation* § 783 (1966).
[18] 39 C.J.S. *Habeas Corpus* § 41 (1944).
[19] 73 YALE L.J., *supra* note 5, at 153.
[20] *E.g.*, KRS § 403.070 (1968) provides in part:
> At any time [after divorce] upon the petition of either parent, the court may revise any of its orders as to the children, having principally in view in all such cases the interest and welfare of the child.

[21] Berry v. Berry, 386 S.W.2d 951 (Ky. 1965) (burden of showing unfitness is on person seeking to deprive natural parent of custody); Bridwell v. Coomes, 250 S.W.2d 868 (Ky. 1952) (in the absence of contract the burden of proof is on the person other than the parent).
[22] Reynardus v. Garcia, 437 S.W.2d 740 (Ky. 1968) (it is presumed that the parent is competent and suitable to rear children); Goff v. Goff, 323 S.W.2d 209 (Ky. 1959) (father has a prima facie statutory right to custody of his children as a parent, and does not have the burden of proving his suitability).
[23] 27B C.J.S. *Divorce* § 317(2) (1959).
[24] R. PETRILLI, KENTUCKY FAMILY LAW 451 (1969).
[25] Runions v. Powers, 258 S.W.2d 514 (Ky. 1953).

worthy, unsuitable, unfit or in any way incompetent for the trust."[26] In addition courts may deprive the natural parent of the custody of his child if the best interests of the child require such action, whether or not the parent is found to be unfit.[27] In the future the parental right test may be abandoned, just as the primary right of the father was abandoned in earlier years.[28] As the best interests of the child test becomes more prevalent there seems to be a trend away from awarding custody to the parents, and awarding custody to whoever can best provide for the best interests of the child.[29]

In the *James* case the Court of Appeals found that the third party uncle and aunt attempting to obtain custody from the natural parent had not met the burden of proving the natural parent unfit. They also found that the natural parent had not contracted to give up custody of his child. In the *Mandelstam* case the Court found that the best interests of the child required that Deborah Mandelstam be placed in the custody of the third party, a Jewish rabbi. Deborah's mother was found to have a mental condition involving severe neurotic disorders. While the lower court did not make a specific finding that the father was unfit, there were several findings of fact as to why the child's best interests required that she be placed in the custody of a third person. These findings included the fact that the father worked nights in a laboratory and was going to hire a maid to take care of the child during the day and that he would take the child with him to the laboratory at night. The chancellor concluded that under this plan there would be little family life or home relationship between the father and the child. He also found that the father knew nothing

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[26] 67 C.J.S. *Parent and Child* § 12 (1950).
Unfit has been defined to mean physical and mental health, strength and ability to earn necessary finances for the purpose (if not already possessed) and good moral character. West v. West, 294 Ky. 301, —, 171 S.W.2d 453, 456 (1943).

[27] "It has been recognized, moreover, that even though a parent is fit to have custody, he may be denied custody if this is clearly inimical to the best interests of the child." 24 AM. JUR. 2d *Divorce & Separation* § 789 (1966). "[T]he court is not required to find the parent unfit before it can award the child to other parent." 27B C.J.S. *Divorce* § 309(6) (1959).

[28] "Any vestige of the English rule of parental right which might exist in the law today should be removed. The court in awarding custody of a child must look only to the welfare of the child." Comment, 36 S. CAL. L. REV. 255, 268 (1963). "There may be occasions where a parent's love must yield to another if after judicial investigation it is found that the best interest of the child is subserved thereby." Wilson v. Wilson, 269 N.C. 676, —, 153 S.E.2d 349, 351 (1967).

[29] Whiteside, *Ten Years of Kentucky Domestic Relations Law 1955-1965*, 54 KY. L.J. 206 (1965):
In line with an apparent trend in other states, the Kentucky courts have adjudicated an increasing number of cases in which an award of custody to a third party other than the parents has been made over strong opposition of one of the parents seeking custody. *Id.* at 234.

about caring for a young child. The Court of Appeals concluded that when the chancellor found that the best interests of the child required the natural parents to be deprived of custody, he was in effect saying that neither parent was fit or suitable to have custody of the child.

The Court of Appeals has refined a correct approach to child custody cases. As evidenced by the *James* case the court still recognizes that the natural parent has some rights to his child which will not be ignored. However, as shown by *Mandelstam,* if the best interests of the child require, the court will deprive the natural parent of custody and award custody of the child to a third party. Thus the court is not just mechanically applying the parental right test or the best interests of the child test. This approach allows the court to make its decision on the basis of the best interests of *all* involved instead of applying one test to the exclusion of the other.

The appellant in *James* correctly contended that the burden of proof was on the third party rather than the natural parent.[30] While the court should not ignore the right of the natural parent to custody of his child, this procedural advantage to the natural parent should be removed. Both the natural parent and the third party should be placed on equal footing. In the context of today's adoption, separation and divorce of natural parents, and the future complications created by artificial insemination, this procedural advantage becomes unrealistic. If a child has lived with some other person, this person may have become a psychological parent[31] and have stronger bonds with the child than the biological parent.

