Kentucky Law Journal

Volume 27 | Issue 4 Article 13

1939

Domestic Relations--Right of Surviving Parent to Custody of Child

Jo M. Ferguson
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Family Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Ferguson, Jo M. (1939) "Domestic Relations--Right of Surviving Parent to Custody of Child," *Kentucky Law Journal*: Vol. 27: Iss. 4, Article 13.
Available at: https://uknowledge.uky.edu/klj/vol27/iss4/13

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

CASE COMMENTS

DOMESTIC RELATIONS—RIGHT OF SURVIVING PARENT TO CUSTODY OF CHILD

A father, upon the death of his wife, gave his child into the keeping of its maternal grandmother. For more than six years thereafter, the father had no regular employment, but a few months before bringing this suit, he obtained such employment and married a woman of exemplary character. He now seeks the custody of the child. Both the father and the grandmother are persons of good character and very moderate means. The child, a boy now twelve years old, expressed a strong desire to remain with his grandmother. The chancellor, finding that a contract had been entered into at the time the father surrendered the custody of the child, and also that the welfare of the child would be better served by leaving him in his present home, decreed in favor of the grandmother. *Held*, affirmed. The serious injury which would result to the child from a severance of the ties which now bind him, coupled with his own desire, is decisive. The controlling consideration is the welfare of the child. *Bridges* v. *Matthews*, 276 Ky. 59, 122 S. W. (2d) 1021 (1938).

It has ordinarily been held that a parent who is a suitable person to have the custody of the child and is able to provide for it, is entitled to the custody as against other persons.[1] This rule has been applied although such others were much attached to the child,[2] and it was attached to them,[3] and preferred to remain with them,[4] and they were suitable to have its custody.[5] But American courts, which have always regarded the welfare of the child as the controlling circumstance in according custody *as between the parents*,[6] have frequently adopted the welfare test even in contests between a parent and a third person.[7]

---

[1] Alred v. Alred, 161 Ga. 687, 132 S. E. 208 (1926); Hohenadel v. Steele, 237 Ill. 229, 86 N. E. 717 (1908); Matter of Livingston, 151 App. Div. 1, 135 N. Y. S. 328 (1912); Atkinson v. Downing, 175 N. C. 244, 95 S. E. 487 (1918).

[2] Wilson v. Mitchell, 48 Colo. 454, 111 Pac. 21 (1910); Van Auken v. Wieman, 128 Iowa 476, 104 N. W. 464 (1905); Nickle v. Burnett, 122 Miss. 56, 84 So. 138 (1920); Hedtke v. Kukuk, 92 Okla. 264, 220 Pac. 615 (1923).

[3] Ex parte Mathews, 176 Cal. 156, 167 Pac. 873 (1917); State ex rel. Kearney v. Steele, 121 La. 215, 46 So. 215 (1908); State v. Ellison, 271 Mo. 416, 196 S. W. 1140 (1917).

[4] State ex rel. Martin, 161 La. 192, 108 So. 411 (1926); Kinnaird v. Lowry, 102 Miss. 557, 59 So. 843 (1912).

[5] Powell v. Johnson, 213 Ala. 259, 104 So. 525 (1925); Wood v. Lee, 123 Kan. 669, 256 Pac. 797 (1927); State v. Deaton, 93 Tex. 243, 54 S. W. 901 (1900).

[6] Madden, Persons and Domestic Relations (1931) p. 371.

[7] U. S. ex rel. Schneider v. Savage, 91 Fed. 490 (Circuit Ct. W. D.

