

CUSTODY ON APPEAL

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This article on Custody of Children of Divorced Parents on Appeal is addressed mainly to the legal profession. Considerations of space prevent extended reference to the non-legal aspects of the problem. The writer recognizes that the topic concerns all of us as individuals and as members of such institutions as the home, the school, the church, and the community because children are the nation's No. 1 natural resource. The community is equally concerned with the welfare of children of divorced parents and, consequently, with the highly relevant question of custody award. Custody is in a sense a by-product or a salvaging operation of the more serious problem of a breakdown in a family unit. The better job the legal profession does in disposing of individual custody cases the greater the contribution our profession makes to a happier and a healthier society.

It is hoped that the following discussion, based upon a study of the statutes of forty-six states¹ and several hundred cases, will be of some practical benefit to judges, lawyers and interested persons by clarifying the problem of custody on appeal and by giving a broader basis for an approach to the analysis of the judicial function of awarding the custody of children of divorced parents.

Since awarding the custody of children involves the difficult task of attempting to measure the character of people, and to predict the suitability of a domestic relationship, it is probably beyond human judgment to determine with absolute certainty a perfect order to be made in many such cases. Particularly is this true of an appellate court with only the record of the case in the lower court before it. Be that as it may, when a custody case is appealed, we are faced with some questions and problems differing from those confronting the trial courts. It is from the appellate point of view that this article is written. The problems and questions as taken up are: (1) What are the spheres of activity and functions of an appellate court in disposing of a custody issue? (2) What factors influence the courts in the exercise of their power? (3) How is the problem of modification handled?

THE SPHERE OF THE APPELLATE COURT'S ACTIVITY

In considering the issue of custody upon divorce of parents as a dispute over what relationship shall exist in the future between the parents and the children of the former marriage, it is perhaps a poor choice of words to speak of the "court's

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¹ Pennsylvania has no custody statute in connection with divorce. South Carolina has no statutory provisions for absolute divorce.

power" to resolve the issues. But we are interested in what the court *can* do in determining this new bond between parents and their children. The key to the extent of judicial activity in this field is perhaps found in an idea expressed by the Alabama court² that the power of any tribunal to deal with the custody of infants of divorced parents is based upon the inherent jurisdiction of chancery to safeguard the State's interest in the welfare of its children. This power or "jurisdiction" does not require a statute³ for its existence, although statutory direction is found in forty-six states.⁴ Since these statutes are so accurately analyzed by Vernier⁵ and in the main are merely declaratory of the courts' inherent power, it has seemed to this writer unnecessary to give them special consideration herein.

As a court of equity, the appellate court is not bound by the findings of the lower court on questions of fact, but can, and often does, review the whole record to decide the case on its merits.⁶ The power of the court on appeal to deal with a custody issue goes beyond mere affirmance or reversal. The judges may decide to try the issue *de novo* and may enter another or different order; thus by its own decree making the award and setting forth the terms thereof.⁷ Sometimes, on appeal, the right of the court to make any order concerning the custody of children is attacked. Thus, to illustrate the nature and scope of the power of the court, it seems pertinent to examine some cases wherein its authority to issue any custody order has been challenged.

When a Divorce Is Denied

It has been argued that the court cannot make a custody award in a divorce proceeding if for some reason the divorce is not granted. This argument has not met with uniform success. The better view seems to be that the court may retain jurisdiction to adjudicate a question of custody though the divorce itself is denied.⁸ This view is based upon the theory that an award of custody is not dependent upon a decree of divorce once the issue of custody is before the court. Having acquired jurisdiction, equity can grant full relief. The court can thus proceed to make some provision concerning the relationship between the quarreling parents and their children. This view seems not only consistent with the general statement that custody is a matter of inherent jurisdiction of chancery,⁹ but has in many cases the added weight of common sense. By the time parents have resorted to the court to dissolve their marital relationship, their family life may well be so disrupted as to

² Thomas v. Thomas, 212 Ala. 85, 101 So. 738 (1924).

³ Decker v. Decker, 176 Ala. 799, 58 So. 195 (1912).

