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## Custody and Control of Children

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## COMMENTS

CUSTODY AND CONTROL OF CHILDREN.—Out of the Roman,<sup>1</sup> canon<sup>2</sup> and common law,<sup>3</sup> come the ever-present problems arising out of the relation of parent and child. With the arrival of the monogamous family relationship<sup>4</sup> arose the penetrating question of the custody of children. While the institution of the home remains normal, nature and law combine to center custody and control within the domestic household and to resist the meddling interference of government or social agency.<sup>5</sup> This orderly norm of parental control is set forth in striking language by the Supreme Court:<sup>6</sup>

"The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Sad to say normalcy no longer obtains in the matrimonial and domestic orders. The spread of divorce<sup>7</sup> in late years has amplified and accentuated the knotty questions of custody of children. One of the unfortunate and sinister results of the depression<sup>8</sup> has been the substantial increase in the number of

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1. RADIN, *HANDBOOK OF ROMAN LAW* (1927) 107; FORSYTH, *CUSTODY OF INFANTS* (1850) 1.

2. Canon 1132, 5 AUGUSTINE, *A COMMENTARY ON THE CANON LAW* (1923) 348; Canon 1374, 6 *id.* at 414.

3. See notes 20, 21 and 22, *infra*.

4. BRISSAUD, *HISTORY OF FRENCH PRIVATE LAW* (2d ed. 1912) § 24.

5. "The court cannot regulate by its processes the internal affairs of the home. Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental, and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act." People *ex rel.* Sisson v. Sisson, 271 N. Y. 285, 287, 2 N. E. (2d) 660, 661 (1936).

"There is a tendency in these days on the part of the civil power to deprive the family of its inherent and inalienable rights over their children, which tendency is as dangerous as the attempts of the state to interfere with the inalienable rights of personal freedom of its citizens. It is old time slavery in another form." 1 WOYWOD, *A PRACTICAL COMMENTARY ON THE CODE OF CANON LAW* (1925) 703.

6. *Pierce v. Society of Sisters*, 268 U. S. 510, 535 (1925).

7. Llewellyn, *Behind the Law of Divorce* (1933) 33 COL. L. REV. 249.

In 1889 the number of divorces per one thousand marriages was 60 and this number increased to 160 divorces per one thousand marriages in 1928. REUTER, *THE FAMILY* (1931) 211.

8. Of the 18,067,000 persons on the relief in the United States in 1935, 2,876,800 or 15.9% were 16 to 24 years of age. MONTHLY LABOR REV., July, 1936, at 47.

Approximately 20% of the 273,820 persons who were receiving assistance as transients in May 1935 were youths from 16 to 24 years of age. *Id.* at 45.

The Federal government recognized the problem presented by this transient population and as a consequence in 1933 formed the FERA and installed a transient division of relief to provide for the wanderers. This project has been gradually abandoned. Emphasis has turned toward the CCC. More than 145,000 have graduated to permanent jobs from a shifting roll call of 1,500,000 names. LITERARY DIGEST, July 25, 1936, at 28.

neglected and destitute offspring. Typical of the human interest interlocked in this most intimate of relations is the news value discerned by the press in the recent *Vanderbilt* decision,<sup>9</sup> the *Eaton* case<sup>10</sup> and the *Astor* controversy.<sup>11</sup> The problem combines legal rules, sentiment, delicacy, expediency and sympathetic appreciation of the facts. Frequently involved are the cross interests of State,<sup>12</sup> Church,<sup>13</sup> parents, child, relatives—and even strangers.<sup>14</sup> The facets of this multi-angled controversy test the ingenuity and acumen of the judicial order. Stressing, then, the abnormal situations which give rise to the necessity of adjudication as to custody and control of children, what are the fundamental principles discernible out of the decisions and precedents of the courts?

### *Those Entitled to Custody*

The early Roman law was distinguished for the harshness with which it upheld parental authority.<sup>15</sup> The father was given unlimited power<sup>16</sup> over his children even to the extent of putting them to death<sup>17</sup> or selling them in open market.<sup>18</sup> While the mother was entitled only to due respect from the children and any wanton disregard of her position was punished,<sup>19</sup> her right to custody was not legally recognized. At early English common law the father, as of right, was entitled to the custody of his minor children<sup>20</sup> and at times his right was considered absolute,<sup>21</sup> even when its exercise was detrimental

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9. This case caused great interest because of the social prominence of the parties involved. Mrs. Vanderbilt was ordered by the court to yield custody of her eleven year old daughter to the child's aunt. *Matter of Vanderbilt*, 245 App. Div. 211, 281 N. Y. Supp. 171 (1st Dep't 1935), *aff'd*, 270 N. Y. 549 (1936), *cert. denied*, 297 U. S. 724 (1936).

10. See notes 65 and 66, *infra*.

11. The tragedy of the Astor case is disclosed in the comment of the court that the 4-year-old daughter of the marriage would "not be awarded as the revenge prize in the family row." N. Y. Sun, Aug. 7, 1936, p. 13.

12. When a court determines a question of custody it not only furnishes the machinery for the settlement of a dispute between the parties but also takes a substantial interest in the result as representative of the state which stands in the relation of *parens patriae* to infants within its borders. *Payton v. Payton*, 29 N. M. 618, 620, 225 Pac. 576, 577 (1924).

13. See note 56, *infra*.

14. See notes 111 and 113, *infra*.

15. The father, *pater familias*, had almost absolute power over his family. This power was called *manus* when applied to his wife, *potestas* when applied to his children and *dominium* when applied to his slaves. RADIN, HANDBOOK OF ROMAN LAW (1927) 107.

See FORSYTH, CUSTODY OF INFANTS (1850) 1.

16. "*Jus autem potestatis, quod in liberos habemus, proprium est civium Romanorum. Nulli enim alii sunt homines qui talem in liberos habeant potestatem, qualem nos habemus.*" 1 INSTITUTES OF JUSTINIAN tit. IX, § 2. For translation see, 2 SCOTT, THE CIVIL LAW 318.

17. HUNTER, INTRODUCTION TO ROMAN LAW (9th ed. 1934) 30.

18. ROMAN ANTIQUITIES OF DIONYSIUS HALICARNASSENSIS, Translation by Spelman (1758) bk. II, c. 26, 27.

19. 8 CODE OF JUSTINIAN tit. 47, § 4. See 14 SCOTT CIVIL LAW 318.

20. 1 BL. COMM. \*452; 2 KENT'S COMM. \*204; 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1927) 511.

