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CHILD CUSTODY IN KENTUCKY DIVORCE CASES: 1940-1952

One of the most tragic aspects of divorce is its effect upon children of the marriage. It is a difficult ordeal for the principals, but it is much easier for them to bear in their maturity than it is for young children. The children will feel the results of the divorce throughout their formative years in that they must be placed in custody of one of the two parents, or both, or in the care of a relative, or even in the care of a third person. In any case the status of the children will be abnormal when compared with that of children of successful marriages. While any custody disposition might have an undesirable effect on a senstive child, an award to an improper guardian may have a disastrous effect upon even a hardy child. Obviously the responsibility of the chancellor in determining the custody disposition of a child is a most grave one, incapable of perfect solution even after he has carefully considered all relevant factors and weighed them minutely.

In Kentucky since 1940 the Court of Appeals has considered approximately eighty divorce cases in which custody was in issue. Some were original appeals, while others were appeals from divorce cases redocketed for the purpose of reconsidering the custody decree. As would be expected, the great majority of these cases occurred after the end of World War II. During the entire period almost an equal number of divorce cases appeared before the court wherein the report discloses that there had been a custody award which was uncontested. It would be difficult to estimate how many more custody dispositions were made in divorce cases which were never appealed. Each divorce decree concerning custody will involve at least one child and often two or more children. It is apparent that since 1940 divorce custody decrees have affected a significant proportion of Kentucky's youthful population. It is imperative for the welfare of the children involved that the courts be properly apprised of all relevant facts in each case in order that they can arrive at the best decision possible under the circumstances.

The determination of a custody problem involves a field of law and human relations which does not lend itself to any standard formula—each case must be determined largely on its own facts. To what, then, does the court look in solving these problems? First and primarily it seems that the court will consider the character and morality of the parents. If it appears that either displays any character aberration such as drunkeness, drug addiction, uncontrollable violent temper, general dissipation, or the like,[1] or that either is immoral or

[1] Goodwin v. Goodwin, 296 Ky. 835, 178 S.W. 2d 214 (1944) (father a drunkard); West v. West, 294 Ky. 301, 171 S.W. 2d 453 (1943) (father a

unchaste,[2] that parent will be deemed unfit to care for the child, and an award will be made to the other parent if it appears from the record that he or she is fit. If it seems that both parents have questionable characters or morals the court will have to make a comparative analysis of the two, and award custody to the parent who will have the least deleterious effect upon the child. If it appears that both are clearly unfit the court will look elsewhere to lodge custody: either to a grandparent, or other relative, or even a stranger.[3]

If both parents seem to be equally fit, in most, if not all, cases the mother will be given the custody of young children of "tender years", and also of girls of any age.[4] The age of "tender years" seems to include the years from birth until the age of eight or nine.[5] The court will hear the expressed preference of a child which has reached an age of discretion and will give it "weight"[6] but such preference will not bind the court and it will be overruled if the court is of the opinion that the circumstances of the case indicate a contrary disposition.[7] However, children of sixteen years and older may be allowed absolutely to make their own selection.[8] A mother will be given the custody of younger children even when it appears that she is guilty of a single and isolated instance of immorality or unchastity. If it is but an incident of her past history the court will give her grace to reform;[9] if she

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shiftless drunkard and a habitual criminal); Finley v. Finley, 8 Ky. Law Rep. 605, 2 S.W. 554 (1887) (mother a drug addict); Charles v. Charles, 246 S.W. 2d 161, (Ky. 1952) (father had outrageous temper and threatened lives of wife and children); Lester v. Lester, 296 Ky. 691, 178 S.W. 2d 423 (1944) (father had a violent temper); Tackett v. Tackett, 302 Ky. 611, 194 S.W. 2d 832 (1946) (father shiftless); Aubrey v. Aubrey, 303 Ky. 534, 198 S.W. 2d 209 (1946) (mother gambled and a writer of cold checks); Stafford v. Stafford, 287 Ky. 804, 155 S.W. 2d 220 (1941) (father inconsiderate of children).