⁴ See 2 VERNIER, AMERICAN FAMILY LAWS (1932) §95; VERNIER, AMERICAN FAMILY LAWS (1938) SUPP. §95.

⁵ *Ibid.*

⁶ Rone v. Rone, 20 S. W. (2d) 545 (Mo. App. 1929).

⁷ Trop v. Trop, 46 N. D. 113, 180 N. W. 26 (1920).

⁸ Adams v. Adams, 178 Wis. 522, 190 N. W. 359 (1922); Duke v. Duke, 109 Fla. 325, 147 So. 588 (1933); Sauvageau v. Sauvageau, 59 Idaho 190, 81 P. (2d) 731 (1938); Davis v. Davis, 12 So. (2d) 435 (Miss. 1943), overruling Walker v. Walker, 140 Miss. 340, 105 So. 753 (1925); Collins v. Collins, 76 Kan. 93, 90 Pac. 809 (1907).

⁹ Thomas v. Thomas, 212 Ala. 85, 101 So. 738 (1924).

make it desirable for the judge to be in a position to make some order respecting the custody of the children even though a divorce is denied. However, the contrary opinion is not without authority.¹⁰ While such a view would seem to be based on the theory that custody is truly incident to a divorce decree and if such a decree does not issue then there can be no order for the custody of the children, as a matter of fact the courts seem only to have thrown out this statement when a custody order should not have issued anyway.¹¹ Furthermore, once two parties, who are father and mother as well as husband and wife, have brought their domestic difficulties before the court, then, as a court of domestic relations, the court should be in a position to consider the welfare of the whole family.¹² Whether the relationship between parents and their children should be altered by a custody award if a divorce is denied should depend upon the peculiar facts of each case. However, it is this writer's opinion that if those facts do warrant the court in making a custody award then the court should not be prevented by adherence to a technicality. The writer is aware that he may have succumbed to the accretive processes of judge-made law. If the courts had consistently (and indignantly) denied the existence of this power and if a statute were proposed to confer it, the writer asks himself whether he would not then denounce it as Godless, bolshevistic governmental interference with private lives and the sacredness of the home.

Failure to Raise the Custody Issue by the Pleadings

A similar attack has met with even less success: that the court is without power to make a custody award even though a divorce is granted if the issue is not raised by the pleadings. While the courts presented with this argument have often disposed of it by speaking of a "duty" or a "right" to make a custody award, it seems clear from the results reached that a court may make a custody order upon divorce of the parents whether the issue is raised by the pleadings or not.¹³ Usually this argument is raised by one party to defeat an award to the other; but, in one unusual case, a mother sought to prevent an award to herself on the grounds that she had not asked for the custody of the minor child!¹⁴ It is not necessary to express an opinion as to the soundness of making an award to a parent taking such a position; that case does, however, show that a court can, in a divorce decree, even refuse to permit a parent to avoid the responsibilities of parenthood by his own failure or unwillingness to ask for the custody of his child. This point of view seems to be in general agreement with that expressed earlier, namely, that the court has an

¹⁰ Klenk v. Klenk, 282 S. W. 153 (Mo. App. 1926); Robinette v. Robinette, 153 Va. 342, 149 S. E. 493 (1929).

¹¹ In the Sauvageau case, *supra* note 8, the wife was denied a divorce on the technical grounds that she had not established the requisite residence. The parents were at irreconcilable odds. Again in the Davis case, *supra* note 8, when the court felt compelled to make a custody award it overruled without hesitation on this point the Walker case, *supra* note 8.

¹² DeFerrari v. DeFerrari, 220 Mass. 38, 107 N. E. 404 (1914).

¹³ Bower v. Bower, 90 Ohio St. 172, 106 N. E. 969 (1914).

¹⁴ Stargel v. Stargel, 21 Tenn. App. 193, 107 S. W. (2d) 520 (1937).

independent interest in the welfare of the children of a marriage when the parents request a divorce.