21. *Matter of Andrews*, L. R. 8 Q. B. 153 (1873); *Rex v. Greenhill*, 4 A. & E. 624, 111 Eng. Reprints 922 (K. B. 1836); *Ex parte Hopkins*, 3 P. Wms. 152, 24 Eng. Reprints 1009 (Ch. 1732).

to the infant's welfare.<sup>22</sup> However, this stringent rule was relaxed by statute<sup>23</sup> and a humane judicial tendency.<sup>24</sup>

In the United States at common law the father, because of his natural and legal obligations to support, protect and educate,<sup>25</sup> was recognized as the natural guardian of the person of his minor child.<sup>26</sup> But this right was not absolute for it centered in the father primarily for the benefit of the infant, the law presuming that it would be for the child's best interest to be under the nurture and care of the father.<sup>27</sup> This is illustrated by the fact that if the father showed himself disqualified<sup>28</sup> for the trust imposed in him by the law and his relationship, the child was given into such custody as was most beneficial to its welfare.<sup>29</sup> The mother's legal interest in her children at common law was subservient to the father's right, but when he was adjudged an unfit guardian the children were generally awarded to the mother.<sup>30</sup> In any event she succeeded to the right of custody on the father's death.<sup>31</sup> It has

22. The action of a father who took his child from its mother's breast was condoned upon the ground of the father's superior right to the custody of his minor children. *Rex v. Manneville*, 5 East. 221, 102 Eng. Reprints 1054 (K. B. 1804). This decision was discussed with approval in *Queen v. Clark*, 7 E. & B. 186, 194, 119 Eng. Reprints 1217, 1220 (Q. B. 1857).

23. Talfourds Act, 1893, 2 & 3 VICT. c. 54 (giving court of chancery authority to award custody of children under the age of seven to the mother); Infants Custody Act, 1873, 36 & 37 VICT. c. 12 (conferring such authority as to all children under sixteen); 15 & 16 GEO. V c. 45 (1925). This last act gave equal rights to the parents, regardless of sex, to apply to a court of chancery for the custody of infant children.

24. *Wellesley v. Duke of Beaufert*, 2 Russ. 1, 38 Eng. Reprints 236 (Ch. 1827); *Wellesley v. Wellesley*, 2 Bligh (N. S.) 124, 4 Eng. Reprints 1078 (H. L. 1828); *Queen v. Gyngall* [1893] 2 Q. B. 232.

25. 2 KENT'S COMM. \*205. For a criticism of the doctrine that custody and services of a child are correlatives of the father's duty of support, see, Comment (1928) 42 HARV. L. REV. 112; 4 VERNIER, AMERICAN FAMILY LAWS (1936) 18.

26. *Busbee v. Weeks*, 80 Fla. 323, 85 So. 653 (1920); *Miner v. Miner*, 11 Ill. 43 (1849); *McDonald v. Short*, 190 Ind. 338, 130 N. E. 536 (1921); *McBride v. McBride*, 64 Ky. 15 (1886); *Commonwealth v. Briggs*, 33 Mass. 203 (1834); *Ex parte Turner*, 151 N. C. 474, 66 S. E. 431 (1909); *People ex rel. Olmstead v. Olmstead*, 27 Barb. 9 (N. Y. 1857).

27. See *Wilson v. Mitchell*, 45 Colo. 454, 466, 111 Pac. 21, 25 (1910).

28. *McGrady v. Brown*, 230 Ala. 484, 161 So. 475 (1935); *Ladd v. Ladd*, 188 Iowa 351, 176 N. W. 211 (1920); *Nathan v. Nathan*, 102 Neb. 59, 165 N. W. 955 (1917); *Larsen v. Wellner*, 97 Ore. 513, 191 Pac. 671 (1920); *Owens v. Owens*, 96 Va. 191, 31 S. E. 72 (1898). Cf. *Duncan v. Duncan*, 119 Miss. 271, 80 So. 697 (1919) (the fact that a father plays poker and drinks whiskey does not render him unfit to have his child's custody).

29. See note 54 and 94, *infra*.

30. *Schnuck v. Schnuck*, 163 Ky. 133, 173 S. W. 347 (1915); *Jones v. Jones*, 173 N. C. 279, 91 S. E. 960 (1917); *Regenvetter v. Regenvetter*, 124 Wash. 173, 213 Pac. 917 (1923); *In re Knoll Guardianship*, 167 Wis. 461, 167 N. W. 744 (1918).

31. *Dunham v. Dunham*, 97 Conn. 440, 117 Atl. 504 (1922); *State ex rel. Sevier v. Sevier*, 141 La. 60, 74 So. 630 (1917); *Watts v. Smylie*, 116 Miss. 12, 76 So. 684 (1917); *Matter of Thorne*, 240 N. Y. 444, 148 N. E. 630 (1925). A surviving father's right to custody of minor children is paramount to that of all others, including persons named as testamentary guardians in deceased mother's will. *People ex rel. Boulware v. Martens*, 258 N. Y. 534, 180 N. E. 321 (1931).

always been the rule that the mother is entitled to the custody of her illegitimate child, the father having no claim whatsoever as against her.<sup>32</sup> But, as in the case of legitimate issue, the right of the mother is not absolute. Should she be shown unfit, the good of the child is the paramount consideration in selecting another custodian.<sup>33</sup> When a marriage, productive of issue, has been annulled the court will make the proper orders for the support and education of the children.<sup>34</sup> If lunacy or fraud is the cause of the annulment the child will be awarded to the sane<sup>35</sup> or innocent party.<sup>36</sup> Where both father and mother because of death or disqualification are removed from consideration the child will be entrusted to the one best able to promote its interests.<sup>37</sup> In such a situation near relatives are usually preferred.<sup>38</sup> Ordinarily a grandmother has a stronger claim to the custody of her grandchildren than more remote kin.<sup>39</sup>

32. *Glansman v. Ledbetter*, 190 Ind. 505, 130 N. E. 230 (1921); *Pitzenberger v. Schnack*, 215 Iowa 466, 245 N. W. 713 (1932); *Grillo v. Sherman-Stalter Co.*, 195 App. Div. 362, 186 N. Y. Supp. 810 (3d Dep't 1921), *aff'd*, 231 N. Y. 621, 132 N. E. 913 (1921). The consent of a seventeen year old unmarried mother to give her child to a third party at birth to avoid disgrace was not such an abandonment as to preclude her from claiming the child. *Jensen v. Earley*, 63 Utah 604, 228 Pac. 217 (1924).

33. *Glansman v. Ledbetter*, 190 Ind. 505, 130 N. E. 230 (1921); *Ex parte Byron*, 83 Vt. 108, 74 Atl. 488 (1909). The mother of an illegitimate child has all the rights of other parents. *Purinton v. Jamrock*, 195 Mass. 187, 80 N. E. 802 (1907).

34. N. Y. CIV. PRAC. ACT (1921) § 1140. "If a marriage be declared a nullity or annulled, the court . . . may award the custody of a child of the marriage to either party as the interests of the child require, and may make provision for his education and maintenance out of the property of either or both of its parents if the marriage shall have been declared a nullity, and out of the property of the guilty parent, if the marriage shall have been annulled." Similar statutes have been enacted in other states. For a collection of statutes, see 1 VERNIER, *AMERICAN FAMILY LAWS* (1931) § 54.

The pendency of an annulment action in which the husband sought custody of a child was not a bar to his *habeas corpus* proceeding for the same relief. *People ex rel. McCanliss v. McCanliss*, 255 N. Y. 456, 175 N. E. 129 (1931).

35. When marriage is annulled because of lunacy the child of the marriage is the legitimate child of the sane party only. *In re Tombo*, 164 App. Div. 392, 149 N. Y. Supp. 688 (1st Dep't 1914).