> The principal flaw in the parental right doctrine is that it entirely overlooks the child's present structure of relationships. The mutual interaction between adult and child, which might be described in such terms as love, affection, basic trust, and confidence, is considered essential for the child's successful development, and is the basis of what may be termed psychological parenthood. It is this psychological parenthood, rather than the biological events which may precipitate such a relationship, which many psychologists identify as the *sine qua non* of successful personality development. . . . After a period of separation from the biological parent and care by a third party, the child may learn to look upon the latter as his psychological parent; any prior relationship with the biological parent may deteriorate to the point where it is not only supplanted, but also incapable of resuscitation. Where this has happened, a change in custody based solely on biological relationship might, by disrupting the existing relationships of psychological

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[30] *Supra* note 22.

[31] Foster & Freed, *supra* note 10, at 437: "It takes little familiarity with current literature in psychiatry, psychology, and the behavioral sciences to realize that the shibboleth that 'blood is thicker than water' is untrue."

> parenthood, work considerable emotional harm upon the child; it could even cause him to refuse . . . the new relationship.[32]

Additionally, both parties should be required to affirmatively prove they are capable of rearing a child in the "revolutionary age" of today.

In *Mandelstam* the court correctly concluded that a *specific* finding that the natural parent is unfit is not *necessary*.[33] In effect, however, both parents were shown to be unfit. By awarding custody to a third person, the court showed that it is not bound by the parental right doctrine and will, if the best interests of the child require, deprive the natural parent of custody.

The best interests of the child test considers more factors than the parental right test. The parental right test often ignores, or at least relegates the child to a secondary position while the fitness of the parents is litigated. The best interests test is broader than merely determining the fitness of the parent since it requires an investigation of the entire situation. The best interests of the child test also avoids the stigma of labeling a parent unfit in order to give custody to someone else.[34]

Although the best interests of the child test requires more investigation, courts do not always make a thorough investigation.

> When one reviews a number of recent cases involving custody awards, the conclusion becomes inescapable that as a group they are marked by question begging, rigid rules, and platitudes which unfortunately tend to inhibit careful inquiry and thorough evaluation. It is a matter of grave concern that in an area of such great human and social importance courts are failing to lay down rules sufficiently precise for meaningful guidance and often insulating themselves from relevant expert advice and information.[35]

A panel of experts in child welfare might be capable of making a more thorough investigation than is the trial judge. This panel might also be better able to determine the best interests of the child than a trial judge who alone must interpret the information relayed to him by the parties and witnesses involved in the custody dispute. If the decision is to be left with the trial judge, it should not be his decision alone. The trial judge should be required to use all the sociologists, psychologists, welfare workers and interested community individuals to discover the best interests of all concerned. Kentucky, by statute, has enabled judges to appoint advisory committees in divorce cases.[36]

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[32] 73 YALE L.J., *supra* note 5, at 158-59.
[33] Watson v. Watson, 434 S.W.2d 33, 35 (Ky. 1968). *See* note 27 *supra.*
[34] H. CLARK, LAW OF DOMESTIC RELATIONS 592 (1968).
[35] Foster & Freed, *supra* note 10, at 427.
[36] KRS § 403.033 (1966).

This statute should be amended to include all child custody cases, not just those that are the result of divorce proceedings.

The best interests of the child test is based on vague standards. Standards such as moral fitness, comparative physical environments and emotional ties are very difficult to define. These standards can also be very subjective due to the wide discretionary power of the judge. The best interests of the child test could become, in the discretion of a particular trial judge, a financial best interest test. If a judge subjectively decided that a factor of physical environment such as wealth was the most important interest of the child then the party with the most financial resources would be awarded custody.

> The best interests of the child test is inevitably artificial and tends to reach unfair and even vicious results when applied in fact unless one uses this test as a philosophical concept, and thinks of the child in an abstract or ideal sense, as an Hegelian might do.[37]

An advisory committee working with the trial judge would be more likely to be objective in a custody award than the trial judge alone. Only by a thorough investigation of the best interests of *all* the parties can parental rights and the child's best interests be balanced to determine the award of custody to the proper party.

William Edward Hudson

ADMINISTRATIVE LAW—KENTUCKY'S "IMPLIED CONSENT" STATUE—REVOCATION OF MOTOR VEHICLE OPERATOR'S LICENSE FOR REFUSAL TO TAKE BLOOD ALCOHOL TEST.—"There has been a long felt need for further legislation to clear the highways . . . of the intoxicated driver. A mounting toll yearly in injured and dead has been his responsibility."[1] The drinking driver creates a serious threat to the safety and protection of lives of persons on our nation's highways. Several studies indicate that ten to fifteen percent of all accidents involve a drinking driver, and fifty percent of the drivers judged to be at fault in fatal accidents have been drinking.[2]

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[37] Sayre, *supra* note 7, at 683.

[1] Schutt v. MacDuff, 205 Misc. 43, —, 127 N.Y.S.2d 116, 121 (Sup. Ct. 1954). For other cases in which the problem of the drinking driver has been noted, see Anderson v. MacDuff, 208 Misc. 271, —, 143 N.Y.S.2d 257, 258 (Sup. Ct. 1955); Beare v. Smith, 82 S.D. 20, —, 140 N.W.2d 603, 606 (1956); State v. Muzzy, 124 Vt. 222, —, 202 A.2d 267, 269 (1964).

[2] HOUSE COMM. ON PUBLIC WORKS, 90TH CONG., 2D SESS., 1968 ALCOHOL AND HIGHWAY SAFETY REPORT 11-15 (Comm. Print 1968); KY. LEGISLATIVE RESEARCH COMMISSION, TRAFFIC SAFETY: THE DRINKING DRIVER, RESEARCH REPORT No. 36 at 2, 9 (Sept. 1967).