Somewhate different rules may apply where the parent has given the custody of the child to another by contract. There is a conflict of opinion as to the validity of a contract or agreement by which the parent surrenders the legal right to the custody and control of his child. Many American decisions have held such a contract valid if properly executed.[8] Other courts, however, insist that this agreement is invalid as against public policy, since a child is not property or the subject of a conveyance.[9] But it appears that even in jurisdictions holding the contract invalid, the parent will not regain custody unless it is for the best interests of the child.[10]

It is impossible to define with certainty the ground upon which the decision in the principal case was placed. The chancellor found that a contract had been made, and the decision states that the court was "not disposed to disturb the chancellor's finding in that respect".[11] Immediately thereafter the court "concedes for present purposes" that a contract was made, and never thereafter discusses the question. The remainder of the decision might be interpreted to mean that the question of existence or non-existence of the contract is not controlling. One of the two cases cited in the opinion as precendents for allowing the grandmother to retain custody is a non-contract case.[12] If it was the intention of the court to base its decision solely upon its opinion of the welfare of the child, the case is clearly contrary to the more carefully considered decisions in this jurisdiction.

The statutes expressly provide that "in the event of the death of either one of the parents, . . . the survivor, if suited to the trust, shall have the custody, nurture and education of such infant child."[13]

Pa. 1899); Miller v. Banks, 280 S. W. 301 (Tex. Civ. App. 1926); 46 C. J. 1240.

[8] Miller v. Miller et ux., 123 Iowa 165, 98 N. W. 631 (1904); Enders v. Enders et al., 164 Pa. 266, 30 Atl. 129 (1894).

[9] Harper v. Tipple, 21 Ariz. 41, 184 Pac. 1005 (1919); Clark v. White, 102 Ark. 93, 143 S. W. 587 (1912); Dunham v. Dunham, 97 Conn. 440, 117 Atl. 504 (1922); Hooks et al. v. Bridgewater, 111 Tex. 122, 229 S. W. 1114 (1921).

[10] Stringfellow v. Somerville, 95 Va. 701, 29 S. E. 685 (1898); Odlasek v. Odlasek, 98 W. Va. 357, 127 S. E. 59 (1925).

[11] Bridges v. Matthews, 276 Ky. 59, 62, 122 S. W. (2d) 1021, 1023 (1938).

[12] Cummins v. Bird, 230 Ky. 296, 19 S. W. (2d) 959 (1929). (But probably the real basis for this decision was that the parent was unsuitable; if so, it is not authority for the principal case.)

[13] Kentucky Statutes (Carroll's, 1936) Sec. 2016 (enacted 1892, amended 1910). [Statutes in other jurisdictions provide for surviving parent's right to custody under various conditions: "If parent fit person," Ill. Rev. Stat. (1935), Ch. 64, Sec. 4; Gen. Laws Mass. (1932), Ch. 201, Sec. 5; "suitable", Burns Ind. Stats. Ann. (1933) 8–109; Compiled Laws Michigan (1929) Sec. 15768; except where unsuitable or child's interest would be adversely affected, Revised Code Delaware (1935) Sec. 3576; absence of misconduct, Oregon Code Ann. (1930) 33-304. No conditions stated: Idaho Code Ann. (1932) 31–1007; Code of Iowa (1931) Secs. 12573-12574; Rev. Stats. Maine (1930) Ch. 72, Secs. 43 and 45; Rev. Stats. Missouri (1929) Sec. 375; Vernon's Texas Stats. (1936) Art. 4118.]

Despite language in a few decisions to the contrary,[14] it is undoubtedly the law in Kentucky, in cases not involving custodial contracts, that a surviving parent is entitled to the custody of a child if he is suited to the trust, and the court will not impose its own opinion as to what is best for the child.[15] In the clearest statement of Kentucky's position on the subject, Judge Logan, speaking for the court, prefers to state the proposition thus:

> "It is true that many of the opinions deal with the question of what is best for the child, but the statute makes it conclusive that it is best for the child to be with the surviving parent if the surviving parent is suited to the trust."[16]

This rule in favor of the parent is none the less applicable where the person contesting the parent's right is a grandparent, who has a right superior to that of an entire stranger.[17] Nor is the parent's right defeated by the desire of the child to remain with the grandparent. The court is not entirely without precedent[18] for its statement in the principal case that the desire of the child should be given great weight, but the better authority in Kentucky is for the view that the child's wishes are to be considered only in close cases.[19]

The parent has no such superior right when he has agreed to give

---

[14] Before statute: Ellis v. Jesup and wife, 74 Ky. (11 Bush) 403 (1875); Burke v. Crutcher, 11 Ky. Op. 695, 697 (1882); Smith v. Martin, 4 Ky. L. Rep. 754 (1883, Superior Court). Under statute: Cummins v. Bird, 230 Ky. 296, 19 S. W. (2d) 959 (1929). (But this case may perhaps be explained on the ground a father is unsuitable for the custody of a girl approaching adolescence, even though he is of good character and is financially secure.)