36. *Hardesty v. Hardesty*, 193 Cal. 330, 223 Pac. 951 (1924). The custody of children of an incestuous marriage is a question for the trial court. *Figoni v. Figoni*, 211 Cal. 354, 295 Pac. 339 (1931).

37. *Burton v. Burton*, 184 Ky. 268, 211 S. W. 869 (1919); *Pryor v. Pryor*, 146 Md. 683, 131 Atl. 47 (1924). The child's welfare and not the desires of the parents govern. *Kenner v. Kenner*, 139 Tenn. 700, 202 S. W. 723 (1918). Since parents have no property rights in their child its custody may be given to a third party even without the consent of the parents. *Ex parte Wallace*, 26 N. M. 181, 190 Pac. 1020 (1920).

38. *Corn v. Hollon*, 191 Ind. 248, 132 N. E. 587 (1921); *Risting v. Sparboe*, 179 Iowa 1133, 162 N. W. 592 (1917); *Ex parte Collins*, 160 Mich. 531, 125 N. W. 389 (1910) (mother's sister-in-law retains custody); *Ex parte Means*, 176 N. C. 307, 97 S. E. 39 (1918) (father's mother and sister given custody); *Larson v. Wellner*, 97 Ore. 513, 191 Pac. 671 (1920); *Cover v. Widener*, 125 Va. 643, 100 S. E. 459 (1919) (grandparents entitled to custody of thirteen year old girl as against father who deserted wife during child's infancy and never contributed to child's support).

39. See *People ex rel. Holliday v. Sherwood*, 119 Misc. 538, 540, 197 N. Y. Supp. 612, 614 (Sup. Ct. 1922).

Today, a majority of states by statutory modification have conferred equal rights on the father and mother in the rearing, control and custody of infants.<sup>40</sup> Other states have simply codified the common law in statutory form.<sup>41</sup> Thus it appears that in the great majority of jurisdictions the natural claim and interest of a mother in her children has crystallized into a legal prerogative. It is interesting to note that in those states conferring equal custody on the parents, the obligation of support<sup>42</sup> and the right to fix the child's domicile<sup>43</sup> remain with the father. An action solely for the custody of children is not maintainable.<sup>44</sup> The only proper way to determine the question, other than by means of custodial order as incidental to a matrimonial proceeding, is through a petition in equity, or by a writ of *habeas corpus*<sup>45</sup> in a state court.<sup>46</sup>

#### *Custody as Incidental to Divorce or Separation Proceedings*

While the normal domestic status continues, the law recognizes the right of the father and the mother to the companionship and the privilege of rearing their children,<sup>47</sup> but when irreparable friction arises and the courts are asked

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40. Generally, such statutes declare that the father and mother are mutually the natural guardians of the person of their minor children. ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4118; COLO. COMP. STAT. (1921) § 5542; CONN. GEN. STAT. (1930) § 4794; FLA. COMP. GEN. LAWS ANN. (1927) § 5884; IDAHO CODE ANN. (1932) § 15—1805; ILL. REV. STAT. (Cahill, 1933) c. 68, § 16; IOWA CODE (1931) § 12573; KAN. CONST. art. XV, § 6; ME. REV. STAT. (1930) c. 72, § 43; MD. ANN. CODE (Bagby, Supp. 1929) art. 72 A, § 1; MICH. COMP. LAWS (1929) § 15768; MINN. STAT. (Mason, 1927) § 8933; MISS. CODE ANN. (1930) § 1863; MO. STAT. ANN. (Vernon, 1932) § 375; NEB. COMP. STAT. (1929) § 38-107; N. H. PUB. LAWS (1926) c. 290, § 4; N. J. COMP. STAT. (1911) tit. 97, § 21; N. M. STAT. ANN. (Courtright, 1929) § 62-201; N. Y. DOM. REL. LAW (1923) § 81; N. C. CODE ANN. (Michie, 1931) § 2241; OHIO GEN. CODE (Page, 1931) § 8032; ORE. CODE ANN. (1930) § 33-304; PA. STAT. ANN. (Purdon, 1930) tit. 48, § 91; S. C. CODE (Michie, 1932) § 8638; S. D. COMP. LAWS (1929) § 200; TENN. CODE (Williams, 1932) § 8463; WIS. STAT. (1933) § 319.03. For a discussion of this legislation, see, 4 VERNIER, AMERICAN FAMILY LAWS (1936) § 232.

41. The purport of these statutes is that the father is the natural guardian of his minor children; and on his death the mother succeeds to this right. ARK. DIG. STAT. (Crawford & Moses, 1921) § 4991; GA. CODE ANN. (Michie, 1926) § 3021; IND. STAT. ANN. (Burns, 1933) § 3388; LA. CIV. CODE ANN. (Dart, 1932) art. 216; N. D. COMP. LAWS ANN. (1913) § 8878; OKLA. STAT. ANN. (Harlow, 1931) § 1685.

See, 4 VERNIER, AMERICAN FAMILY LAWS (1936) § 232.

42. *Russell v. Russell*, 170 Miss. 364, 154 So. 881 (1934); *Laumeier v. Laumeier*, 237 N. Y. 357, 143 N. E. 219 (1924); *Utah Fuel Co. v. Industrial Comm.*, 83 Utah 166, 27 P. (2d) 434 (1933) (a minor cannot waive his father's obligation of support).

43. *Trammell v. Kansas Compensation Board*, 142 Kan. 329, 46 P. (2d) 867 (1935); *Ferguson's Adm'r v. Ferguson's Adm'r*, 255 Ky. 230, 73 S. W. (2d) 31 (1934); *Matter of Thorne*, 240 N. Y. 444, 148 N. E. 630 (1925).

44. *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624 (1925).

45. 10 CARMODY, PLEADING AND PRACTICE (2d ed. 1934) 62.

46. The states alone have jurisdiction of the whole subject of the domestic relation of husband and wife and of parent and child. *Ex parte Burrus*, 136 U. S. 586, 593, 594 (1890). The federal courts have always been denied jurisdiction over questions of divorce and alimony. *Barber v. Barber*, 62 U. S. 582 (1858). The custody of a child is a question local in its nature and not federal. *Matters v. Ryan*, 249 U. S. 375 (1919).

47. *Sisson v. Sisson*, 271 N. Y. 285, 2 N. E. (2d) 660 (1936).

to terminate the marriage relationship it is no longer possible for the child to have the advantage of their joint comfort and support. When all the parties are before it the court exercising jurisdiction in a divorce proceeding has the power to determine the custody of minor children. This power is in most jurisdictions regulated by statute,<sup>48</sup> but the making of custody decrees in divorce suits is such an accepted fact that the basis of the decree is seldom expressed, the court contenting itself with the statement<sup>49</sup> that the decree is authorized as an incident to the divorce proceeding.<sup>50</sup>

As a general rule the children will be awarded to the innocent spouse.<sup>51</sup> However it does not necessarily follow that the victorious party in a divorce suit will be awarded the custody of a minor child. Guilt or innocence of either party is not a conclusive factor. Thus a mother, guilty of bigamy and adultery received the custody of a young girl, even in the absence of misconduct on the part of the father.<sup>52</sup> The court in the exercise of its broad discretion<sup>53</sup> will determine what is to the "best interests"<sup>53a</sup> of the child.<sup>54</sup>

48. For a collection of the legislation on this subject see 1 VERNIER, *AMERICAN FAMILY LAWS* (1931) § 54. See also, Note (1913) 41 L. R. A. (N. S.) 597.