[2] McGill v. Coomer, 309 Ky. 703, 218 S.W. 2d 947 (1949); Philpot v. Philpot, 300 Ky. 114, 188 S.W. 2d 107 (1945); Cole v. Cole, 299 Ky. 319, 185 S.W. 2d 382 (1945); Reynolds v. Harris, 297 Ky. 206, 179 S.W. 2d 880 (1944); Perkins v. Perkins, 291 Ky. 571, 165 S.W. 2d 152 (1942) *Cf.* Napier v. Napier, 286 Ky. 452, 151 S.W. 2d 72 (1941).

[3] *See* Davis v. Davis, 289 Ky. 618, 159 S.W. 2d 999 (1942).

[4] Bartley v. Bartley, 310 Ky. 332, 220 S.W. 2d 850 (1949); Perkins v. Perkins, 291 Ky. 571, 165 S.W. 2d 152 (1942); DAVIS v. DAVIS, 289 Ky. 618, 159 S.W. 2d 999 (1942); Stafford v. Stafford, 287 Ky. 804, 155 S.W. 2d 220 (1941); Sowders v. Sowders, 286 Ky. 269, 150 S.W. 2d 903 (1941); Travis v. Travis, 282 Ky. 215, 138 S.W. 2d 336 (1940).

[5] *See* Mitts v. Mitts, 312 Ky. 854, 229 S.W. 2d 958 (1950); also Lawson v. Mitts, 247 S.W. 2d 382 (Ky. 1952).

[6] Wright v. Thomas, 306 Ky. 763, 766, 216 S.W. 2d 315 (1948); Horn v. Dreschel, 298 Ky. 427, 183 S.W. 2d 22 (1944); Gray v. Gray, 295 Ky. 91, 174 S.W. 2d 16 (1943); Varney v. Trout, 232 Ky. 513, 23 S.W. 2d 944 (1930); Cummins v. Bird, 230 Ky. 296, 19 S.W. 2d 959 (1929).

[7] Bowman v. Bowman, 313 Ky. 806, 233 S.W. 2d 1020 (1950); Wright v. Thomas, 306 Ky. 763, 209 S.W. 2d 315 (1948).

[8] Stamper v. Stamper, 309 Ky. 161, 216 S.W. 2d 936 (1949).

[9] Harp v. Harp, 314 Ky. 618, 236 S.W. 2d 698 (1951); Hager v. Hager, 309

marries the man with whom she has been indiscreet, the court will call it love, and will allow her custody if she can provide the child a good home.[10] Promiscuity on the mother's part will, of course, destroy her chances of getting custody.[11]

In addition to the character and morality of the parents, there are other considerations to be taken into account by the court. The type of home into which the child will be taken, the neighborhood, the type of people with which the child will come into contact in the home, whether or not the home is crowded, its accessibility to school, the quality of available school facilities, the home's relative isolation from urban areas, the social and cultural advantages to be afforded the child—these are but a few of the considerations.[12] To be sure, none of the enumerated factors, or others which might be pertinent to a particular case, will singly have a conclusive effect on the ultimate award, but a favorable aggregation of factors will certainly help the parent who has met the character requirements. Of course, the husband has an additional burden to overcome if a child of tender years is involved; it is incumbent upon him to show that the physical environment to be provided by the mother would have a very adverse effect upon the child, and that the one he can provide will be much the superior. The mere poverty of the mother will not result in an award against her, unless it is clearly shown that the conditions would undesireably influence or affect the child.[13] The court seems to be of the attitude that a mother's love and devotion will compensate for all

Ky. 803, 219 S.W. 2d 10 (1949); Howard v. Howard, 307 Ky. 452, 211 S.W. 2d 412 (1948).

[10] Price v. Price, 306 Ky. 214, 206 S.W. 2d 924 (1947); Birkholz v. Birkholz, 304 Ky. 202, 200 S.W. 2d 294 (1947); Clark v. Clark, 298 Ky. 18, 181 S.W. 2d 397 (1944).

[11] Smith v. Smith, 242 S.W. 2d 860 (Ky. 1951); Bartley v. Bartley, 310 Ky. 332, 220 S.W. 2d 850 (1949).