[15] Mason v. Williams, et al., 165 Ky. 331, 176 S. W. 1171 (1915); Rallihan v. Motschmann, 179 Ky. 180, 200 S. W. 358 (1918); Walker v. Crockett, 194 Ky. 531, 240 S. W. 35 (1922); Hampton v. Alcorn et al., 213 Ky. 599, 281 S. W. 540 (1926); Moore et ux. v. Smith, 228 Ky. 286, 14 S. W. (2d) 1072, 1074 (1929) (". . . the only question for consideration is whether appellee [the surviving parent] . . . is 'suited to the trust'."); Baker et al. v. Coleman et al., 229 Ky. 473, 17 S. W. (2d) 417 (1929); Matlock v. Elam et ux., 262 Ky. 631, 90 S. W. (2d) 1016 (1936); Johnson v. Cook, 274 Ky. 841, 120 S. W. (2d) 675 (1938).

[16] Thompson v. Childers et al., 231 Ky. 179, 181, 21 S. W. (2d) 247, 248 (1929).

[17] Johnson v. Cook, 274 Ky. 841, 120 S. W. (2d) 675 (1938).

[18] Ellis v. Jesup and wife, 74 Ky. (11 Bush) 403 (1875).

[19] Stapleton v. Poynter, 111 Ky. 264, 62 S. W. 730 (1901); Rallihan v. Motschmann, 179 Ky. 180, 200 S. W. 358 (1918); Johnson v. Cook, 274 Ky. 841, 849, 120 S. W. (2d) 675, 679 (1938). (*Rallihan* case, Ky. p. 191, S. W. p. 363: ". . . it is only where the court is in great doubt . . . that the preference of the child is given weight . . . where there is no doubt of the proper judgment, there is no necessity to rest the decision upon the immature judgment of an infant of tender years, who is in the custody of some of the parties and speaks alone from its present affections.") (Other jurisdictions: In a contest between a parent and third person, mere preference of child will not as a rule be allowed to prevail, though it may be considered on question of welfare. State v. Cline, 91 Fla. 300, 107 So. 446 (1926); Kinnaird v. Lowry, 102 Miss. 557, 59 So. 843 (1912).

the custody of the child to another. Kentucky recognizes such contracts as valid and binding upon the parent.[20]

> "If a father desires to make a contract whereby . . . he may be relieved, at least in part, of the burden of [the children's] support, there is no good reason why the contract should not be enforced. . . . good conscience demands that [the father] be estopped from repudiating his agreement to the distress of those having the custody of the children, and the children themselves."[21]

It is only in these cases of custodial agreements that the rule should prevail that the welfare of the child is the controlling consideration. For in these cases, though the court may enforce the contract even against a parent who is "suitable", it will be disregarded and custody restored to the parent where the welfare of the infant dictates that such be done.[22] It is this "welfare of the child" rule *in favor of the parent* in "contract" cases, which the courts have sometimes erroneously attempted to apply *against the parent* in "non-contract" cases. Where no custodial contract is involved the only test is the "suitability" rule to be applied to the parent seeking custody. Such phrases as "suitability of parent" and "welfare of the child" are not subject to exact definition, and the court has made no attempt to so define them, but they may be distinguished. The suitability rule looks to the parent, and to him alone. If he is a person of moral habits, free from infectious or contagious disease, and of enough industry to reasonably insure the child from want and positive distress, he is "suitable".[23] The welfare rule looks primarily to the child, but also to the parent, *and to the person seeking to retain custody.* It enables the court to weigh the psychological and economic factors.