49. *Ross v. Ross*, 89 Colo. 536, 5 P. (2d) 246 (1931); *Minick v. Minick*, 111 Fla. 620, 149 So. 483 (1933); *Stephens v. Stephens*, 53 Idaho 427, 24 P. (2d) 52 (1933).

50. The decisions are not harmonious as to whether custody of children will be awarded by the court when a divorce or separation is refused. The principle that when equity acquires jurisdiction for one purpose, it will grant complete relief, is favored by some states. *Cairnes v. Cairnes*, 211 Ala. 342, 100 So. 317 (1924); *Workman v. Workman*, 191 Ky. 124, 229 S. W. 379 (1921); *Jacobs v. Jacobs*, 136 Minn. 190, 161 N. W. 525 (1917); *Barker v. Barker*, 105 Okla. 240, 232 Pac. 371 (1924) (no likelihood of parties becoming reconciled so court made necessary order for children's benefit); *Adams v. Adams*, 178 Wis. 522, 190 N. W. 359 (1922). Other jurisdictions hold that a divorce court has no power to make custodial orders when the divorce or separation is not granted. *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345 (1911); *Oliver v. Oliver*, 216 Iowa 57, 248 N. W. 233 (1933); *Walker v. Walker*, 140 Miss. 340, 105 So. 753 (1925); *Redding v. Redding*, 85 Atl. 712 (N. J. Ch. 1912); *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624 (1925); *Robinette v. Robinette*, 153 Va. 342, 149 S. E. 493 (1929).

51. *Caldwell v. Caldwell*, 141 Iowa 192, 119 N. W. 599 (1909); *Anderson v. Anderson*, 152 Ky. 773, 154 S. W. 1 (1913); *Van Buren v. Van Buren*, 227 Mich. 131, 198 N. W. 584 (1924); *Folkenberg v. Folkenberg*, 58 Ore. 267, 114 Pac. 99 (1911); *Owens v. Owens*, 96 Va. 191, 31 S. E. 72 (1898); *Regenvetter v. Regenvetter*, 124 Wash. 173, 213 Pac. 917 (1923).

52. *Haskell v. Haskell*, 152 Mass. 16, 24 N. E. 859 (1890).

This seemingly shocking disposition of the child is well supported by authority. *Rieden v. Rieden*, 206 Mich. 550, 173 N. W. 362 (1919); *Grant v. Grant*, 110 Atl. 70 (R. I. 1920) (mother granted divorce for husband's extreme cruelty but he was awarded custody of child); *Twohig v. Twohig*, 176 Wis. 275, 186 N. W. 592 (1922).

53. A court trying the question of a child's custody is entrusted with a wide discretion. *Joslyn v. Ohlmacher*, 229 Mich. 181, 200 N. W. 968 (1924); *Martin v. Martin*, 184 S. E. 220 (Va. 1936). For a general discussion of judicial discretion in equity suits, see *Hennessey v. Carmony*, 50 N. J. Eq. 616, 625, 25 Atl. 374, 379 (1892).

53a. No more elusive standard exists than the "best-interests" test. What is the relative value of money, education, religion, sympathy, environment, *etc.*, in applying the "best-interests" norm? See WHITE, *THE LEGAL EFFECT OF ANTE-NUPTIAL PROMISES IN MIXED MARRIAGES* (1932) 48. See notes 55 to 60, *infra*.

54. *Basden v. Basden*, 209 Ala. 632, 96 So. 881 (1923); *Burton v. Burton*, 184 Ky.

Every element of the child's mental and physical surroundings is a factor to be considered. Its age,<sup>55</sup> religion,<sup>56</sup> sex,<sup>57</sup> state of health,<sup>58</sup> the election of the child<sup>59</sup> and its peace of mind<sup>60</sup> are interlocking factors in the settlement of a custodial decree. So also the character,<sup>61</sup> pecuniary position,<sup>62</sup> political beliefs<sup>63</sup> and education<sup>64</sup> of those contending for its custody receive due weight in the decision.

268, 211 S. W. 869 (1919); *Pangle v. Pangle*, 134 Md. 166, 106 Atl. 337 (1919); *Chadwick v. Chadwick*, 275 Mich. 226, 266 N. W. 331 (1936); *Bierck v. Bierck*, 123 Atl. 537 (N. J. Ch. 1923); *Hoffmann v. Hoffmann*, 224 App. Div. 28, 229 N. Y. Supp. 489 (1st Dep't 1928); *Morris v. Morris*, 81 Okla. 222, 198 Pac. 70 (1921); *Martin v. Martin*, 184 S. E. 220 (Va. 1936); *Pressey v. Pressey*, 184 Wash. 191, 50 P. (2d) 891 (1935).

55. The mother unless unfit, is awarded children of a tender age. *McFadden v. McFadden*, 22 Ariz. 246, 196 Pac. 452 (1921); *Porter v. Porter*, 168 Md. 296, 177 Atl. 464 (1935) (custody of seven year old daughter of separated parents awarded to mother); *Boxa v. Boxa*, 92 Neb. 78, 137 N. W. 986 (1912) (mother given children one and three years old); *Matter of Vardinakis*, 160 Misc. 13, 289 N. Y. Supp. 355 (Dom. Rel. Ct. 1936); *Sachs v. Sachs*, 145 Ore. 23, 25 P. (2d) 159 (1933); *Ostrander v. Ostrander*, 176 Wash. 669, 30 P. (2d) 658 (1934) (child's welfare and not warring parents' natural rights is guide for awarding child of tender years); *Burt v. Burt*, 48 Wyo. 19, 41 P. (2d) 524 (1935).

56. In the *Matter of Vardinakis*, 160 Misc. 13, 289 N. Y. Supp. 355 (Dom. Rel. Ct. 1936).

"Whenever a child is remanded or committed by the court to any duly authorized association, agency, society or institution, other than an institution supported and controlled by the state or a subdivision thereof, such commitment must be made, when practicable, to a duly authorized association, agency, society or institution under the control of the persons of the same religious faith or persuasion as that of the child." N. Y. DOM. REL. CT. ACT. (1933) § 88 (1).

See WHITE, THE LEGAL EFFECT OF ANTE-NUPTIAL PROMISES IN MIXED MARRIAGES (1932) 47 *et seq.*; Friedman, *Parental Right to Control the Religious Education of a Child* (1916) 29 HARV. L. REV. 485.

57. Courts are disposed to award custody of young girls to mothers even in situations where the child would have been placed elsewhere if it had been older. *Ross v. Ross*, 89 Colo. 536, 541, 5 P. (2d) 246, 249 (1931). *Matter of Vardinakis*, 160 Misc. 13, 289 N. Y. Supp. 355 (Dom. Rel. Ct. 1936) (oldest girl awarded to the mother and oldest boy to the parental uncle).