[12] McGill v. Coomer, 309 Ky. 703, 218 S.W. 2d 947 (1949) (bad section of town); Runge v. Runge, 307 Ky. 752, 212 S.W. 2d 275 (1948) (father's unsettled army life, his parents' home overcrowded); Tufts v. Tufts, 307 Ky. 114, 209 S.W. 2d 821 (1948) (father's home comprised of elderly people); Napier v. Napier, 303 Ky. 525, 198 S.W. 2d 226 (1946) (bad atmosphere in which to rear children); Ragland v. Ragland, 299 Ky. 699, 187 S.W. 2d 257 (1945) (mother left girl in care of neglectful grandmother in unsavory conditions); Slusher v. Slusher, 298 Ky. 400, 182 S.W. 2d 972 (1944) (uncomfortable home of mother with bad influences, good home of father near school); Clark v. Clark, 298 Ky. 18, 181 S.W. 2d 397 (1944) (father engaged in temporary war work away from his permanent home); Gray v. Gray, 295 Ky. 91, 174 S.W. 2d 16 (1943) (father living with parents of his second wife in four room house); Hockensmith v. Hockensmith, 286 Ky. 448, 151 S.W. 2d 37 (1941) (no females in family of father except aged mother).

[13] Ruttencutter v. Ruttencutter, 293 Ky. 556, 169 S.W. 2d 604 (1943); Sowders v. Sowders, 286 Ky. 269, 150 S.W. 2d 903 (1941); Wacker v. Wacker, 279 Ky. 19, 129 S.W. 2d 1043 (1939).

except positively undesirable physical environmental factors—mere indigence or inconvenience will not counterbalance the love and care a mother can offer.[14] If, however, the mother is physically incapable of properly caring for her child, custody will be denied her.[15]

The court has announced a policy of not separating children of the same blood by a split custody award except for cause. Where an older child expresses a desire to live with one parent, the court may respect its wishes while awarding younger children to the other parent.[16] If the court feels that the influence of an older child will prove harmful to the development of good character and habits of younger brothers or sisters it will separate them.[17]

The court will approve placement of a child in the hands of near relatives, usually the grandparents, if it appears that neither parent is suited to care for it.[18] There has been but one award of custody since 1940 which deprived both parents of custody and placed a child in an institution,[19] although the court indicated in another case that the chancellor might well have best served the child by placing him in a children's home.[20] In the case depriving both parents of custody[21] the mother was proved unchaste, and it was shown that the father's notion of the proper conditions and environment in which to rear a young girl was not at all proper. The court affirmed the chancellor's award to a reputable boarding school. The court in a subsequent appeal indicated that the award would stand so long as it appeared that the child was happy in the school, and it was not shown the school was having an adverse effect upon her.[22]

In making an award when both parents seem reasonably fit, the court will usually allow the child to spend part of the year with each.[23] In most cases the court will allow the child to spend the school months

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[14] Howard v. Howard, 307 Ky. 452, 211 S.W. 2d 412 (1948).

[15] Hardman v. Hardman, 308 Ky. 284, 214 S.W. 391 (1948) (mother an epileptic); Dayton v. Dayton, 290 Ky. 418, 161 S.W. 2d 618 (1942) (mother suffering from severe nervousness).

[16] Eckhoff v. Eckhoff, 247 S.W. 2d 374 (Ky. 1952); Stamper v. Stamper, 309 Ky. 161, 216 S.W. 2d 936 (1949); Roberts v. Roberts, 302 Ky. 423, 194 S.W. 2d 1003 (1946).

[17] Wright v. Thomas, 306 Ky. 763, 209 S.W. 2d 315 (1948); Groslin v. Gibson, 301 Ky. 706, 192 S.W. 2d 962 (1946).

[18] Cates v. Cates, 314 Ky. 507, 236 S.W. 2d 268 (1951); Mitts v. Mitts, 312 Ky. 854, 229 S.W. 2d 958 (1950); Ray v. Ray, 302 Ky. 788, 196 S.W. 2d 609 (1946); Morris v. Morris, 300 Ky. 159, 188 S.W. 2d 95 (1945); Ragland v. Ragland, 299 Ky. 699, 187 S.W. 2d 257 (1945); Travis v. Travis, 282 Ky. 215, 138 S.W. 2d 336 (1940).

[19] Horton v. Horton, 287 Ky. 586, 154 S.W. 2d 550 (1941).

[20] Tufts v. Tufts, 307 Ky. 114, 209 S.W. 2d 821 (1948).

