Fordham Law Review

Volume 19 | Issue 2 Article 6

1950

The Custody Award Without the Divorce Decree

Reference should be made here to the case of *Childs v. O'Donnell*[42] which has been cited for the proposition that a warranty on a sale of one bill of goods does not attach to a sale of another bill at a later time.[43] No such rule can be drawn from the case inasmuch as the court held, in answer to the buyer's claim of reliance on an express warranty previously given, that there was no warranty; merely an option to return the goods if unsatisfactory. But the dicta of the court is appropriate to the general question under consideration:

"The language used cannot be construed as a warranty. The sale of the first order was one on approval simply, with the privilege of a trial of the goods. As a matter of law, this option, even, did not extend to subsequent orders and invoices of goods, *unless repeated with each order, or unless some general language was used covering all orders or sales.*"[44]

CONCLUSIONS

The general rule would appear to be that express warranties do *not* carry over to subsequent sales of the same product between the same parties. Thus where the buyer makes subsequent purchases in reliance on tests he has made or where it would be unreasonable for the buyer to rely on the previous express warranties because of the nature of the transaction (retailer-consumer relationship), the warranties do not subsist and attach to subsequent sales. This rule is subject to the exception that the intention of the parties may be to have the warranties carry over to subsequent sales. Such an intention has been held to appear where:

1) The parties expressly declare that the warranties given shall apply to subsequent sales.

2) The subsequent order refers expressly and specifically to a previous order in which express warranties were given.

3) The parties contemplated a series of transactions or a future course of dealings and the logical inference from all the facts and circumstances is that the warranties were meant to survive the original transaction (manufacturer-retailer relationship and the steady customer situation).

THE CUSTODY AWARD WITHOUT THE DIVORCE DECREE

Does equity have jurisdiction to render custodial awards when it has found the facts insufficient to order a divorce or separation? More realistically put, may a court, upon the unsuccessful suit of one of the parents for a legal dissolution of the marriage, take cognizance of the fact that, although the marital bond must remain unsevered by law, the marital relationship is clearly cut in fact and, in an exercise of discretion, award the custody of the children of the marriage to the more worthy parent? In a field of legal study not famed for the

42. 84 Mich. 533, 47 N. W. 1108 (1891).

43. Powers v. Briggs, 139 Mich. 664, 103 N. W. 194 (1905).

44. Childs *et al.* v. O'Donnell, 84 Mich. 533, 538, 47 N. W. 1108, 1109 (1891) (italics supplied).

present clarity and predictability of its decisions, it would seem that no general question could be more precisely posed nor so unequivocally answered. However, such is not the case. A recent case, *Johnson v. Levis*,[1] decided by the Iowa Supreme Court, fully manifests the complex considerations which burden the courts handling the problem. In that case the trial court found the facts insufficient to decree the divorce sought by both parents but did award the custody of two minor children to the plaintiff-mother with rights of visitation to the defendant-father—in the meanwhile retaining jurisdiction over the custody matter in the interests of the children's well-being. On certiorari brought by the father against the trial judge Iowa's highest tribunal sustained the writ and found, not without an exhaustive dissent,[2] that the jurisdiction of the trial judge to render custodial orders terminated when the plea for divorce failed. The difficulties of the Iowa court in answering the question before it prompt a brief discussion of the historical, statutory and equitable considerations which make the problem more complex than it seems at first blush.

I

At early common law in England jurisdiction over divorce was in the ecclesiastical courts and in Parliament.[3] In the United States jurisdiction over divorce was in the assemblies,[4] though for a time this authority to dissolve the marital bond was torpid.[5] On the other hand, jurisdiction over children, and custody in particular, was in the courts of chancery in both England and the United States.[6]

The state legislatures in time enacted statutes which, to some extent, did away with the distinction in the jurisdiction over custody and divorce. Under these statutes, which delimit the causes or grounds upon which a divorce or separation may be decreed, the authority to pronounce a decree of divorce or separation has been delegated to the equity courts.[7] Incident to this decree of divorce,

1. 38 N. W. 2d 115 (1949).