58. *McFadden v. McFadden*, 22 Ariz. 246, 196 Pac. 452 (1921); *Umlauf v. Umlauf*, 128 Ill. 378, 21 N. E. 600 (1889); *Barlow v. Barlow*, 28 Ky. 664, 90 S. W. 216 (1906); *Campbell v. Campbell*, 96 N. J. Eq. 398, 130 Atl. 361 (1924) (decree of alternating custody reversed); *In re Welch*, 74 N. Y. 299 (1878); see *Parrish v. Parrish*, 116 Va. 476, 481, 82 S. E. 119, 121 (1914) (danger to child of a change in climate, controlling).

59. See notes 72 and 104, *infra*.

60. See *Oliver v. Oliver*, 151 Mass. 349, 351, 24 N. E. 51, 51 (1890).

61. *Hartkemeir v. Hartkemeir*, 248 Ky. 803, 59 S. W. (2d) 1014 (1933); *Arix v. Arix*, 212 Mich. 438, 180 N. W. 463 (1920) (mother living with paramour); *Wandersee v. Wandersee*, 132 Minn. 321, 156 N. W. 348 (1916); *Jones v. Jones*, 173 N. C. 279, 91 S. E. 960 (1917); *Page v. Page*, 124 App. Div. 421, 108 N. Y. Supp. 864 (1st Dep't 1908), *aff'd*, 195 N. Y. 540, 88 N. E. 1127 (1909) (evidence insufficient to show mother was not entitled to children's custody because of habitual use of narcotics and liquors).

62. *Moore v. Moore*, 192 Iowa 394, 184 N. W. 732 (1921); *People ex rel. Glendening v. Glendening* 288 N. Y. Supp. 840 (Sup. Ct. 1936).

63. See note 65, *infra*.

64. A mother's lack of education tended to defeat her claims to her son's custody.



A current case—*Eaton v. Eaton*<sup>65</sup>—agitating the commentators<sup>66</sup> awarded custody of minor children to the father as an incident to a divorce proceeding. The furor arose because the Advisory Master stated that the atheistic and communistic leanings of the mother rendered her unfit to receive custody of the child. Suffice it to say that the husband was granted a divorce on the ground of the wife's extreme cruelty. Incident thereto it was not at all improper for the court to award custody of the children to the innocent party. While the principle of non-interference by the State with normal domestic affairs is deeply rooted in American law,<sup>67</sup> it must be noted that in the *Eaton* case normalcy no longer obtained. Surely as *one* of many factors, the Master might well consider the objectives of communism in relation to youth.<sup>68</sup> This attempt to keep children's minds patriotically untarnished is no modern development.<sup>69</sup> The religious aspect of the case offers a prolific field for individual sentiment and antagonistic debate, especially in a country whose constitution provides for freedom of worship.<sup>70</sup>

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"In my opinion this difference in education is sufficient alone to justify leaving the boy in the father's custody during his school days." *People ex rel. Glendening v. Glendening*, 288 N. Y. Supp. 840, 848 (Sup. Ct. 1936).

65. *Eaton v. Eaton*, N. J. Ct. of Chancery, Jan. 27, 1936, Docket No. 111, p. 54. The original decree allowed to the mother only the right of visitation. *N. Y. Times*, Jan. 30, 1936, p. 1, col. 4. A modified ruling permitted Mrs. Eaton to take the children to her own home during specified hours every two weeks. *N. Y. Herald Tribune*, Feb. 26, 1936, p. 16.

66. The interest occasioned by this decision is reflected in its wide and diversified publication. See (1936) 36 *COL. L. REV.* 678; (1936) 49 *HARV. L. REV.* 831; Editorial, *N. Y. Times*, Aug. 28, 1936; *The New Yorker*, Aug. 22, 1936, p. 9. The American Civil Liberties Union has published a book entitled, "THE STRANGE CASE OF MRS. EATON."

67. See notes 5 and 6, *supra*.

See Tosti, *The Regulation of Education in the United States* (Unpublished thesis in the Fordham Law School Library, 1933).

68. "The Soviet School is a vehicle for the principles of communism, *i.e.*, the principles underlying the teachings of Marx and Lenin. It is its function to convey the influence of the proletariat to the other layers of the working masses." *PRYKEVICH, SCIENCE AND EDUCATION IN THE U. S. S. R.* (1935) 27.

"In his brilliant speech, incomparable in its value for Communistic education, delivered at the Third Komsomol Congress in 1920, Lenin said: 'The problem of the youth movement is to conduct its activities in such a way that in the progress of learning, organizing, cooperating, and striving, youth will develop itself and all others who recognize its leadership to the end that it may make Communists.'" *TROW, CHARACTER EDUCATION IN SOVIET RUSSIA* (1934) 38.

69. Aristotle in his "POLITICS" wrote, ". . . it is an axiom that the best laws though sanctioned by every citizen of the State will be of no avail unless the young are trained by habit and education in the spirit of the Constitution."

The poet Shelley was denied custody of his children because of revolutionary ideas expressed in his "Queen Mab". The court did not deem him a fit parent and awarded custody of his children to the grandparents. *Shelley v. Westbrooke*, Jac. 266, 37 Eng. Reprints 850 (Ch. 1817). See Correspondence, *N. Y. L. J.* Feb. 24, 1936, p. 948.

70. For a discussion of this subject see, *WHITE, op. cit. supra* note 56, at 47; Friedman, *The Parental Right to Control the Religious Education of a Child* (1916) 29 *HARV. L. REV.* 485.

If the child has reached the age of reason<sup>71</sup> its preference as to either parent will sometimes be decisive.<sup>72</sup> The weight accorded to such a choice varies directly in proportion to the infant's age and mental development.<sup>73</sup> Thus an unequivocally expressed desire of a daughter within a few months of her majority will greatly influence a court.<sup>74</sup> If the child is not capable of expressing a sound discretion the court will appoint the custodian best fitted to care for the child.<sup>75</sup>

It has been suggested that custodial decrees partake of a penal nature against the party refused custody.<sup>76</sup> This punitive interpretation is perhaps present in specific instances.<sup>77</sup> But the marital culprit fails to obtain custody not because of his offense but because of the court's endeavor to transfer control to the one best fitted to care for and protect the child's interests.<sup>78</sup> A decree of custody is not permanent but temporary and always subject to modification by the court of rendition if a sufficient change of circumstances is shown.<sup>79</sup> Such a decree only establishes the rights of the two opposing parties during their lifetime so that the right of the survivor, if a suitable person, again revives and is superior to claims of third parties.<sup>80</sup> Upon the death of the spouse to whom

71. It is no easy task to determine at what age a child is capable of exercising a sound discretion. But it is hardly proper to permit a child of tender years to determine the person to whom its custody should be entrusted.

72. *Frates v. Frates*, 135 Wash. 567, 238 Pac. 573 (1925).

73. *Garlin v. Garlin*, 154 Okla. 230, 7 P. (2d) 463 (1932).

