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The Custody of Children

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COMMENTS

THE CUSTODY OF CHILDREN

Masculine supremacy (especially if the male be married) has until very recently been enforced by the common law courts with a zeal worthy of a better cause. Such purely legal supremacy has probably lasted longer than it has been reflected by actual facts. Legally, however, as well as practically, it has gradually receded until there are now but few residua of the proud position once held by the male of the species.

The right to the custody of children has reflected this same development. Such cases as *Ex parte Skinner*¹ and *King vs. Greenhill*,² in both of which a father was held to be entitled to the custody of his small children as against their mother notwithstanding the fact that she had separated from him on account of his admitted and continuing misconduct, are now looked upon as antiquities of the law—and not very honorable antiquities at that. Statutes³ and also contrary decisions of Courts of Equity⁴ have effectively disposed of the doctrine of these cases in England.

In America the history of the development of this subject has been somewhat similar to that in England but it is comforting that in most jurisdictions no statutes have been necessary in order to reach the same result. Very early, American courts began to recognize that the question is not one of rights of parents or others to custody but rather of the right of the child, itself, and of the state to have its custody placed where it will be most conducive to its welfare.⁵ In other words, while it is generally fitting and proper that the parents should have the custody of the child, this is only true because, and to the extent that, it will be conducive to the child's welfare; and accordingly

¹ 9 Moore, 278 (1824).

² 4 Ad. & El. 624 (1836). See the acrimonious (but it is submitted justifiably so) comment on this case by Walworth, Chancellor, in *Mercein v. People*, 25 Wend. 64, at pp. 93-94.

³ 2 & 3 Vict. c. 54 (Talfourd's Act) giving the mother a right to the custody of infants under the age of 7; 36 & 37 Vict. c. 12 (Infant's Custody Act) extending this right to children under 16.

⁴ See Tiffany on Domestic Relations (3rd Edition), p. 344.

⁵ There is a valuable general discussion of this subject in Tiffany on Domestic Relations (3rd Edition), pp. 343-354. Among the leading cases are *Mercein v. People*, *supra*; *Wood v. Wood*, 77 N. J. Eq. 593, 77 Atl. 91; *McKim v. McKim*, 12 R. I. 462, where the custody of a four-year-old girl was awarded to the mother, although the latter was apparently largely to blame for her separation from the father, the court basing its action upon "the welfare of the child, considering her tender age, her sex, and the

the custody may properly be taken away from either or both parents if the welfare of the child demands such action.⁶

The rule indicated above is now followed in nearly all American jurisdictions, though there is perhaps not entire uniformity in its application. As already indicated, the parents are prima facie entitled to the custody of children—not because of the parent's rights but because this is ordinarily conducive to the child's welfare—and the father has perhaps a slight advantage over the mother. To follow the phraseology of a race, the father has a very slight handicap over the mother but both parents have a very decided handicap over any other claimant to the custody of the child. This does not mean, however, that any of the persons thus entitled to a handicap are sure to win the race. It takes but a very little for the mother to overcome the father's handicap and while it is much more difficult, it is by no means impossible for a third person to win over either or both of the parents.

To abandon this comparison and to make use of the ordinary legal phraseology, the father will be preferred over the mother if all other things are equal and either parent will be even more clearly preferred over a third person, unless, the third person is better fitted for the custody of the child; but in all cases the test is not the "rights" of the persons claiming custody but the welfare of the child.

Such welfare is of course primarily a question of fact and of judgment. The following circumstances are among the more important which have been considered by the courts in the application of this test, these elements being here mentioned roughly in order of their importance. They are as follows: (1) Moral character of the persons seeking custody;⁷ (2) Temperamental characteristics of such persons including especially their aptitude in the governing and general handling

delicacy of her constitution." See also the statement of Justice Story in *U. S. v. Green*, 3 Mason 482 (Fed. Cas. No. 15256): "It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody."

⁶ *Wood v. Wood*, *supra*; *McDonald v. Short*, 190 Ind. 338, 130 N. E. 536.