2. *Id.* at 118.

3. 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION §§ 115-149 (1st ed. 1891).

4. *Ibid.*

5. 2 KENT, COMMENTARIES § 97 (14th ed. 1896), "During the period of our colonial government, for more than one hundred years preceding the Revolution, no divorce took place in the colony of New York, and for many years after New York became an independent state, there was not any lawful mode of dissolving a marriage in the lifetime of the parties but by a special act of the legislature."

6. In speaking of the origin of the equitable jurisdiction over infants Pomeroy says: "It may, in its very inception, have belonged to the King as a part of his executive power as *parens patriae* to protect his subjects, and may by him have been transferred to the court of chancery. It is, however, firmly established as a judicial function of the court.... The same inherent jurisdiction is possessed, although not exercised so freely and minutely, by the American courts, unless curtailed or taken away by a statute,—a fact very difficult of explanation, on the assumption that the jurisdiction is a part of the executive functions of the crown." 3 POMEROY, EQUITY JURISPRUDENCE § 1304 (4th ed. 1918).

7. Actually there has been no change in the seat of jurisdiction over divorce and separation. This is still retained by the legislature. What has happened, however, is that the

the courts were also authorized to award custody of the children to one or the other participant in the divorce proceeding. Hence the question arises: By such enactments have the state legislatures confined the general equitable jurisdiction of the courts over children to the successfully maintained divorce or separation action? Or does the right to award custody still inhere in the court of equity apart from statutory provisions so that an award of custody may be granted, though the divorce or separation is denied?

The answer to the question has depended upon the interpretation given by the various state courts to the statutes involved. There are statutes which expressly limit the custodial power of the court to those suits where a divorce or separation is decreed;[8] while other states have statutes which expressly grant the power to award custody where there is no such decree.[9] Where the statutes are not clear, the jurisdictions have split, some courts inferring the limitations,[10] (*Johnson v. Levis* is in this category), and others refusing to infer such a limitation.[11] In the latter instance the courts sustain their conclusion on the grounds that the statute is not prohibitive and that, therefore, the courts may rely on their inherent jurisdiction over children in making custodial awards where a divorce or separation suit has failed.[12]

II

One of the leading cases relied on by the courts which infer that jurisdiction over children in a divorce action is limited to the successfully maintained action is the New York case of *Davis v. Davis*.[13] In the *Davis* case an action brought for separation failed. The question arose as to whether the court could, nevertheless, award custody of the children. Basing its decision on a section of a statute[14] which provided for the rendition of custodial orders when a separation was decreed, the court held that it was without jurisdiction to award custody, since the separation sought had not been decreed. Another section of the same statute, however, provided that custody could be awarded even though a sepa-

legislature no longer arbitrarily passes an enactment dissolving a marital bond, but has crystalized its voice in statutes providing for a dissolution of the marital bond upon proof of certain facts. The authority conferred on the judiciary is merely to pronounce that these facts are present, and, therefore, the legislature decrees the marital bond dissolved.

8. GA. CODE ANN. § 30-127 (1933); Black v. Black, 165 Ga. 207, 140 S.E. 364 (1927); ILL. REV. STAT. c. 40, § 18 (1939); Thomas v. Thomas, 250 Ill. 354, 95 N. E. 345 (1911).

9. N. D. REV. CODE § 4401 (1913); Tank v. Tank, 69 N. D. 39, 283 N. W. 787 (1939); CAL. CIV. CODE § 136 (1935). *Ex parte* Saul, 31 Cal. App. 382, 160 Pac. 695 (1916).

