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Adoption--Requirement of Consent of Natural Parent

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it if a clear guide is furnished the trier of facts than if an unintelligible and confusing guide is given to them.

Therefore, the following suggestive basic instructions are submitted to serve as a means of informing the jury in plain terms as to what is expected and required of them.

Ordinary civil case—"The court instructs the jury that if you believe that the evidence shows a greater probability of truth than of falsity you must find for the offeror."

Unusual Civil Case—"The court instructs the jury that if you believe that the evidence shows so much greater probability of truth than of falsity that a reasonable man would be convinced of its truth you must find for the offeror."

Criminal cases—"The court instructs the jury that if you believe that the evidence is so convincing that a reasonable man would not doubt it you must find for the offeror."

These instructions can be easily adapted to fit the facts of each particular case and thus inform the jury in plain terms as to the degree of belief without the use of rhetorical and flowery language. It is believed that such instructions if used would eliminate much of the confusion that exists in the jurors minds after listening to the instructions given them.

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ADOPTION—REQUIREMENT OF CONSENT OF NATURAL PARENT

The typical attitude of courts today with regard to the necessity for parental consent to the adoption of a child and the importance attached to such consent is illustrated by the recent Arkansas case of *Woodson* v. *Lee*.[1] In construing the Arkansas statute,[2] which requires child for six months next preceding the filing of the petition for adoption, the court held that the evidence failed to disclose such an abandonment by the father as to preclude the need for his consent. Previously a divorce decree had given the mother custody and responsibility for the maintenance and upkeep of the child during minority with rights of visitation given to the father. The father had written consent of living parents unless the parent has abandoned the visited his son every two weeks until sometime before the petition for

[1] 254 S.W. 2d 326 (Ark. 1953).
[2] ARK. STATS. sec. 56-106 (a), (b) (I) (1947).

adoption by the child's maternal grandparents. The evidence indicated that the only reasons for discontinuing the visits were the attitude of the former wife, including her attempts to prevent the visits, and the advice of the father's attorney who was engaged to preserve his rights of visitation. In view of these circumstances, the requisite intention to abandon the child permanently to the care of others was not shown;[3] therefore, the consent of the father was necessary because he had done nothing to negative the need for consent.

It has been said that one of the greatest responsibilities of a court is that of determining the proper custodian of a child. It seems that this field of the law is unsuited to the use of fixed maxims, rather the courts should weigh all of the individual and social interests involved.[4] Under the common law of England, the rights of the father with regard to custody of minor children were almost unlimited, with little concern for the rights of the mother or the interests of the child. Although the courts had the power to remove a child from the custody of its parents under certain circumstances, this was rarely done, the right of the father to custody being considered almost proprietary.[5]

The view regarding custody has been largely changed by legislation and by decisions of courts of equity making the rights of both parents more nearly equal, but these rights have been made secondary to the welfare of the child. The state, as parens patria, may make any reasonable regulation governing the custody of infants.[6] Statutes in the fifty-one American jurisdictions expressly grant courts the power to deprive both parents of custody under certain circumstances.[7]

After recognizing that courts have the power to remove children from the custody of parents who have forfeited their rights to such custody, the question arises as to when courts can go one step further

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[3] The court quotes from 2 C. J. S. 388 (1936):
" 'Ordinarily abandonment by a parent, to justify in law the adoption of his child by a stranger without his consent, is conduct which evinces a settled purpose to forgo all parental duties continued for a prescribed period of time when the statute so provides. Merely permitting the child to remain for a time undisturbed in the care of others is not such an abandonment. . . .' "
See also *In re* Cordy, 169 Cal. 150, 146 Pac. 532 (1914).

[4] Note, 28 N. C. L. REV. 323 (1950).

[5] 4 VERNIER, AMERICAN FAMILY LAWS 17, 19 (1936); MADDEN, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 369-370 (1931).

[6] 43 C. J. S. 50, 55 (1945); MADDEN, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 374 (1931). (Wherein Madden states that some courts have gone so far as to say that the father has a right to custody, not because of an absolute right, but because such custody is for the benefit of the infant as a legal presumption.)