[21] Horton v. Horton, 287 Ky. 586, 154 S.W. 2d 550 (1941).

[22] Horton v. Horton, 294 Ky. 374, 171 S.W. 2d 424 (1943).

[23] Davis v. Davis, 289 Ky. 618, 159 S.W. 2d 999 (1942).

with the mother and the vacation months with the father. Reasonable visitation rights will be reserved in each parent while the child is with the other. The court treats this right of reasonable visitation as an absolute right in all parents, regardless of any provision in the divorce decree, and no matter how undeserving of custody they are.[24] Where each parent has seasonal custody, the court may require a bond to be posted by a parent to insure prompt return of the child.[25] Of course, in any case there is a contempt proceeding facing a tardy parent who disregards the chancellor's orders.

From the reported cases appearing since 1940, it appears that Kentucky fits into the general pattern of the law of custody determination. The primary consideration in all cases is the welfare of the child. This principle has been codified by statute, and by this same statute it is provided that any custody decree is always before the chancellor and is subject to modification and revision upon a showing of changed conditions.[26] Notably lacking in these recent cases is any direct reference to the old common law rule that the father has superior right to the custody of his children.[27] As early as 1861 the court termed this right of the father only a prima facie right which was overcome in the case of children of tender years by the mother's love and devotion for her children.[28] The Kentucky court has for all practical purposes given the mother a prima facie right to the custody of young children which can be overcome only by a showing of pronounced unfitness or a clear inability to provide for them adequately.

It seems that the Kentucky courts have done a commendable job in most instances. In a few cases it would seem that it might have been better for the child if some disposition other than custody reposed in the parents had been made, even to the point of placing him in the care of a child welfare institution, or any other place away from its parents.[29] A court would hesitate to make such a decree, especially when it is not fully aware of all pertinent facts. The appellate court, with only the written record before it, is reluctant to reverse a chan-

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[24] Tackett v. Tackett, 302 Ky. 611, 194 S.W. 2d 832 (1946).

[25] Harp v. Harp, 314 Ky. 618, 236 S.W. 2d 698 (1951); Birkholz v. Birkholz, 304 Ky. 202, 200 S.W. 2d 294 (1947).

[26] KY. REV. STAT. sec 403.070 (1948); Gray v. Gray, 301 Ky. 381, 192 S.W. 2d 102 (1946); Cole v. Cole, 299 Ky. 319, 185 S.W. 2d 382 (1945); Clark v. Clark, 298 Ky. 18, 181 S.W. 2d 297 (1944).

[27] Shehan v. Shehan, 152 Ky. 191, 153 S.W. 243 (1913); Rogers v. Rogers, 8 Ky. Opn. 414 (1875); McBride v. McBride, 64 Ky. (1 Bush) 15 (1866).

[28] Adams v. Adams, 62 Ky. (1 Duval) 168 (1861).

[29] Moore v. Moore, 307 Ky. 552, 211 S.W. 2d 852 (1948); Tufts v. Tufts, 307 Ky. 114, 209 S.W. 2d 821 (1948); Harms v. Harms, 302 Ky. 60, 193 S.W. 2d 407 (1946); Groslin v. Gibson, 301 Ky. 706, 192 S.W. 2d 962 (1946).

cellor's decree of custody unless it is clearly erroneous.[30] It feels that the record may not disclose some intangible factors which might have influenced the chancellor when he had the parties before him with their witnesses. In some cases, however, the proceedings before the chancellor are largely by deposition, in which instance he is not much better informed than the Court of Appeals, except that he is closer to the source.