⁷ *Kelsey v. Green*, 69 Conn. 291, 37 Atl. 679; *Young v. State*, 15 Ind. 480; *Gamer v. Gordon*, 41 Ind. 92. In *Commonwealth v. Addicks*, 5 Binn. (Pa.) 520, two little girls were awarded to their mother as against their father, although the mother had been divorced from the father on account of her misconduct and was then living, as his wife, with the man with whom she had had improper relations and whom she had been forbidden to marry. However, a few years later, the same children were awarded to the father, the court considering that the older child would be put in

of children, with firmness but without undue severity;⁸ (3) The age of the child;⁹ (4) The sex of the child;¹⁰ (5) The general health of the child;¹¹ (6) The relative pecuniary ability of the persons seeking custody;¹² (7) The wishes of the child as to his own custody;¹³ (8) The parent's agreements as to custody.¹⁴ With respect to these elements, in numbers (3), (4), and (5) the mother or other female relative is of course preferred in the case of small children, especially if they are in delicate health, and she is also preferred in the case of a girl; as to the other

serious moral peril by being left with the mother. (2 S. & R. 194.) In *Joab v. Sheets*, 99 Ind. 328, it was held that the intent of the mother to disobey an order of court forbidding her to take the child out of the state did not show her moral unfitness.

⁸ *Mercein v. People*, *supra*, where the father was barred in part because of his rough and boisterous disposition; *Jones v. Darnall*, 103 Ind. 564, 2 N. E. 229.

⁹ *McKim v. McKim*, *supra*; *Commonwealth v. Addicks*, *supra*. A rather extreme application of this test was made in *People v. Sinclair*, 91 App. Div. 322, 86 N. Y. Supp. 539, where a three-year-old boy was, on account of his tender age, awarded to his mother as against his father. Only two years later, the boy, now arrived at the manly age of five, was again claimed by his father, and the court decided that the father was now entitled to the custody. 40 Misc. 230, 95 N. Y. Supp. 861, affirmed 105 App. Div. 642, 94 N. Y. Supp. 1154.

¹⁰ *McKim v. McKim*, *supra*; *Hussey v. Whiting*, 145 Ind. 580, 44 N. E. 639.

¹¹ *McKim v. McKim*, *supra*; *Reeves v. Reeves*, 75 Ind. 342.

¹² *Wood v. Wood*, *supra*; *Shaw v. Nachtwey*, 43 Ia. 653. Of course "welfare" does not mean solely pecuniary welfare (*Stapleton v. Poynter*, 111 Ky. 264, 62 S. W. 730), but pecuniary resources are an important constituent element of welfare.

¹³ *Kelsey v. Green*, *supra*; *Darnell v. Mullikin*, 8 Ind. 152. In *Stapleton v. Poynter*, *supra*, the court intimated an opinion that the child's wishes are of little weight in this matter, because of its immaturity. It is submitted that this reasoning is unsound, because the happiness of the child is a vital factor in its general welfare, and on this point its maturity or immaturity are not really of consequence. In *Wood v. Wood*, *supra*, and *Shaw v. Nachtwey*, *supra*, the court declined to follow the child's expressed wishes, but only on the ground that the expression was believed not to represent the child's real feelings, because of undue influence on the part of persons then having custody. To this extent a consideration of the immaturity of the child is perhaps justified. It is believed, however, that the courts have, in general, given too little weight to this factor in its welfare.

¹⁴ All courts give little weight to this point and properly so, since it has no direct bearing on the child's welfare. Many states (probably including Indiana) do not even give effect to it as a renunciation of the so-called rights of the parent to custody. See Kales, *Cases on Persons*, Note on p. 10; *Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669.

elements the claimant who is preferred is sufficiently obvious from the very statement of the test.

The same tests are applicable in any case where the custody of child is under consideration, whether in divorce or separation proceedings, in habeas corpus proceedings, or any other cases where the custody of children comes before the courts. Of course in divorce proceedings the contest is usually only between the two parents, but even in such cases the child may be awarded to a third person not a party to the proceedings, if its welfare so demands.¹⁵

Indiana has an unusually consistent and honorable record with respect to this matter. A few of the earlier decisions¹⁶ may seem to take a somewhat rigid position with respect to the so-called "rights" of the father or the mother; but even these cases recognize the necessity of the consideration of the welfare of the child. More recent cases in this state have, however, abandoned any consideration other than the child's welfare and have awarded the custody solely with reference to this test.¹⁷ The priority of the parents has been properly considered not as a question of their rights but as merely an application of the same test of the child's welfare; that is to say that, as a matter of fact, it will ordinarily be conducive to that end that the child

¹⁵ See *McDonald v. Short*, *supra*, where in divorce proceedings the custody of the child had been awarded to a third person, although both parents were living; the court held that this was presumptive evidence of the unfitness of the parents. See also *Dinson v. Drosta*, 39 Ind. App. 432.