[7] VERNIER, *op. cit. Supra,* note 5 at 19. Common instances where custody is denied to the parents exist where abandonment, neglect, cruel treatment, etc. cause the parental rights to be forfeited.

and permit adoption of children without parental consent and even over parental objection. The mere fact that a parent has been deprived of or does not have custody of the child is not alone sufficient to dispense with the necessity for his consent.[8] The relationship created by adoption was unknown at common law.[9] Since its regulation is wholly by statute the statutory provisions in different jurisdictions must be closely examined, especially those dealing with consent to adoption, the fundamental element at the heart of the adoption concept. Under ordinary circumstances, in all but four jurisdictions (Florida, Maryland, South Carolina, and Tennessee), the consent of the natural parents of a child to be adopted is required by statute.[10] However, as Vernier so ably points out, exceptions to the rule are rather numerous and vary with the particular jurisdiction making it often extremely difficult to determine legislative intent regarding necessity for parental consent under certain circumstances.[11]

When parents are guilty of certain classes of misconduct statutes commonly permit adoption without consent of a child's parent or parents. Exceptions (approximately stated) to the general rule requiring consent occur where the court finds abandonment (26 jurisdictions); desertion or neglect (15 jurisdictions); deprivation of custody, guardianship, or parental rights by judicial decree (23 jurisdictions); loss of guardianship in divorce proceedings (7 jurisdictions); and in cases where divorce has been granted because of adultery, cruelty,[12] abandonment, nevertheless or desertion (6 jurisdictions); and habitual drunkenness (14 jurisdictions).[13]

Even in the jurisdictions where loss of custody, guardianship, or parental rights by judicial decree deprives a parent of his right to

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[8] The rule is perhaps different in Iowa. See *In re* Chinn's Adoption, 238 Iowa 4, 25 N.W. 2d 735 (1947); *In re* Adoption of Karns, 236 Iowa 932, 20 N.W. 2d 474 (1945); *In re* Adoption of Alley, 234 Iowa 931, 14 N.W. 2d 742 (1944); also see VERNIER, *op. cit. supra,* note 5 at 341; note, 33 IOWA L. REV. 678 (1948).

[9] *In re* Thorne's Estate, 155 N.Y. 140, 49 N.E. 661 (1898). MADDEN, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS, 354 (1931). (There he defines adoption as "the act by which the relations of paternity and affiliation are recognized as legally existing between persons not so related by nature.")

[10] VERNIER, *op. cit. supra,* note 5 at 340.

[11] In some cases consent of the parents has been considered a prerequisite to jurisdiction of the court with regard to adoption. Willis v. Bell, 86 Ark. 473, 111 S.W. 808 (1908); Furgeson v. Jones, 17 Or. 204, 20 Pac. 842 (1888); *In re* McCormick's Estate, 108 Wis. 234, 84 N.W. 148 (1900).

[12] See CAL. CIV. CODE, sec. 224 (Deering, 1949). See also *In re* Cozza, 163 Cal. 514, 126 Pac. 161 (1912) where, although the statute in question negatives necessity for consent of a parent adjudged guilty of cruelty and divorced on such ground, the court held that the consent of the mother to an adoption was essential even though she had been guilty of cruelty with regard to her husband, but where the court nevertheless had seen fit to give her custody in the decree of divorce.

[13] See VERNIER, *op. cit. supra,* note 5 at 341 et seq. for an excellent summary of provisions dealing with consent to adoption in the various jurisdictions.

object to adoption without his consent, the courts seem unwilling to dispense with such consent except for certain grave reasons which have caused loss of custody. Furthermore, statutory provisions frequently require that such decree be separate from divorce proceedings, or that any deprivation of custody be based upon a specified fault such as desertion or abandonment.[14] Definition of the terms "desertion" and "abandonment" are seldom found in the statutes and courts are free to adopt their own definition of these terms.[15]

From an examination of statutes and cases, it is apparant that in many jurisdictions the statutory provisions bearing upon consent need a thorough redrafting in order that the meaning and purpose of the legislature can be made clear.[16] This need is well illustrated by the situations arising under provisions of the Massachusetts statutes,[17] requiring consent of lawful parents to adoption with certain exceptions. Under these provisions unfair results arose in cases where one parent or a third party was awarded custody of a child with or without an order for support against the other parent. For example one court held that a child cannot be deserted by a parent who does not have custody and who is not required by a court order to support the child.[18] These unfortunate results the legislature sought to correct by succes-

[14] See CAL. CIV. CODE. sec. 224 (Deering, 1949); ILL. REV. STAT., C. 4, sec. 2 (2-1) (1947) where action depriving of custody must be separate from divorce proceeding; 3 IDAHO CODE ANN. sec. 16-1504 (1948); 4 REV. CODES OF MONT. ANN. sec. 61-130 (1947); 4 NEV. COMP. LAWS, sec. 9478 (1929); OKLA. STAT. ANN. tit. 10, sec. 44 (1941); 1 UTAH CODE ANN. sec. 4 (1943). See excellent note in 33 Iowa L. REV. 678 (1948) where it is pointed out that Iowa provides generally that the parent having the care and providing for the wants of the child has the sole right of consent and where the effect of decisions has been to disregard the distinctions between custody and adoption by treating custody in a divorce action as practically absolute and irrevocable and making such award of custody the basis for adoption. This view with the results achieved is distinctly a minority position. *In re* Adoption of Karns, 236 Iowa 932, 20 N.W. 2d 474 (1945); *In re* Adoption of Alley, 234 Iowa 931, 14 N.W. 2d 742 (1944).