Finally, to round out, somewhat, the picture of the extensive power of a court to deal with a custody issue, it might be noted that the court will not let its jurisdiction in this respect be ousted because there is pending in a juvenile court a proceeding involving the child, if the parents have come before the court for a divorce.¹⁵

Thus, it would seem that once a breakdown in a family unit is brought before a court in a divorce proceeding the lower court and hence, in due course, the appellate court on review, has rather "full power" to make an order for the custody of the children of the marriage. Judges are not prone to permit their activity to be limited even though a divorce is not granted, or the issue of custody is not raised by the pleadings, or an independent suit is pending in a juvenile court in the same jurisdiction.

FACTORS INFLUENCING THE APPELLATE COURTS IN PRACTICE

Without exception, the appellate courts purport to exercise their power to make an independent custody order only when they find an "abuse of discretion" on the part of the lower courts. Of course, in vacuo, these magic words have no meaning. The question is raised then, what is an abuse of discretion in a custody award? Looking first to the language of the decisions themselves, the courts say they determine whether there has been an abuse of discretion by looking to see whether the lower court has properly applied the almost universally recited best-welfare-of-the-child test. Whether or not the order below is proper as being fair or reasonable and consistent with the evidence is determined then by whether or not the award was made in the best interests of the child. Ever since the abandonment of the older conception of a "right" to the custody of a child in the father (on the ground that he alone had a duty to support it), we have been really concerned, on appeal, with the question: can the court say the order given clearly will not serve the best welfare of the child? Whether we have thus come upon a modern and humane test that will point toward the proper solution in a complicated and difficult custody case, or whether we have merely changed two nickels for a dime is probably debatable. While the so-called welfare test has been highly praised, at least it has directed attention to the fact that the child has come to be regarded as the most important person in a custody fight. But, in order for this test to have any meaning, it is still necessary to examine the cases to see what factors determine whether or not the order of the lower court has been made in the best interest of the child and consequently there has not been an abuse of the lower court's discretion by its award. In effect, then, we are to ascertain what facts of human experiences lead our appellate courts to agree or disagree with a custody award of the lower court.

Fitness or Unfitness of a Parent

If one parent is unfit and the other fit to have the custody of the child, we need no Solomon to decide the issue. For this reason one of the first things to which

¹⁵ *Ross v. Ross*, 89 Colo. 536, 5 P. (2d) 246 (1931).

an appellate court will look will be to see if the lower court has made any finding of fitness of the parties. But, what facts are sufficient to warrant a decision that a parent is unfit to have the care and custody of his child? Locking a child in a closet and threatening to kill her has been held sufficient to show a mother's improper attitude.¹⁶ Brutal punishment such as having struck a child with a strap on the end of which was a buckle and leaving a permanent scar obviously may disqualify a parent.¹⁷ Misconduct or leading a "wild life," i.e. getting drunk and associating with disreputable characters¹⁸ or immorality¹⁹ may disqualify a parent. Also, past failure to care for the child and neglect of parental duties seem to be sufficient to justify the court in refusing to make an award.²⁰ Thus, if the appellate court can find from the evidence a picture of unfitness of one parent in his relationship with the child by improper conduct or attitude, or the parent's own bad personal conduct, refusal to grant full custody follows naturally.

The more usual situation occurs when it is necessary to balance the characters of the two parties. Seldom is a case appealed in which one party is a complete "angel" and the other an unmitigated "devil." Where both parents seem to the court to be equally unsuitable to have custody of a child, it is proper, and not uncommon, to award the child to a third person, usually a close relative who is deemed to be a fit custodian.²¹ But, in such a case a clear finding must be made that *both* parents are unfit.²² Of course, unless clearly inconsistent with the evidence, an appellate court is most hesitant to disturb a decision if an actual finding of unfitness has been made. This is because the lower court is in a much better position to evaluate the parents.²³ Contrast this statement, by a parent, appearing in the cold record with its potential range of meaning when spoken with one of numerous inflections: "Yes, I will take the child." It would be rash to venture a judgment from a mere reading of such words as to the attitude of the speaker.