10. IOWA CODE § 598.14 (1946); OHIO GEN. CODE ANN. § 8032 (1935); Gatton v. Gatton, 41 Ohio App. 397, 179 N.W. 745 (1931). For the view generally accepted by this line of cases see Davis v. Davis, 75 N. Y. 221 (1878).

11. WYO. COMP. STAT. ANN. § 35-117 (1931); Urbach v. Urbach, 52 Wyo. 207, 73 P. 2d 953 (1937); MISS. CODE ANN. § 1421 (1930); Davis v. Davis, 194 Miss. 343, 12 So. 2d 435 (1943); ARK. DIG. STAT. § 3808 (1921), c. 49, § 3808, Horton v. Horton, 75 Ark. 22, 86 S. W. 824 (1905).

12. See note 9 *supra*.

13. Davis v. Davis, 75 N. Y. 221 (1878).

14. 2 N. Y. REV. STAT. 147, § 54 (1827 & 1828).

ration was not decreed.[15] The court interpreted this section to mean that, although a separation decree was not necessary, nevertheless, the party seeking custody had to establish grounds for such separation.[16] These conclusions resulted from the premise that the authority to award custody in a divorce action was purely statutory.[17] Bound by this theory, the New York courts considered that they had the authority to award custody only where a divorce or separation was granted until 1941 when Section 1170-a was added to the New York Civil Practice Act which expressly allowed custodial orders whether or not a divorce or separation sought was granted.[18] Accordingly, the *Davis* case is no longer controlling on this point in New York. However, as a basis for the principle that the authority to award custody in a divorce or separation action is purely statutory, it has never been questioned or overruled. It is in this sense that the reasoning of the *Davis* case became the bulwark of the courts inferentially denying custodial orders where a divorce or separation has failed.[19]

Other arguments have been presented in furtherance of the position taken by these courts. One such argument is expressed by the prevailing opinion in the *Johnson* case.[20] This is that the statute providing for the rendition of custodial orders must be interpreted in the light of another statutory provision concerning the parity of control of husbands and wives over their children.[21] It was this statute which abrogated the common law priority of the husband over the minor children of the marriage and declared that the parents are the natural guardians of their minor children, and equally entitled to their care and custody. Reflecting on this parity of control, the court in the *Johnson* case considered that the legislature intended to create an equality, and that if any disturbance was to be allowed, it must expressly appear in some other statute; since the statutes do not expressly provide for the rendition of custodial orders when a divorce

15. In this case the court interpreted Section 55 of that statute as dependent for its meaning on the preceding section, Section 54, which provided for a decree of separation where the husband was guilty of cruel and inhuman treatment. Section 55 read "Although a decree for separation from bed and board be not made. . . ." the court may award custody of the children. This was interpreted as an alternative to a legal separation, when cruel and inhuman treatment was present.

16. Light v. Light, 124 App. Div. 567, 180 N. Y. Supp. 931 (2d Dep't 1908).

17. Davis v. Davis, 75 N. Y. 221, 227 (1878).

18. N. Y. Civ. Prac. Act § 1170-a (1946), provides that if the "court for any reason whatsoever, other than lack of jurisdiction, refuses to grant a judgment of divorce, separation or annulment . . . the court may, nevertheless, render judgment in the same action making such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any child of the marriage." Caldwell v. Caldwell, 298 N. Y. 146, 81 N. E. 2d 60 (1948).

19. *Id.* at 152, 81 N. W. 2d at 63; Fein v. Fein, 261 N. Y. 441, 444, 185 N. E. 693, 694 (1933); Lord v. Lord, 80 W. Va. 547, 92 S.E. 749 (1917).

