Custody of Children

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NOTE

CUSTODY OF CHILDREN

At common law, a father was entitled to the custody and control of his minor children. This right was absolute, being based upon the fact that it was his obligation to maintain and educate them. Secondary to the right of the father was the mother's right to the custody of her children which she could exercise upon the father's death or upon a showing of his incompetency.

With this cursory statement of the law pertaining to the custody of children under the common law, let us consider what disposition is made of the child today. It might be well to divide the discussion into two categories: (1) custody of the child of divorced parents, and (2) custody of the child where there is a dispute between one parent and a third person.

In the case of divorce, it is the well-recognized rule that the welfare of the child is to govern the decision of the court in awarding custody and with this policy, Kentucky is in accord.

There is a split of authority as to whether or not the court should divide the custody of the child equally between its divorced parents. Some courts have been reluctant to divide the custody on the ground that the welfare of the child is not promoted by passing him back and forth between parents.

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1 Rallihan v Motschmann, 179 Ky. 180, 200 S. W 358, 361 (1918), McShan v McShan, 56 Miss. 413, 415 (1879); People ex rel. Snell, 77 Misc. Rep. 538, 137 N.Y.S. 193, 194 (1912), Denny v. Denny, 118 Va. 79, 86 S. E. 335 (1915).
2 Rallihan v Motschmann, 179 Ky. 180, 200 S. W 358 (1918).
4 Cowls v. Cowls, 3 Gilman (Ill.) 435, 44 Am. Dec. 708 (1846).
"Were the little boy to be regarded as a mere plaything existing..."
there is no division of custody, the child, of tender years, is usually given to the mother with the right of visitation by the father. This always raises the problem of the father who loves his child as much as the mother does being compelled to support the child, perhaps for years, with no companionship from the child—except at stated intervals, for example, once a week or once a month. As a practical matter, this means that after some time; the child and his father drift apart although the father must continue to carry the burden of supporting a child whom he never sees and from whom he has no companionship. This situation is unfortunate, but there seems to be no solution to the father’s predicament. However, some courts have held that the child’s best interests are promoted if his custody is divided and he has the opportunity to share the love and training of both father and mother. It is to be stressed, however, that in both lines of decisions, the court bases its findings on the welfare of the child, even though in deciding what is best for the child, different conclusions are reached.

Courts almost invariably refuse to divide the custody in cases involving children of tender years. In such cases, as between the parents, the child will be given to the mother, if she is a fit person, because her custody is held to be the most conducive to the welfare of the child.

alone for the pleasure and entertainment of his parents, there might be some justification in changing the place of residence twice a year; but, as his welfare is of paramount importance, he should be accorded, if possible, such a home as will conduces to his physical and moral well-being and enable him to acquire a suitable education. No argument is required to support the proposition that a permanent abode is for a child’s best interest and, rarely, indeed, will a divided custody by parents who have separated prove beneficial.” Davis v. Davis, 289 Ky. 618, 159 S. W. (2d) 999 (1942), McNeely v. McNeely, 219 Ky. 296, 292 S. W. 798 (1927), Cormier v. Cormier, 193 La. 159, 190 So. 365 (1939). McDermott v. McDermott, 192 Minn. 32, 255 N. W. 247 (1934) Larson v. Larson, 176 Minn. 490, 223 N. W. 789 (1929).

“Belknap v. Belknap, 265 Ky 411, 96 S. W (2d) 1012 (1936), Adams v. Adams, 281 Mich. 448, 275 N. W. 204 (1937), Brock v. Brock, 123 Wash. 450, 212 Pac. 550, 551 (1923) “In determining what is for the best welfare of a child of tender years, the courts must consider not only food, clothing, shelter, care, education, and environment, but must also bear in mind that every such child is entitled to the love, nurture, advice, and training of both father and mother, and to deny to the child an opportunity to know, associate with, love, and be loved by either parent may be a more serious ill than to refuse it in some part those things which money can buy.”

“Meffert v. Meffert, 118 Ark. 582, 177 S. W 1 (1915); Stafford v. Stafford, 297 Ky. 804, 155 S. W (2d) 220 (1941); Evans v. Evans,
The rule, that the best interests of the child constitute the controlling factor guided the Kentucky Court in the recent decision of *Davis v. Davis*, in which the custody of a four year old boy was awarded to the mother and the father was merely allowed to visit the child. The court said.