However, when both parties have been deemed fit, or there has been a failure by the lower court to make a finding of unfitness as to either party, we come to the "hard" custody cases on appeal. It is then the courts feel the need for some formula and are inclined to start with a "presumption" or a "right to the custody." While these cases are still subject to the welfare test the approach is confused since some courts are too prone to look for an easy way out by reliance on some presumption. Other courts entertain us with didactics upon the weaknesses and shortcomings of human nature. Let us examine some of the cases where both parties,

¹⁶ *Ex Parte Shull*, 127 Okla. 253, 260 Pac. 775 (1927).

¹⁷ *Penn v. Penn*, 37 Okla. 650, 133 Pac. 207 (1913).

¹⁸ *Gotthelf v. Gotthelf*, 38 Ariz. 669, 300 Pac. 186 (1931).

¹⁹ *Vallandingham v. Vallandingham*, 232 Ky. 125, 22 S. W. (2d) 424 (1929); *Pearce v. Pearce*, 30 Mont. 269, 76 Pac. 289 (1904); *Barnett v. Barnett*, 158 Okla. 270, 13 P. (2d) 104 (1932).

²⁰ *Chandler v. Chandler*, 149 La. 427, 89 So. 312 (1921).

²¹ *Piatt v. Piatt*, 32 Idaho 407, 184 Pac. 470 (1919); *Phillips v. Phillips*, 161 Ga. 79, 129 S. E. 644 (1925); *Sang v. Sang*, 240 Wis. 288, 3 N. W. (2d) 340 (1942).

²² *Ibid.*

²³ *Leach v. Leach*, 46 Kan. 724, 27 Pac. 131 (1891); *State ex rel. Mims v. Parker*, 200 La. 191, 7 So. (2d) 706 (1942).

seeking custody of the children of the marriage, are fit persons to have the child or, at least, where neither has been declared unfit by the lower court.

If Child Is of Tender Years

One of the most often used "presumptions" is that the child of tender years should be awarded to his mother. If the custody of such a child is in controversy the door is open for an easy way to dispose of the issue. Following the above "rule" the courts often look no farther than to see if the mother has been deemed a fit person,²⁴ and sometimes only to see that she has not been affirmatively declared unfit.²⁵ Perhaps human experience supports the policy that young children should not be deprived the care of their mothers. In all the cases cited above, it may have been true that for each child and all the parties the result reached was the most satisfactory. However, it is this writer's opinion that even such "sound general rules," as this one is said to be, should be used with caution in custody cases. The reason is not that the "rule" is wrong but that the approach is wrong and often imposes upon the courts great labor when they wish to reach a different result. It is submitted that the essential question is, in light of all the facts before the court, what domestic relationship should be sanctioned as between this particular child and these divorced parents. Such an approach would never prevent a court from awarding a young child to its mother and would avoid the necessity of laboring the issue if in a particular case some other result should be reached. Thus far when faced with such a situation the courts have said that this "rule" was subject to the welfare test so that it need not be followed where against the best interests of the child. So, in the *Broesch* case²⁶ the young son was not awarded to his mother, whose fitness was not attacked, because in the mother's home was a slightly older stepbrother "fresh out of reform school." Fearing the potential danger of the influence of this stepbrother, the court relied on the best-welfare-of-the-child test to excuse itself from permitting this young boy to be in the full care of his mother.

Best-Welfare-of-the-Child Test

Should we not simply state then that the sole test for awarding custody of children is the best welfare test? If this test means that the court in dealing with the complicated and delicate problem of custody is to look at all the facts and then lay down a framework for the relationship between the divorced parents and their children, perhaps we should say yes. But, in using the word "test" are we not simply pretending that there is some magic formula that will open the eyes of the court in Solomon-like fashion to the proper solution in each case? After studying the material collected for this article, it is the author's opinion that no such magic formula exists. Certainly the courts will continue to state their conclusions as

²⁴ *Anderson v. Anderson*, 165 Ala. 181, 51 So. 619 (1910); *Riggins v. Riggins*, 216 Ky. 281, 287 S. W. 715 (1926); *Gentry v. Gentry*, 161 Va. 786, 172 S. E. 157 (1934); *Mason v. Mason*, 163 Wash. 539, 1 Pac. (2d) 885 (1931); *Rierson v. Rierson*, 107 W. Va. 321, 148 S. E. 203 (1929).