When the rights of children are involved, who is it that will be the advocate of these rights? Each parent may perhaps believe that he is the proper guardian and that he will properly protect the welfare of the child. But parents often become engrossed in the issues of the divorce itself and lose all perspective of what is best for the child; or even worse, each may use the custody issue as a means of retalation against the other. Can it be that in such an atmosphere the rights of the children will be adequately represented? The Kentucky Legislature believes not. In 1948 it passed a bill[31] providing that in all counties containing a city of the first or second class the fiscal court may authorize the judge of that circuit to select a lawyer to act as a "friend of the court" to insure that the rights of children will be adequately protected. The friend of the court is authorized, upon request of the chancellor trying a divorce, to appear in court and represent the rights of the children. He has the power to make investigations, take depositions and take other steps necessary to learn the facts involved. After ascertaining the facts he submits a report to the chancellor along with his recommendations as to what disposition would be best for the welfare of the child. The friend of the court can represent none of the parties but the children. He is also empowered to see that the custody decree is carried out and that the person entrusted with custody cares for the child properly, and that the husband promptly provides for the child's maintenence.[32] It is to be noted that the fiscal courts of counties containing cities of the first or second classes are merely authorized to create this office and are not required to do so. It would seem that the seriousness of the divorce-custody problem would warrant a mandatory statute of statewide application along these lines. The powers and duties of the friend of the court under the present statute appear to protect adequately the rights of children of divorced parents, but such an officer should be available to all circuit court judges when they are

[30] Heltsley v. Heltsley, 242 S.W. 2d 973 (Ky. 1941); and see Gilliam v. Gilliam, 244 S.W. 2d 463 (Ky. 1951).

[31] KY. REV. STAT. sec. 403.090 (1948).

[32] The father is responsible for support of his children regardless of who has custody. Bowman v. Bowman, 313 Ky. 806, 233 S.W. 2d 1020 (1950).

hearing a divorce case involving children.[33] Certainly all the children in this state who will have their lives affected by a divorce decree deserve the opportunity to have presented to the court a fair and dispassionate account of all the factors which will have a bearing on their ultimate custody disposition. Therefore, the "friend of the court" should be required to investigate *all* divorce cases affecting children. Since some counties may not alone be able to bear the financial burden of hiring a "friend of the court", it might be advisable to allow the counties in a circuit court district to share the expense, especially where the divorce docket would not justify a full-time "friend" in all the counties of the district. In any event the ultimate benefits to be derived by children of divorced parents and by the state and its counties might more than offset the expense of the office.[34]

CHARLES N. CARNES

DIVORCE – DOES RECRIMINATION REMAIN IN KENTUCKY?

In most states the fact that the complainant in an action for divorce has been guilty of conduct which would constitute a ground for divorce affords the defendant an adequate defense to the action.[1] This defense, referred to as the doctrine of recrimination, is most simply defined by the oft-repeated statement that if both parties have a right to a divorce neither has. This principle has often been criticised as too harsh,[2] and as a result, some states have passed statutes which limit its application in several different ways.[3]

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[33] 3 MICH. COMP. LAWS sec. 552.251 (1949) provides for a friend of the court for all counties who must see that all decrees effecting children are properly followed, and the chancellor may call upon him to make an investigation and submit recommendations during the original action. 1 ILL. REV. STAT. c. 28 sec. 438 (1947) allows the chancellor to call upon the County Welfare Department to make such an investigation.

[34] For a comprehensive treatment of the problem see *Children of Divorced Parents; A Symposium,* 10 LAW AND CONTEMP. PROB 697-866 (1944) and see Cochran, *Children of Divorce,* 11 KY. B. J. 201 (1947).

[1] Brazell v. Brazell, 54 Cal. App. 2d 458, 129 P. 2d 117 (1942); McMillan v. McMillan, 120 Fla. 209, 162 So. 524 (1935); Smiley v. Smiley, 114 Ind. App. 138, 51 N.E. 2d 98 (1943); Rigsby v. Rigsby, 266 Ky. 291, 97 S.W. 2d 835 (1936); Boyd v. Boyd, 177 Md. 687, 11 A. 2d 461 (1940); Reddington v. Reddington, 317 Mass. 760, 59 N.E. 2d 775 (1945); Tebbe v. Tebbe, 223 Mo. App. 1106, 21 S.W. 2d 915 (1929); Studley v. Studley, 129 Neb. 784, 263 N.W. 139 (1935); Cilente v. Cilente, 104 N.J. Eq. 605, 146 Atl. 469 (1929); Weiger v. Weiger, 59 N.Y.S. 2d 444 (1946); Phillips v. Phillips, 48 Ohio App. 322, 193 N.E. 657 (1935); Gray v. Gray, 232 Wis. 400, 287 N.W. 708 (1939).

[2] Note, 36 KY. L. J. 342.

[3] For a comparison of statutes of 32 states, see 2 VERNIER AMERICAN FAMILY LAWS 82 (1932).