"It is our view that where both parents are proper and suitable to have the custody of their children and are similarly situated each should be given the right of custody for as nearly equal a period as is practical and compatible with the welfare and convenience of the children. (Citing cases.) But the disposition of a child of divorced parents does not rest upon the justification for penalizing one of them unless it be that he or she was grievously to blame for the breaking up of the home. It is axiomatic that the true guide for the court is the welfare of the child. The dominant thought is that a child is not a chattel to be disposed of according to the wishes of either or both of his parents, but is a human being and personality and is to be treated as such. This rule for disposition of a child is not only directed by the statute, Section 2123, but by the dictates of morality and of wisdom born of experience. To that end his custody may be awarded one parent or the other, or to his grandparents, or a stranger, according to the circumstances."

When one turns to a situation involving a dispute between the parent and a third person, the cases may be divided into (1) those in which there is a custodial contract, and (2) those in which there is no such contract. One of the leading contract cases is *Bridges v. Matthews*, in which the father, upon the death of his wife, by contract gave the child to its maternal grandmother. Six years later, having remarried and obtained permanent employment, he sought the custody of his child. The court held that the grandmother should have the custody because to sever the ties would result in serious injury to the child. The decision was based on what was best for the welfare of the child, not upon the fact that a contract had been made granting custody to the grandmother.

Although there is such a contract, the court abides by the rule placing custody where the child will be most benefited. The presence of a contract does not necessarily influence the chan-

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232 Ky. 155, 22 S. W. (2d) 578 (1929); Caudill v. Caudill, 172 Ky. 460, 189 S. W. 431 (1916). It is submitted that courts are reluctant to say specifically at what age "tender years" are at an end. Usually, though, when the child is over eight or ten, it will not be awarded to the mother on the basis of its age.

*Id.* at 621, 189 S. W. (2d) 1001.

KRS 403.070: In case of divorce, "having in all such cases of care and custody the interest and welfare of the children principally in view"

276 Ky. 59, 122 S. W. (2d) 1021 (1938)
cellar one way or the other for the court may ignore the contract or decree that its terms shall be carried out if they are for the best interests of the child.

Mr. Ferguson, in a note written several years ago, concluded that the law in Kentucky in cases not involving custodial contracts is that a surviving parent is entitled to the custody of a child if he is suited to the trust and that the court will not impose its own opinion as to what is best for the child.

It is submitted that Mr. Ferguson's thesis is fundamentally fallacious. According to KRS 405.020 the surviving parent is to have the custody of the child if he is suited to the trust. But the right of the parent is not absolute and the court does impose its opinion as to what is best for the interest of the child. In interpreting this statute, the court said, in the case of Cummins v Bird:

"it will be seen that the statute does not confer upon a parent an absolute right, but conditions the custody of infant children upon the suitability of the particular parent to the discharge of the duties of the trust. The welfare of the child, consistently with legal responsibilities, is the controlling consideration on determining its custody or the suitability of a claimant for the trust."

In that case, even though the father's morals and habits were unimpeachable and though he was financially secure, custody was given to the grandmother because the child's best interests demanded such an award. Does not the court then impose its opinion as to what is best for the child? In determining whether or not the parent is suited for the trust of keeping the child, the court is deciding what is best for the welfare of the child and making that its chief concern.

It is only natural that the parent ordinarily has more affection for his child than a third person would have. Consequently, because of an infant's need of love and affection, as well as his need of physical security and educational advantages, it

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13 Williston, op. cit. "since the welfare of the child is the determining factor, the court in the exercise of its equitable powers, may ignore the bargain, whether legal or illegal, and if the custody of the child has already been transferred may leave it with the transferee." Restatement, Contracts (1932) sec. 583.
14 (1939) 27 Ky. L. J. 790.
15 230 Ky. 296, 19 S. W. (2d) 959 (1929).
is logical that the court would look first to the parent in placing custody. But, in each case, the court carefully considers the character and reputation of each of the contestants for custody, the type of home life offered, educational facilities, financial status, and environment in general. But once it is decided that the best welfare of the child requires it, the court will not hesitate to award custody to a third person instead of to the parent.

Thus, the welfare of the child is the primary consideration of the courts in determining the custody of the infant, whether as between parents who are divorced, or as between a parent and third person. It is submitted that because of the state's interest in children and because each child should have an opportunity to be reared in the environment which is most conducive to molding him into a good citizen and individual, this is the only rule which should be applied where the court must determine custody.

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Moore et ux. v. Smith, 228 Ky. 286, 14 S.W. (2d) 1072 (1929); Hampton v. Alcorn, 213 Ky. 599, 281 S.W 549 (1926)