²⁵ *Peters v. Norris*, 191 La. 436, 185 So. 461 (1938); *Smith v. Smith*, 15 Wash. 237, 46 Pac. 234 (1896).

²⁶ *Broesch v. Broesch*, 159 Wash. 409, 293 Pac. 464 (1930).

drawn from "general rules" or following some "test." And, as long as it is remembered that these symbols are only general guides and not absolute directives, the only harm done is that the cases tend to reveal a confusion that perhaps does not exist. As the Kentucky court has stated it, ". . . in the settlement of such unhappy controversies (custody awards) only general rules of law may be laid down and that *in their application each case in a large measure must be determined upon its peculiar facts and conditions.*"²⁷ Keeping in mind then that in custody cases we are seeking by sound judgment to formulate the framework of a domestic relationship in each particular case on its own merits but with the guide of certain "rules" or "tests," let us now consider what the courts mean by the so-called welfare test which is by far the most important guide.

The courts do not mean that a child should be "given" to the parent with the most money.²⁸ And yet, even though poverty is no excuse for denying custody, a party to obtain custody of an infant must be able at least to provide for his necessities of life.²⁹ The best welfare test is somewhat elusive because it is also a spiritual test. That is, the general environment, influence, and character of the home into which the child is to be reared must be the best possible under the circumstances for the development of his mind and character as well as his body.³⁰

Other Factors

Finally the welfare test does not seem to be the sole consideration. Many courts, perhaps erroneously, seem to be influenced by the fact that the party "to blame" for the dissolution of the family unit should be denied custody,³¹ or that the successful party in the divorce suit should have the custody of the children.³² Likewise the choice of the child, himself, if he be old enough to express an intelligent desire, is given weight voluntarily in most states, and of necessity by statute at least in Ohio.³³ And too, while an agreement between the parties is not binding on the court, it is usually not disregarded if made in good faith and reasonable.³⁴ No court reacts happily to a situation when it detects that the custody case is but a bitter fight by each party to deprive the other party of the pleasure of having the children of the marriage.³⁵ As factors operating in the background, the reputation of the judge of the lower court, his decision, and the consideration he has given the case,

²⁷ *Riggins v. Riggins*, 216 Ky. 281, 282, 287 S. W. 715, 716 (1926). Writer's italics.

²⁸ *Fields v. Fields*, 143 Fla. 886, 197 So. 530 (1940).

²⁹ *Skidmore v. Skidmore*, 261 Ky. 327, 87 S. W. (2d) 631 (1935).

³⁰ *Dupree v. Dupree*, 157 Ga. 779, 122 S. E. 196 (1924); *Broesch v. Broesch*, 159 Wash. 409, 293 Pac. 464 (1930).

³¹ *Owens v. Owens*, 96 Va. 191, 31 S. E. 72 (1898); *Rierson v. Rierson*, 107 W. Va. 321, 148 S. E. 203 (1929).

³² LA. CIV. CODE (Dart, 1932) art. 157; *Hayden v. Hayden*, 154 La. 716, 98 So. 162 (1923); *Brewton v. Brewton*, 159 La. 251, 105 So. 307 (1924); *O'Dwyer v. Natal*, 173 La. 1075, 139 So. 486 (1932).

³³ OHIO GEN. CODE ANN. (Page, 1938) §8033; *Schwalenberg v. Schwalenberg*, 65 Ohio App. 217, 29 N. E. (2d) 617 (1940); *Godbey v. Godbey*, 70 Ohio App. 450, 44 N. E. (2d) 810 (1942).

³⁴ *Slattery v. Slattery*, 139 Iowa 419, 116 N. W. 608 (1908).