74. (1928) 92 JUSTICE OF PEACE 208.

75. HOCHHEIMER, CUSTODY OF INFANTS (3d ed. 1899) § 46.

76. See N. Y. L. J. Feb. 5, 1936, at 650. This editorial which discusses a case of custody is captioned "Penalizing Opinions".

77. *Moore v. Moore*, 192 Iowa 394, 184 N. W. 732 (1921) (father guilty of despicable conduct toward mother was refused custody without any discussion of the child's welfare); *Folkenberg v. Folkenberg*, 58 Ore. 267, 114 Pac. 99 (1911) (father's cruel treatment of mother seems to be the reason the mother was awarded custody).

78. The child's welfare is the only explanation of an adulterous mother receiving the child's custody; see note 52, *supra*. Similarly the father's obligation to support a child who is in the custody of a divorced mother is not penal but rather is imposed for the good of the child, and to prevent it from becoming a public charge. See Beale, *The Progress of the Law* (1919) 33 HARV. L. REV. 1, 14; see Comment (1930) 15 CORN. L. Q. 624, 627.

79. *Skidmore v. Skidmore*, 261 Ky. 327, 87 S. W. (2d) 631 (1935); *Higginbotham v. Lofton*, 193 La. 489, 164 So. 255 (1935); *Bestel v. Bestel*, 53 P. (2d) 525 (Ore. 1936); *Standish v. Standish*, 177 Wash. 478, 32 P. (2d) 110 (1934).

"... The court by order upon the application of either party to the action, or any other person or party having the care, custody and control of said child or children pursuant to said final judgment or order, . . . may annul, vary or modify such directions . . . as justice requires for the custody, care, education and maintenance of any such child . . . ." N. Y. CIV. PRAC. ACT (1934) § 1170.

80. *People ex rel. Westfall v. Gorham*, 70 Colo. 544, 203 Pac. 661 (1922); *Stafford v. Stafford*, 299 Ill. 438, 132 N. E. 452 (1921); *In re Smith's Guardianship*, 158 N. W. 578 (Iowa 1916); *In re Crews*, 106 Kan. 438, 186 Pac. 498 (1920); *Stone v. Duffy*, 219 Mass. 178, 106 N. E. 595 (1904); *Matter of Thorne*, 240 N. Y. 444, 148 N. E. 630 (1925); *Ex parte Bryant*, 106 Ore. 359, 210 Pac. 454 (1922); *Yates v. Yates*, 165 Wis. 250, 161 N. W. 743 (1917).

custody has been awarded, his or her right of custody does not descend nor can it be transmitted by testamentary document.<sup>81</sup>

Ordinarily a decree of custody provides for access to the child by the absentee-parent at specific intervals.<sup>82</sup> This right of visitation is so highly regarded by the court that if the parent having custody intentionally makes it difficult for the other parent to visit the child, it is considered cause for modifying the custodial decree.<sup>83</sup> Except where there is extreme ground for refusal all will agree that a parent should be given an opportunity to see his or her child, even when that parent's conduct occasioned the divorce or separation.

But where the custody of the child has been alternately awarded to each parent for an equal period of time, it would seem that the sensibilities of the father and mother received more recognition than the good of the child.<sup>85</sup> Although he may be well provided with material things such a child lacks a static and normal family life which is so essential to an infant's moral and intellectual development.<sup>86</sup> There is danger that young children might attach their affections to those who administer to their needs and comforts and cater to their whims.<sup>87</sup> Hence in the case of a decree of intermittent custody it is more than likely that the child will be emotionally swayed in opposing directions as it vacillates between parents.<sup>88</sup> An absolute award of custody

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81. *People ex rel. Boulware v. Martens*, 258 N. Y. 534, 180 N. E. 321 (1931) (surviving father's right is superior to that of testamentary guardian named in mother's will).

82. *Chadwick v. Chadwick*, 275 Mich. 226, 266 N. W. 331 (1936) (decree giving right to visit child at reasonable time suitable to both parties was erroneous. Although right of visitation is not absolute, time and place for visit should be specified). *Kennard v. Kennard*, 87 N. H. 320, 179 Atl. 414 (1935) (a father's pro-German sympathies and disloyalty to the American flag did not warrant an order depriving him of access to his minor son).

83. *Oliver v. Oliver*, 151 Mass. 349, 24 N. E. 51 (1890); *Phipps v. Phipps*, 163 Mo. App. 697, 154 S. W. 825 (1913). Only the father or mother is entitled to this right of visitation. Thus a court has no power to grant this right to maternal grandmother where the father is the proper guardian. *People ex rel. Schachter v. Kahn*, 241 App. Div. 686, 269 N. Y. Supp. 173 (2d Dep't 1934).

84. See note 65, *supra*.

85. A child awarded for alternate periods of time to each parent is a "wanderer from home to home." *McDermott v. McDermott*, 192 Minn. 32, 36, 255 N. W. 247, 248 (1934). A child is not a "plaything for the entertainment of its parents." *Caldwell v. Caldwell*, 141 Iowa 192, 119 N. W. 599 (1909). This case reversed a decree which gave custody to the father and mother every six months. A child's interest will be better served by placing him permanently with one parent rather than by alternation of his custody. *Bradstreet v. Bradstreet*, 34 Ariz. 340, 346, 271 Pac. 717, 719 (1928).

86. The lack of family leadership by one person is detrimental to the child's social adaptability. Editorial, *Divided Custody of Children* (1935) 38 LAW NOTES 42. He will either "play" one parent against the other, or become a plastic mold impressed with the several characteristics of those privileged to have its custody. See N. Y. Herald Tribune, Mar. 18, 1934, Magazine Section, Week End Children, p. 18.

87. THOM, *NORMAL YOUTH AND ITS EVERY DAY PROBLEMS* (1932) 340.

88. The child's conflicting loyalties, varying with the calendar, deprive him of a sense of security which is an essential to normal development. WHITE HOUSE CONFERENCE ON CHILD HEALTH AND PROTECTION. SECTION IV (1930).

and control to the spouse best fitted for the trust, with a provision that the other parent may visit the child at regular periods, would obviate this potential difficulty and would be a true consideration of the infant's best interests.<sup>89</sup>

*Voluntary Submission of the Question to the Court*

When the custody of children is not awarded as an incident to a suit for divorce or separation the subject is regulated by either a writ of *habeas corpus* or by petition to the chancellor or to the court which has succeeded to the chancellor's prerogative.<sup>90</sup> Equity in exercising its jurisdiction on petition does not proceed upon the theory that one party has a cause of action against the other, nor seek to determine respective rights as to the child, but acts rather in the position of *parens patriae*<sup>91</sup> and its aim is, as ever, to decide what is best for the interests of the child. Although the fundamental purpose of a writ of *habeas corpus* is to set free those who are illegally deprived of their liberty,<sup>92</sup> when the writ is directed to a child, the question of personal liberty is not paramount. The court then is not determining strict legal rights<sup>93</sup> but is called upon to consider claims of an equitable nature, having in view primarily the welfare of the child.<sup>94</sup> In a divorce suit the child's custody is generally awarded to either of its natural guardians,<sup>95</sup> the father or mother. But when, by a

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89. See *Bradstreet v. Bradstreet*, 34 Ariz. 340, 346, 271 Pac. 717, 719 (1928); *Caldwell v. Caldwell*, 141 Iowa 192, 195, 119 N. W. 599, 600 (1909); *McDermott v. McDermott*, 192 Minn. 32, 36, 255 N. W. 247, 248 (1934); *Campbell v. Campbell*, 96 N. J. Eq. 398, 398, 130 Atl. 361, 361 (1924); Editorial, *Divided Custody of Children* (1935) 38 LAW NOTES 42.

