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Infants--Right to Custody and Control of Infant

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of a trust seems hard to substantiate when one tries to point out the trust res, except in some cases where the money is paid into the court as in the principal case. We venture to submit that the practice be called: a rule of convenience to avoid circuity of action. One court has had this to say, "by following it (referring to allowing the third party to sue) one action often effects the same result that two would be required to accomplish without it." But most courts are content to consider the right as a matter of fact and let it go at that.

In conclusion, we submit that, generally speaking, the law is settled that a creditor beneficiary for whose implied benefit a contract is made may sue thereon in his own name, and that the question has ceased to be a question of law but merely a matter of construing the agreement of the parties.

FOREST J. NEEL.

INFANTS—RIGHT TO CUSTODY AND CONTROL OF INFANT.

The matter of custody of an infant child has long been a problem to the courts. This is true, not because of a great discrepancy in prior decisions upon the subject, but because succeeding generations have recognized the weaknesses prevalent in the old system of laws on infants and have sought to better them. Courts have, as always, hesitated to branch out upon a new line of thought. They have clung tenaciously to the idea that the family, being the foundation of civilization, should never be disturbed, and that the parent is the supreme ruler of the destinies of his children. The courts at early common law, failed to recognize a right of control in the mother, but placed the entire matter in the hands of the father. It has been quite a struggle for the courts even with the aid of statutes to avoid following this rule. In the early cases, even where the father was leading a life of open-profligacy, he was given custody of his children. Gradually considering the statutes and the discretionary power of the courts, it has come to be the rule that the welfare of the infant is the chief consideration in controversies of this kind and courts will give the custody of the child to either father or mother and sometimes will deny to both of them the custody of their children. Neither father nor mother has any right that can be allowed to seriously militate against the welfare of the child. If the father be unfit to have the custody of his child the courts will promptly declare his rights for-

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1 Ellis v. Harrison, 104 Mo. 279, at p. 671, 16 S. W. 198, at p. 199 (1891).
2 People v. Mercerin, 3 Hill (N. Y.) 399 (1842).
3 Ball v. Ball, 2 Sim. (N. S.) 54 (1851).
4 Pryse v. Thayer, 85 Kan. 566, 118 Pac. 56 (1911); Chance v. Pigneguy, 212 Ky. 430, 279 S. W. 640 (1926); Moore v. Smith, 228 Ky. 286, 14 S. W. (2d) 1072 (1929).
feited; likewise as to the mother. As has been said, in such a case the child may be awarded to a third person. Kentucky follows this rule also. However, as between father and mother the tendency of the courts is to give the custody of very young children to their mother, especially in cases of divorce or where the father is unfit or unable to provide for them. But where it is for the best interests of the child, its custody will be awarded to the father.

Even though the courts have progressed a long way from the early common law rule they are still reluctant to decree a separation of parent and child and will do so only when proof of a parent's unfitness is clear and convincing. The unfitness which will deprive a parent of the right to the custody of his minor child must be positive and not comparative and the mere fact that the minor child might be better cared for by a third person is not sufficient to deprive the parent of his or her right to its custody.

There has been much written on the subject of forfeiture of custody of the infant by contract. The decisions show a confusion and uncertainty on the part of the courts as to the validity of such a contract. As a general rule, however, it may be stated that a parent does not necessarily forfeit the right to custody of the child merely because he or she, by force of circumstances places the child in the care of another. An agreement by one parent for the disposal of the custody of his children is binding on him alone and not upon the other.

Kentucky holds that a contract made by the mother for the disposition of her child, made during coverture, is void. It has also been held that the custody of a minor given by virtue of a fair agreement with the parent, and not prejudicial to the welfare of the minor, although not binding on the parent, is not unlawful or against public policy so as to constitute such an illegal restraint as the court must relieve at the will or caprice of the father or mother. However, a father is not presumed to have abandoned control of his child to others.