[15] See Woodson v. Lee, *supra* note 1, where the court approves Webster's definition of "abandonment" and quotes the meaning as "to relinquish or give up with the intent of never again resuming or claiming one's rights or interests in; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in," etc.

See also *In re* Cozza, 163 Cal. 514, 126 Pac. 161 (1912) wherein the court concluded that to constitute abandonment, there must be an intention to abandon, either express or implied, from the conduct of the parent, respecting the child. Accord, *In re* McCormick's Estate, 108 Wis. 234, 84 N.W. 148 (1900); Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23 (1893).

[16] VERNIER, *op. cit. supra,* note 5 at 345.

[17] II MASS. GEN. LAWS, c. 210, sec. 2 (1932).

[18] See Zalis v. Ksypka, 315 Mass. 479, 53 N.E. 2d 104 (1944) where custody had been awarded to a grandparent with no obligation of the father to provide support and where the father's lack of consent prevented an adoption by the grantparent; see also Broman v. Byrne, 322 Mass. 578, 78 N.E. 2d 616 (1948) where a mother, who had custody of a child, and her second husband were not allowed to adopt a child, even though the father provided no support. WASSERMAN, ASSENT TO ADOPTION, 37 Mass. L. R. 56 (1952).

sive amendments in 1945, 1951 and 1952, so that an absconding father who had in reality deserted his child could not prevent an adoption for the benefit of the child. By chapter 352 of 1952, which re-writes G. L. Ted. Ed. Sec. 3, these unfair results seem to be greatly remedied so that a natural parent who has lost all real interest in a child, by failure to visit it or properly support it, cannot prevent an adoption for the best interest of the child.[19] It seems that the legislatures of Massachusetts and other jurisdictions are really seeking to promote adoptions for the welfare of the child without encountering interference from parents who have truly forfeited a right to object to such an adoption.

The whole problem with regard to the necessity for consent seems to be one involving the balancing of the interests of the parents' natural right to custody on the one hand, and the desirability of encouraging adoptions beneficial to children and society on the other. The majority view, which requires consent and dispenses with it only if there is conduct amounting to a voluntary forfeiture of parental rights, clearly seems to be the proper view. This has been demonstrated by difficulties encountered in Maryland, Iowa and the other three states that do not require consent of the parents.[20]

Some decisions indicate that a child can be adopted against a parent's consent principally for reasons relating to the welfare of the child.[21] Although welfare of a child seems to be the prime consideration in cases involving custody, other factors as well must be taken into account in adoption cases.[22] This is true because an award of

[19] WASSERMAN, *op. cit. supra,* note 18 at 58. As re-written Sec. 3 provides consent of the father shall not be required ". . . if he has wilfully deserted or neglected to provide proper care and maintenance for such child for one year last preceding the date of the petition, and the foregoing provision shall be applicable to the father of the child and his consent shall not be required notwithstanding the absence of a court decree ordering said father to pay for the support of said child, and notwithstanding a court decree awarding custody of said child to its mother. . . ."

[20] VERNIER, *op. cit. supra* note 5, at 340.

[21] In Adoption of Lagumis, 186 Md. 97, 46 A. 2d 189 (1946), the court reaches a correct result in permitting adoption over the protest of the natural father because it seems that the father really neglected and abandoned his son by not taking advantage of a right to have custody of his son at certain intervals and by not attempting to see the child. The majority opinion, however, overemphasizes the element of welfare of the child when it indicates that a child can be adopted against the father's consent merely because of consideration of such welfare. An excellent criticism of this case is contained in a note in 14 U. OF CHI. L. REV. 303 (1947) where it is pointed out that both the majority and dissenting opinions use the statutory standard of the welfare of the child, but they differ as to the weight to be accorded the rights of the natural father.