90. *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624 (1925); *Queen v. Gyngall*, [1893] 2 Q. B. 232.

91. *Ex parte Flynn*, 87 N. J. Eq. 413, 100 Atl. 861 (1917) (the limited *habeas corpus* jurisdiction of the court is not invoked, but the broad equity jurisdiction over the custody of the persons of infants which the chancellor exercises as *parens patriae*); *Queen v. Gyngall* [1893] 2 Q. B. 232, 239; POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1307. However, in a *habeas corpus* proceeding to release a minor from a sheriff's custody, the only proper subject of inquiry is whether the child was unlawfully restrained. In such circumstances the court will not decide who will be awarded custody. *Ex parte Reinhardt*, 88 Mont. 282, 292 Pac. 582 (1930).

92. *In re Moyer*, 35 Colo. 159, 85 Pac. 190 (1904); *McDonald v. Short*, 190 Ind. 338, 130 N. E. 536 (1921); *People ex rel. Curtis v. Kidney*, 225 N. Y. 299, 122 N. E. 241 (1918); *State v. Heugin*, 110 Wis. 189, 85 N. W. 1046 (1901).

93. See *People ex rel. Riesner v. New York Nursery and Child's Hosp.*, 230 N. Y. 119, 124, 129 N. E. 341, 343 (1920).

94. *Witt v. Burford*, 84 Fla. 201, 93 So. 186 (1922); *Mesmer v. Eglund*, 197 Ind. 700, 151 N. E. 826 (1926); *Adair v. Clure*, 218 Iowa 482, 255 N. W. 658 (1934); *Haynie v. Hudgins*, 122 Miss. 838, 85 So. 99 (1920); *Ex parte Lee*, 220 N. Y. 532, 116 N. E. 352 (1917); *Ex parte Smith*, 118 Wash. 1, 202 Pac. 243 (1921).

95. The authorities differ as to whether anyone but the father and the mother can properly be said to be a natural guardian. *Lamar v. Micou*, 114 U. S. 218 (1885) (if next of kin the grandparents are the natural guardians); *Holmes v. Derrig*, 127 Iowa 625, 103 N. W. 973 (1905). *Contra*: SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) (only the father and the mother are the natural guardians); *People v. Schoonmaker*, 117 Mich. 190, 75 N. W. 439 (1898) (a step-father is not a natural guardian, relying on Schouler). Perhaps the question has been settled by an authoritative statement of the American Law

petition in equity or by a writ of *habeas corpus*, a third party seeks to remove the child from its father or mother or from both, it would seem that the court should hesitate and should not decree such a change in custody unless the facts positively demand such a result.<sup>96</sup> By canon law,<sup>97</sup> by common law,<sup>98</sup> and by statute<sup>99</sup> the natural parents are entitled to the custody of their minor children except when they are unsuitable persons to be entrusted with their care, control and education,<sup>100</sup> or when some special circumstance appears to render such custody inimical to the welfare of the infant. Only the most unusual circumstances justify a court in refusing a parent custody of his child in favor of a third party, no matter how unselfish the latter's motives may be.<sup>101</sup> It is one thing to determine sole custody *inter parentes* but to grant custody of a child to a person other than a parent presents a different problem. However circumstances may be such that it is not only desirable but imperative that a child be committed to the care of a third party.<sup>102</sup> Again it must be recognized that there exists a type of person who, oblivious of the child's welfare, will sue merely to gain some pecuniary advantage attached to the infant's custody or to annoy and wound the feelings of the parent or guardian. In such case the vital issue of the litigation, the welfare of the infant, is obscured by the animosities of adults in their scramble for primacy of position for themselves. Courts should hesitate to permit children to be made the excuse or occasion for adult controversies, and should guard against the inevitable mental consequences upon the children resulting from battles among their elders.<sup>103</sup>

The wishes and preferences of a child will be consulted if it has reached the age of discretion,<sup>104</sup> but a child's mere whim will not be permitted to subvert

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Institute to the effect that a grandmother is a natural guardian. RESTATEMENT, CONFLICT OF LAWS (1934) § 39.

96. *Ex parte* Martin, 29 Idaho 716, 161 Pac. 573 (1916); *Ex parte* Hollinger, 90 Kan. 77, 132 Pac. 1181 (1913); *State v. Armstrong*, 141 Minn. 47, 169 N. W. 249 (1918); *Ex parte* Clark, 82 Neb. 625, 118 N. W. 472 (1908) (to remove child a positive unfitness of parent must be shown); *Lynch v. Poe*, 53 Okla. 595, 157 Pac. 907 (1916) (to obtain custody grandparents must show father unfit); *Ex parte* Barnes, 54 Ore. 548, 104 Pac. 296 (1909) (father entitled to custody as against mother's parents); *State ex rel. Collins v. Bell*, 58 Wash. 575, 109 Pac. 51 (1910).

97. "The right of parents and guardians under God is inalienable and inviolable because the child belongs primarily and before others to the parents; this natural right has its foundation in the very fact of procreation and involves the right of the parent to feed, clothe and educate his children . . . These rights involve their corresponding duties which parents may neither evade nor ignore." 6 AUGUSTINE, CODE OF CANON LAW, (3d ed. 1923) 412.

98. See notes 20 and 26, *supra*.

99. See notes 40 and 41, *supra*.

100. See notes 28 and 30, *supra*.

101. See *Matter of Vanderbilt*, 245 App. Div. 211, 213, 281 N. Y. Supp. 171, 173 (1st Dep't 1935).

102. *Harrist v. Harrist*, 151 Ala. 656, 43 So. 962 (1907) (mother subjected child to drudgery); *Nannestad v. Nannestad*, 44 S. D. 241, 183 N. W. 541 (1921) (father in delicate health); *Hutchison v. Harrison*, 130 Va. 302, 107 S. E. 742 (1921).