³⁵ *Weiss v. Weiss*, 107 Mich. 431, 140 N. W. 587 (1913).

cannot but influence the appellate court in its decision. Occasionally a court will express these influences as did the North Carolina court in *Tyner v. Tyner* saying, "Judge Alley, a most human judge, who heard this case in the court below. . . ."³⁶ Thus, in each custody case there are numerous elements at play. Since these courts are in a sense experimenting with human happiness, care should be taken not to express an extreme individual sociological viewpoint. Each court should be, as most courts are, deeply conscious of its responsibility and by exercise of good judgment should dispose of each custody case as a separate problem with the view of creating the best relationship between divorced parents and their children that is possible under the circumstances.

MODIFICATION

Thus far we have considered the nature and the power of an appellate court in handling custody cases and as a court of equity the manner in which the problems have been resolved. The problems as considered involved disputes concerning the custody of children upon divorce of their parents. Issues we have not taken up have been problems concerning provisions in the order for visitation,³⁷ alternate custody,³⁸ and others. However, there is one more phase of the custody problem which should not be neglected: modification. By this is meant not the attempt to review the original custody order on immediate appeal, but rather the effort some time after the divorce, and entry of original decree, to change the custody order. It might be well to raise one preliminary question as to the power of the court to make a modification order or later to make any custody order as incident to the divorce if the divorce decree was silent as to the custody of the children.

Failure to Award Custody Upon Divorce

The Arizona court has said that subsequent to divorce it could not give a wife custody of both children (she had actual custody of one) under a Nevada modification statute since there was no provision in the divorce decree for the custody of the children and therefore there was nothing to modify.³⁹ While it is perhaps possible to avoid the implication of this case by an independent custody proceeding if the children are before the court, it would seem most advisable that in every divorce decree there be some order for the custody of any children of the marriage. If the parties themselves fail to ask the court to make an order, then the court itself should make some provision for the custody. This it may well do as we saw earlier when the inherent power of the court was considered. In the protection of his client, every lawyer realizing the possibility of future disputes, should see that this matter is not overlooked even though the parties are in agree-

³⁶ *Tyner v. Tyner*, 206 N. C. 776, 781, 175 S. E. 144, 147 (1934).

³⁷ E.g., *Bennett v. Bennett*, 228 Wis. 401, 280 N. W. 363 (1938); *McCoy v. McCoy*, 98 N. J. Eq. 116, 130 Atl. 639 (1925); *Breedlove v. Breedlove*, 27 Ind. App. 560, 61 N. E. 797 (1901).

³⁸ E.g., *Gilcrease v. Gilcrease*, 176 Okla. 237, 54 P. (2d) 1056 (1936); *Swift v. Swift*, 37 S. W. (2d) 241 (Tex. Civ. App. 1931); *Caldwell v. Caldwell*, 141 Iowa 192, 119 N. W. 599 (1909).

³⁹ *Stanley v. Stanley*, 29 Ariz. 288, 240 Pac. 1033 (1925).

ment at the time of the divorce as to the care of their children. But, this is more properly the concern of the lower court. Assuming that there has been some custody order in the divorce decree, when will the court on motion by one of the parties modify that award?

Approach to the Problem

Almost every case for modification repeats the phrase that there must be a sufficient change in circumstances to warrant a new order,⁴⁰ although the existence of previously unknown material facts seems to be a proper ground for modification.⁴¹ On occasion a court has examined the original order and finding it improper has permitted a new order without any change in circumstances as the court did in the *Holdeman* case.⁴² But, some cases seem to proceed directly on the basis of what is the best welfare of the child.⁴³ Again, if we try to discover any pattern from the cases by the use of some formula or test, it seems we find only confusion and conflict. So let us take the approach that the court is considering a later stage of an earlier problem with the view of again attempting to work out a more satisfactory relationship if in fact the original order is not now efficacious. Without examining the soundness of any magic formula, we can look at some of the cases to see what factors have been of sufficient importance to lead the courts to modify a custody order.