[22] See note, 95 U. OF PA. L. REV. 788 (1947) where the author argues against the holding of a number of courts insisting on calling the welfare of the child a secondary issue in adoption cases and holding the natural right of the parents paramount. The author concludes that there is no sound basis why consideration

custody is essentially subject to change; while adoption creates a new permanent relationship and dissolves the previous natural relationship of parent and child. The natural parental relationship has always been considered sacred and courts, constantly seeking to protect it, presume that its preservation serves the best interests of the child except in extraordinary cases. It is therefore reasonable that in adoption cases the parent's feelings deserve greater weight than in cases involving custody, and should be balanced against the considerations affecting the child's welfare.

It has been pointed out that the political implications of allowing a child to be taken from its parents without any consent are disturbing because there is danger in making a child's welfare, as determined by the state, the only consideration in adoption issues.[23]

Under the accepted view that adoption statutes, in derogation of the common law, must be strictly construed, most courts are not prone to dispense with the requirement of consent except in clear cases.[24] It has been observed that the trend is away from the type of statute in effect in Maryland, under which parental consent to adoption is not required. The Maryland type statute departs from the idea that adoption is a contract by which a child is transferred from the natural parent to the adopting parent, and introduces the element that adoption is a means of remedying abuses of parental power, a function which has traditionally been enforced by the states' power of parens patria in proceedings different from adoption.[25]

This idea of remedying such abuses appears to be the theme behind many statutes eliminating the necessity for consent where custody, guardianship, or parental rights have been removed from parents by judicial decree. It is submitted that a less confusing approach to the problem would be achieved by looking carefully to the reasons for which custody has been denied to a parent before depriving him

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of welfare should be confined to custody cases and says the holding that the child's welfare cannot be considered in determining whether there has been abandonment is unrealistic.

[23] See note, 14 U. of Chi. L. R. 303, 306 (1947).

[24] Thompson v. Burns, 337 Ill. App. 354, 86 N.E. 2d 155 (1949); *In re* Cozza, 163 Cal. 514, 126 P. 161 (1912); *In re* McCormick's Estate, 106 Wis. 234, 84 N.W. 148 (1900). But see Seibert v. Seibert, 170 Iowa 561, 153 N.W. 160 (1915) stating that a statute allowing a single parent having the lawful custody to consent to adoption of the children of the marriage in case of divorce should be given a liberal construction. The court says that in construing strictly or liberally such construction would depend on who is making the contest, with strict construction being applied when a non-consenting parent is making a contest of adoption, and with liberal construction being given when a contest is by one to whom the child is adopted. (The court held that here a wife merely left her husband temporarily and so her consent was necessary under a statute permitting consent by the party having custody during a separation.)

[25] See note, 14 U of CHI. L. REV. 303, 305 (1947).

of the right to give or withhold consent to the adoption of his child. Statutes should be carefully worded to insure the right of the natural parent, with or without present custody, not to have the permanent parent-child relationship terminated by adoption by another without his consent, unless that parent's neglect of duty to the child has been flagrant.

P. JOAN SKAGGS

MANUFACTURERS' LIABILITY IN KENTUCKY

The law of manufacturers' liability in America has evolved a long way from the 1842 English case of *Winterbottom* v. *Wright*[1] to the so-called "modern view" of the 1916 American case of *MacPherson* v. *Buick Motor Co.*[2] In order to attempt to classify Kentucky's present position in such cases, a brief summary of this evolution would appear to be in order. *Winterbottom* v. *Wright* is one of the most discussed, but unfortunately oft-misunderstood cases in the law. In this case the court held that one who had contracted with a buyer to keep a mail coach in repair was not liable on the contract to a third party for injuries caused by disrepair. Certain dicta of the judges were so grossly misunderstood, however, that a "general rule" of tort evolved from the case that the original maker or seller of goods was not liable for the damages caused by his negligence in manufacture, or failure to inspect, to anyone except his immediate buyer.

As is usual, exceptions were made to the "general rule." Probably the most significant of these were summarized in the 1903 case of *Huset* v. *J. I. Case Threshing Machine Co.*[3] as follows: 1) Where a manufacturer does a negligent act, imminently dangerous to human life in preparation of articles intended to preserve, destroy or effect human life he is liable to third parties injured by his negligence. 2) Where an owner invites one to come onto land and use defective instruments, he is liable for an injury caused by the defective condition of the instruments. 3) Where one sells or delivers an article which he *knows* to be "imminently" dangerous, because defective, without giving notice of its qualities, he is responsible to any person who suffers an injury therefrom which might have been reasonably anticipated. Later cases condensed the rule into liability for the negligent manufacture of articles "inherently" dangerous, in describing the first ex-

[1] 10 M. & W. 109, 152 E. R. 402 (1842).
[2] 217 N.Y. 382, 111 N.E. 1050 (1916).
[3] 120 F. 865 (1903).