103. See *In re Norris*, 157 Misc. 333, 334, 283 N. Y. Supp. 513, 516 (Surr. Ct. 1935).

104. *Garrett v. Mahaley*, 199 Ala. 606, 75 So. 10 (1917) (expressed wish of child will

the whole law of the family.<sup>105</sup> The fact that a child's affections are fixed on those having its custody so that he regards his mother as a stranger does not deprive her of the right of custody.<sup>106</sup> Although such preferences are not controlling when all other circumstances are equal, the child's wish may be the determining factor.<sup>107</sup> In this type of proceeding, as in custodial orders incidental to matrimonial actions, the welfare of the child overshadows all other considerations.<sup>108</sup> It has been said that this rule is based on the theory that a sound growing citizenry is essential to the perpetuation of the state.<sup>109</sup> Despite this unemotional criterion of award, the judiciary constantly senses the importance of the family unit.<sup>110</sup> The sensibilities and rights of the parties will not be disregarded when a proceeding for custody has been instituted by a third party.<sup>111</sup> Thus lack of wealth is not sufficient reason for depriving a father of custody in favor of wealthy grandparents.<sup>112</sup> Nor will mere material advantage to the child overcome a parent's natural right.<sup>113</sup>

### Conclusion

Vexatious and troublesome are the questions relating to custody and control of children. Out of this morass of confusion, however, some certainty may

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be accorded great weight); *Ellis v. Jesup*, 74 Ky. 403 (1875) (court will not take child from third person and award it to father against wishes of child); *People ex rel. Bishop v. Bishop*, 117 App. Div. 445, 102 N. Y. Supp. 592 (1st Dep't 1907) (wish of twenty year old daughter to live with father fulfilled); *Hutchison v. Harrison*, 130 Va. 302, 107 S. E. 742 (1921).

105. *Brown v. Harden*, 159 Ga. 99, 102 S. E. 864 (1920) (child's wishes not controlling); *Edwards v. Edwards*, 23 Ky. 1051, 64 S. W. 726 (1901) (preference of children not controlling over parents, *prima facie* right to custody); *Kinnaird v. Lowry*, 102 Miss. 557, 59 So. 843 (1912) (child's desire to stay with grandmother does not defeat mother's right to custody). *Ex parte Swall*, 36 Nev. 171, 134 Pac. 96 (1913) (on *habeas corpus* proceeding child's preference of third party does not defeat parent's rights); *Ex parte Sidle*, 31 N. D. 405, 154 N. W. 277 (1915).

106. *Ex parte Matthews*, 176 Cal. 156, 167 Pac. 873 (1917); *Kinnaird v. Lowry*, 102 Miss. 557, 59 So. 843 (1912).

107. *Knochemus v. King*, 193 Iowa 1282, 188 N. W. 957 (1922); *Ellis v. Jesup*, 74 Ky. 403 (1875); *Workman v. Watts*, 74 S. C. 546, 54 S. E. 775 (1906).

108. See notes 54 and 94, *infra*.

109. *Wilson v. Mitchell*, 48 Colo. 454, 465, 111 Pac. 21, 25 (1910); *Mercein v. People*, 25 Wend. 64, 103 (N. Y. 1840).

110. *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). See *Wilson v. Mitchell*, 45 Colo. 454, 111 Pac. 21, 25 (1910).

111. *Garrett v. Mahaley*, 199 Ala. 606, 75 So. 10 (1917); *Kinnaird v. Lowry*, 102 Miss. 557, 59 So. 843 (1912); *Ex parte Livingston*, 151 App. Div. 1, 135 N. Y. Supp. 328 (2d Dep't 1912).

112. *Adair v. Clure*, 218 Iowa 482, 255 N. W. 658 (1934).

113. *Ex parte Judge*, 91 N. J. Eq. 395, 116 Atl. 720 (1920); *In re Mead*, 113 Wash. 504, 194 Pac. 807 (1920).

In speaking of wealth as a criterion of award, one court said, "The philosophy of this teaching, if carried to its logical consequence, would justify the state in taking away from parents of little means a precocious and promising child, and giving it to others who, by means of their greater wealth, could give it greater such material advantages. That philosophy has never been accepted in this country, and I think it not likely to be." *Lester v. Lester*, 178 App. Div. 205, 222, 165 N. Y. Supp. 187, 199 (2d Dep't 1917).

be extracted. The first point of emphasis is to note clearly and decisively that, in America at least, the inherent rights of control and custody of children are firmly fixed in the home, and in the natural parents. In the absence of abnormal circumstances within the domestic circle the State has only a limited right to intervene in matters pertaining to the child's moral, educational, physical and religious upbringing. When complications intervene and the breakdown of the home is involved, the approach by the State to this regrettable situation is with the objective of protecting the best interests of the child. The salvaging of human values is essentially a matter of compromise with the eye of the court directed to the welfare of the unfortunate children. No magic formula exists. Institutional care,<sup>114</sup> and paternalism of the State may be imperative in these emergencies but no law or statute can completely rectify the irreparable harm and work a satisfactory solution. Perhaps the parting proposal might be that the cure is not to be found in the law but in a removal of the social and economic shortcomings which have made the children the innocent victims of their elders' folly.

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THE CONTRACT OF THE CORPORATE SURETY.<sup>1</sup>—Not until the last quarter of the nineteenth century did corporate enterprise in this country grasp the potentialities inherent in the practise of "going bond."<sup>2</sup> One of the oldest of

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114. There is a definite trend to place a dependent child in a foster home rather than in an institution. This is because institutional life is necessarily surrounded with artificial atmosphere which is inferior to the natural contacts which home life provides. WHITE HOUSE CONFERENCE ON CHILD HEALTH AND PROTECTION. SECTION IV (1930) 134; HALL, SOCIAL WORK YEAR BOOK (1935) 164; MANGOLD, PROBLEMS OF CHILD WELFARE (1930) 499. "Institutional care for the most part has produced uninspired individuals poorly adjusted for the outside world." WHITE HOUSE CONFERENCE ON CHILD HEALTH AND PROTECTION. SECTION IV (1930) 134.

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1. Bifold in meaning, the term "suretyship" is more generally employed in its broad sense by the courts to include all promises to answer for the debt of another regardless of the form of the undertaking. BOUVIER, LAW DICTIONARY (Student's ed. 1928) 1152; ARANT, SURETYSHIP (1931) § 5. Because the law applicable to the term is usually the same when the term is used either in respect to primary obligations, which are also known as those of strict suretyship, or to those collateral or accessorial in nature, more often called guaranties, courts have little reason to be hyper-technical in the choice of these words. *Ibid.* 2 WILLISTON, CONTRACTS (1920) § 1211. Where, however, distinction is thought necessary for clarity, courts do not hesitate to use the terms "guaranty" and "suretyship" in their restricted sense. Pfaelzer v. Kau, 207 Ill. 116, 69 N. E. 914 (1904); Young v. Merle & Heaney Mfg. Co., 184 Ind. 403, 110 N. E. 669 (1915); Clymer v. Terry, 50 Tex. App. 300, 109 S. W. 1129 (1908); Ricketson v. Lizotte, 90 Vt. 386, 98 Atl. 801 (1916).

2. According to Morgan, *The History and Economics of Suretyship* (1927) 12 CONN. L. Q. 153, 487, the first company to be chartered in America was the Fidelity Insurance Co. in 1865. 34 BANKERS' MAGAZINE 423, fixes the organization of the first corporate surety in 1866, while according to Arnold, *The Compensated Surety* (1926) 26 COL. L. REV. 171, the first incorporation of this type of business did not occur until 1875 although attempts to organize were begun as early as 1853 in this country and 1720 in England.