Factors Influencing Modification

If the parent having the custody of a child attempts to prejudice that child against the other parent inexcusably by destroying the child's love for his parent or by interfering with the court's order permitting the parent to see the child, then the court may be moved to not only rebuke the offender but depending upon the seriousness of the situation even to remove the child from his custody.⁴⁴ Or, if the parent having custody has become an unfit person, within the meaning of those words as previously discussed, that parent may lose the custody of the child.⁴⁵ But, the mere fact that one party has materially improved his position does not in

⁴⁰ *Mehaffey v. Mehaffey*, 143 Fla. 157, 196 So. 416 (1941); *Prouty v. Prouty*, 16 Cal. (2d) 190, 105 P. (2d) 295 (1940); *Shields v. Bodenhamer*, 180 Ga. 122, 178 S. E. 294 (1935); *Frazier v. Frazier*, 109 Fla. 164, 147 So. 464 (1933); *Rice v. Rice*, 36 Ariz. 190, 283 Pac. 922 (1930); *Neve v. Neve*, 210 Iowa 120, 230 N. W. 339 (1930); *Reeves v. Reeves*, 205 Iowa 191, 217 N. W. 823 (1928); *Duncan v. Duncan*, 119 Miss. 271, 80 So. 697 (1919).

⁴¹ *McLain v. McLain*, 115 Wash. 237, 197 Pac. 5 (1921).

⁴² *Holdeman v. Holdeman*, 191 Okla. 309, 129 P. (2d) 585 (1942). Here the original order was that when the child reached the age of three years the father was to have custody of the child during the summer months. The mother sought a modification of the order when the child reached the age of three. The appellate court agreed that the child should remain with the mother during these months and overruled the father's demurrer. Apparently the original order was incorrect as well as the feeling on the part of the court that it was not in the best interests of the child to let the order stand. No change in circumstances appears in the facts.

⁴³ *Vierck v. Everson*, 228 Iowa 418, 291 N. W. 865 (1940); *Gotthelf v. Gotthelf*, 38 Ariz. 669, 300 Pac. 186 (1931).

⁴⁴ *Johnson v. Johnson*, 102 Ore. 407, 202 Pac. 722 (1921).

⁴⁵ *Tulley v. Tulley*, 38 S. W. (2d) 291 (Mo. App. 1931); see prior discussion of fitness of the parties.

itself justify a modification,⁴⁶ nor does the mere passage of time and the remarriage of the parties provide such a basis.⁴⁷ Failure to send the child to Sunday School has been held not sufficient to warrant modification of the original order on the ground that the court should not enter into a religious controversy even though it felt the child should be given some religious training.⁴⁸ Material violation of the custody order appearing alone would justify a modification.⁴⁹

While this hurried glimpse of the modification difficulty is not complete, the writer does believe that the judicial approach to the problem should emphasize (as in fact it usually does, at least *sub silentio*) the view of testing the original order to see wherein it has failed or wherein it is now failing to provide the framework for a good relationship between the divorced parents and their children.

IN CONCLUSION

The problem of custody is and inevitably will remain a human problem and not a matter which lends itself to the categorization characteristic of "estates" in land. While the results of our American courts have reached in disposing of the issue are in the main wholesome and commendable, we should discard as misleading the use of such phraseology as "the right to custody" or "a presumption is raised," just as we should realize that there is no one test or formula that can resolve all the cases.

The function of the appellate court should be to examine the custody order under consideration in light of the evidence before the court with the view of "pencil in" or correcting here and there the general outline of the plan that the lower court has drawn to govern the future relationship of divorced parents and their children. The whole outline should be erased only when wholly inadequate or inconsistent with the facts. While the appellate court should thus act in a supervisory capacity we must remember that each custody case calls for varying degrees of skill and judgment to balance the relationship between parents and their children after the operation of a divorce has destroyed the family unit. Custody as a problem is still "on appeal," or at least "on trial."

⁴⁶ *Reeves v. Reeves*, 205 Iowa 191, 217 N. W. 823 (1928); *Bennett v. Bennett*, 200 Iowa 415, 203 N. W. 26 (1925).

⁴⁷ *Shields v. Bodenhamer*, 180 Ga. 122, 178 S. E. 294 (1935).

⁴⁸ *Rone v. Rone*, 20 S. W. (2d) 545 (Mo. App. 1929).

⁴⁹ *McLain v. McLain*, 115 Wash. 237, 197 Pac. 5 (1921).