¹⁶ *Tarkington v. State*, 1 Ind. 171; *Bounell v. Berryhill*, 2 Ind. 613; *State v. Banks*, 25 Ind. 495; *Henson v. Watts*, 40 Ind. 170; *Child v. Dodd*, 51 Ind. 484.

¹⁷ The leading case is undoubtedly *Hussey v. Whiting*, *supra*, where the custody of a thirteen-year-old girl in delicate health was awarded to her maternal grandparents as against her father, although the latter was concededly of good moral character, partly because the child preferred to stay with her grandparents but more largely because she was in delicate health and her grandparents had greater financial and other resources for taking care of her. See also *Berkshire v. Caley*, 157 Ind. 1, 60 N. E. 696, and *Corn v. Hollon*, 191 Ind. 248, 132 N. E. 587, which are recent cases reaching similar results, the latter referring especially to relative pecuniary resources as bearing on the ability to educate the child.

In *Shoaf v. Livengood*, 172 Ind. 707, 88 N. E. 593, it was held that the guardian has no absolute right to the custody of his minor ward although the statutes of Indiana relating to the appointment of guardians (Burns' Annotated Statutes, 1926, Secs. 3388 & 3389) give a preference to parents very similar to that given them as to custody of children.

The following miscellaneous cases are of interest on the general subject: *McGlennan v. Margowski*, 90 Ind. 150; *Bryan v. Lyon*, 104 Ind. 227, 3 N. E. 880; *Schleuter v. Canatsy*, 148 Ind. 384, 47 N. E. 825; *Gilmore v. Kitson*, 165 Ind. 402, 74 N. E. 1083; *Orr v. State*, 70 Ind. App. 242, 123 N. E. 470.

be left with one of its parents, unless the parent is quite clearly unfit to have such custody.

The question is therefore one of fact and an upper court on appeal should not reverse the decision of the lower court unless the circumstances are such that a reversal on the facts is justified. In other words, there is a very strong presumption of the correctness of the findings of the lower court even though the custody be awarded to be in favor of claimants other than the parents of the child. Accordingly an upper court should not reverse except under extraordinary circumstances. The Indiana Supreme Court has several times so held, in one or two cases stating that a contrary decision by the lower court would likewise have been upheld.¹⁸ In these cases, the court considered that the situation was such as to justify the affirmation of any decision by the lower court.

These principles have been recently applied by the Indiana Supreme Court in *Mesmer vs. Eglund*, 151 N. E. 826, a case which on first reading seems somewhat startling. The question in this case was of the custody of a girl, nine years old. Her father being dead, the custody was claimed by her mother as against her great-grandmother. The child had lived with the latter claimant during nearly all her life and was greatly attached to her. Both of the parties to the action were concededly of good character but the pecuniary resources of the great-grandmother considerably exceeded those of the mother, though the latter would have presumably have been able to support the child. Under these circumstances the lower court awarded the custody of the child to the great-grandmother and upon the mother's appeal the decision was affirmed. The decision of the Supreme Court was based primarily upon the theory that the circumstances were not sufficiently clear in favor of the mother to warrant the court in reversing the decision of the lower court.

The result of the case may seem to impose a serious hardship upon the mother but it must be remembered that in all such cases the question is not the "rights" of the person claiming custody, for there are no such rights; the question is rather the welfare of the child. When, as here, the child had lived nearly all her life with the defendant, her great-grandmother, who was obviously fitted by character and temperament for her

¹⁸ *McKenzie v. State*, 80 Ind. 547; *Bullock v. Robertson*, 160 Ind. 521, 65 N. E. 5; *Mahan v. Hendricks*, 181 Ind. 630, 99 N. E. 418; *Luellen v. Younger*, 194 Ind. 411, 143 N. E. 163; *Keesling v. Keesling*, 42 Ind. App. 361, 85 N. E. 837.

custody; when the child very evidently preferred to stay with the defendant; and when the pecuniary resources of the defendant clearly exceeded that of the mother (although this is of course a matter of somewhat less consequence), the circumstances are certainly sufficient to justify the affirmance of the decision of the lower court. It submitted, therefore, that the result, while perhaps surprising, is justified; and, at any rate that the general attitude of the court that the welfare of the child is controlling and that such welfare is largely a question of fact as to which the decision of the lower court is entitled to great weight, is clearly correct and praiseworthy. The court has laid down principles which are not merely sound from the standpoint of legal theory but also from a practical standpoint. Such a decision ought to insure that the question of the custody of Indiana children who are in the future brought before the courts of the state, shall be determined in accordance with sound principles and therefore, in most cases at least, for the best interests of the child and of the community.

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