The materiality of the distinction between the "suitability" rule in non-contract cases and the "welfare" rule in contract cases in clearly revealed by the facts of the principal case. If there was no contract the father, who was admittedly "suitable" to have custody of the child, should have prevailed; if there was a contract, the court's action in allowing the grandmother to retain custody was correct, since the father did not show that a change would benefit the child. It is clear that there was a contract; the decision is unfortunate only in that it fails to indicate a recognition that this was the basis on which the discussion of the welfare of the child must rest.

These cases, involving as they do the delicate question of parental rights, should not be lightly decided according to what the court may

[20] Proctor v. Rhoads, 4 Ky. L. Rep. 453 (Superior Court, 1882); Bedford v. Hamilton, 153 Ky. 429, 155 S. W. 1128 (1913) (Orphanage held best for child although one adoptive and one natural parent living); Thompson v. Childers et al., 231 Ky. 179, 21 S. W. (2d) 247 (1929); Contra dictum: Mason v. Williams et al., 165 Ky. 331, 334, 176 S. W. 1171, 1172 (1915).

[21] Thompson v. Childers et al., 231 Ky. 179, 184, 21 S. W. (2d) 247, 250 (1929).

[22] Bedford v. Hamilton, 153 Ky. 429, 155 S. W. 1128 (1913); Scott et al. v. Kirkpatrick, 205 Ky. 700, 266 S. W. 390 (1924).

[23] Stapleton v. Poynter, 111 Ky. 264, 268, 62 S. W. 730, 731 (1901).

happen to think is the best interest of the child. It is socially dangerous to deny the custody of a child to a parent who is suited to the trust, and precedent will not justify the action of a court which so interferes with natural relationships, unless the parent has voluntarily and expressly parted with his rights, and cannot be heard to complain.

> "It is one of the cardinal principles of nature and of law that . . . the father . . . if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by anyone whatever. . . . It is not enough to consider the interest of the child alone."[24]

The above quotation, substituting only the word "parent" for "father", expresses the law in Kentucky as defined by the better reasoned cases and by statute. It is earnestly submitted that the distinction between "contract" and "non-contract" cases should be rigidly maintained, and the rule that the welfare of the infant is the controlling consideration should be applied only in those cases in which the parent has contracted away his rights, and is seeking to regain custody of his child despite the contract.

JO M. FERGUSON

TAXATION—INHERITANCE TAX—INTEREST IN JOINT TENANCY PASSING BY SURVIVORSHIP

Plaintiff and decedent held certain stocks, bonds, and real estate in joint tenancy with right of survivorship. Plaintiff paid under protest an inheritance tax on one-half of the joint estate and now seeks to have the State Auditor issue a warrant to him for the amount so paid. *Held:* The tax was valid. Thus, the statute[1] providing that the property held by joint tenants and payable to the survivor upon the death of one should be deemed a transfer of one half in the same manner as tho held by them as tenants in common and bequeathed or devised to the surviving tenant by the deceased tenant by will was held constitutional. *DuBois Admr.* v. *Shannon*, 275 Ky. 516, 122 S. W. (2d) 103 (1938).

The principal contention of the plaintiff was that the law only covered transfers by devise and intestate succession, and, since this was a transfer by survivorship, it did not come within the statute.[2] But the inheritance tax law expressly covers the situation presented in this case.[3] Even if it did not, the transfer of an interest in a joint estate might be taxable as a "deed, grant, bargain, sale or gift. . . . intended to take effect in possession or enjoyment at or after the death of the grantor or donor".[4] The court did not mention this section, but it seems that it could have been cited to meet plaintiff's contention.

---

[24] Verser v. Ford et al., 37 Ark. 27, 29 (1881).

[1] Carroll's Kentucky Statutes, 1930 Edition, Sec. 4281a-1, subd. 4. Same section in 1936 edition, 4281a-15.

[2] 275 Ky. 516, 518, 122 S. W. (2d) 103, 104 (1938).

[3] *Supra* note 1.

[4] Kentucky Statutes, 1930 Edition, Sec. 4281a-1, subd. 1.