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6 Wellesley v. Beaufort, 2 Russ. 1 (1827); Anonymous, 2 Sim. (N. S.) 54 (1851).
7 Masterson v. Masterson, 24 K. L. R. 1352, 71 S. W. 490 (1903).
1 The court said, "Without going into detail we will say that appellant presents circumstances and surroundings, while not reprehensible, indeed, rather moving one's sympathy than criticism, are such as to make it very questionable whether it would be just to the child to change its present home for hers."
20 Ex Parte Hopkins, 3 P. Wms. 152 (1732); In re McGrath, 1 Ch. 143 (1893); Reg. v. Gymgall, 2 Q. B. 233 (1893); Goerlitz v. Barney, 4 Brewst. (Pa.) 408 (1872); Jamison v. Gilbert, 30 Okla. 751, 135 Pac. 342 (1913).
32 Anderson v. Young, 54 S. C. 388, 32 S. E. 448 (1899).
where he periodically contributes to its support. A contract made by a mother on her deathbed with assent of the father, by which custody of the children was given to relatives of the mother, was held to be void as against public policy. A father who is not shown to have forfeited his right, has a right to the custody of his minor child as against the world, and as against strangers, the father may claim no matter how poor and humble, if he is of good moral character. An early case shows a logical exception to this rule. A man permitted the custody of his infant child to pass in accordance with his wife's will, to her sisters, and allowed the child to remain with them and be reared and trained by them for 5 or 6 years. The court held that he was not allowed to reassert his right of custody because it was not for the best interest of the child if he did so.

It is natural and proper that a parent, being the logical guardian of the child, should be given its custody as against guardians appointed by the court, or by other persons. Next to the parents come the relatives. An early case held differently and decided that custody of the infant could not be taken from the guardian appointed by will of the parent, and be placed with the grandparents of the child. The parents may often make mistakes in disposing of the custody of their children. Equity has jurisdiction to place the child where its welfare and best interests are protected. Kentucky has held that nothing short of statutory inhibition will abridge the power of the chancellor to award custody of an infant to whomsoever its welfare and happiness demand. This decision does not mean, however, that Kentucky holds the rights of the statutory guardian superior to that of the parents. As between the two, if the parent is moral and competent, he is given personal custody even though the guardian may have control over the disposition of the child's property.

It has been generally held that guardianship proceedings which oust a parent of custody of a minor child without notice and an appeal to be heard, do not preclude the parent. In Mahan v. Steele, a Kentucky decision, it was decided that the county court had jurisdiction of appointment and removal of guardians without filing of any petition or issuance of summons, and that the appointment of a guardian without notice to the parent was valid. This decision is way out of line and seems unconstitutional in that it robs a parent of his child without due process. The best rule is that appointment of a

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23 Hibbetts v. Baines, 78 Miss. 695, 29 So. 80 (1900).
24 See note 13, supra.
27 Stringfellow v. Somerville, 95 Va. 701, 29 S. E. 685 (1898).
29 Workman v. Workman, 191 Ky. 124, 229 S. W. 379 (1921).
30 Mason v. Williams, 165 Ky. 331, 176 S. W. 1171 (1915).
32 109 Ky. 31, 58 S. W. 446 (1900).
guardian by a county court is not conclusive as against a parent's right to custody of his children unless it appears he had notice of the proceedings and that the question of his competency was adjudicated.2

In Kentucky it is provided by statute that the guardian shall have custody of his ward.24 In construing this statute the courts first considered the welfare of the child. In Bishop v. Bishop,25 it was held that equity has power to determine the right of actual control and custody of an infant in the legal custody of an appointed guardian. In the recent Kentucky case of Fletcher v. Lippert's Guardian,26 the maternal grandparents were held entitled to custody of a five-year old child as against the child's statutory guardian, where the mother before her death requested the grandparents to rear the child together with the mother's other two children and where the grandparents had given the child very good care and were devoted to it.

It is readily seen from this brief survey that no longer is the parent the absolute ruler of the destinies of the child, but that in the final analysis, the courts have assumed this position, and rightly so. They have considered, not the desires of the parents altogether, but rather, the welfare of the child. In so considering such welfare they have perhaps infringed upon the old common law ideas of family privileges. It is most logical that the state, through its judiciary should care for and protect children when the natural parents are unable or unfit to do so.

Debond DeWeese.

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2 Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472 (1908); Bryant v. Dukhart, 106 Or. 359, 210 Pac. 454 (1923).
23 Ky. Statutes, Sec. 2032.
24 238 Ky. 702, 35 S. W. (2d) 657 (1931).
25 251 Ky. 469, 65 S. W. (2d) 250 (1933).