20. Johnson v. Levis, 38 N. W. 2d 115, 116 (1949).

21. Iowa Code § 668.1 (1946). 1 Vernier, American Family Laws § 142 (1st ed. 1932) states: "today in most jurisdictions the parents either by decision or by statute are practically upon a basis of equality so far as the custody of the minor children is concerned. . . . "

or separation is denied, the courts are without authority in such cases to award custody. Moreover, it may be said that to award custody where there is no legal divorce or separation would lead to an incongruous situation. It might be argued that such an award would constitute a judicial sanction to a breaking up of the home. Giving custody of the offspring to one of the parents would tend also to operate against a reconciliation of the parties. Such a result would appear to be out of conformity with traditional concepts of equity jurisprudence which predicate a legal separation on the offense of one of the parties. Thus, if there is no decree of separation or divorce, or if there are not sufficient grounds for such a decree as was the New York rule,[22] in awarding custody the courts indirectly would be decreeing a legal separation where neither party was at fault. Finally, the argument is offered that an award of custody is only an incident to a plea for divorce or separation.[23] If the primary relief sought is not granted, it would seem improper under this theory to allow the incidental relief.

The courts which declare this lack of authority to award custodial orders unless a divorce is decreed do not leave the parties without a remedy. They suggest two possible solutions; one the writ of habeas corpus,[24] and the other, an independent action in equity where custody is the only issue introduced. In the latter instance, as mentiond by the majority opinion in the *Johnson* case,[25] the court would look to its inherent authority derived from the English Lord Chancellor's historic position as the "King's conscience" and as such would make an award of custody as the welfare of the child required.

III

The opposite position taken by those courts which have awarded custody without a legal divorce or separation has, it is submitted, a more sound basis. In the case of *Urbach v. Urbach*,[26] in answer to the contention that custody in a divorce action was merely incidental to the divorce, the court pointed out that it was equally possible that the divorce could be incidental to custody. The court held that the true determinant should be the scope of the pleadings and the trial. This approach would appear to be reasonable. If the pleadings raise the issue of custody as well as that of divorce, and if evidence is presented on both of these issues, the trial court should be competent to award custody although the evidence is not sufficient to sustain a divorce. Nor should it be denied jurisdiction because the divorce is denied; for it is a well-known equitable maxim that "equitable jurisdiction having once attached, it will be continued for the final adjudication of all rights involved and thus avoid further litigation in the future, even though this involves the giving of relief which is

22. This rule, established by the *Davis* case, was followed by the courts in New York until early 1941 when in Schwartz v. Schwartz, 26 N. Y. S. 2d 547 (1941), the court anticipating the effective date of Section 1170-a of the Civil Practice Act, September 1, 1941, awarded custody in a separation action where a separation was not decreed, nor were grounds for it established.

23. Walker v. Walker, 140 Miss. 340, 105 So. 753 (1925); Davis v. Davis, 75 N. Y. 221, 227 (1878); Gatton v. Gatton, 41 Ohio App. 397, 179 N. E. 745 (1931).

24. Davis v. Davis, 75 N. Y. 221, 228 (1878).

25. Johnson v. Levis, 38 N. W. 2d 115, 118 (1949).

26. 52 Wyo. 207, 73 P. 2d 953 (1937).

usually classified as legal."[27] It is submitted that the trial court would have the same grounds for awarding custody as a judge in a habeas corpus proceeding or an action where custody was the only issue introduced.

It is apparent that many parents are irreconcilable and permanently separated before they ever seek a legal dissolution of the marital bond. The children of such marriage are not enjoying the benefits and blessings which devoted parents can provide. In awarding custody although denying a divorce or separation under such circumstances, the court is looking out for the best interests of the children, rather than giving judicial sanction to a breaking up of the home as has been suggested. Such an approach is realistic and legal by virtue of equity's power as *parens patriae*.[28]

The need for some solution to the problem of custody when the parents are, in fact, living apart is evident. It is submitted that it does not appear consistent with general equitable concepts to hold that the courts are without jurisdiction to pass on the issue of custody only because a concomitant divorce or separation is denied.[29] This conclusion receives further support from the fact that even those courts which so confine equitable power to the successfully maintained action have recognized the inherent jurisdiction of equity over the custodial rights of children by indicating, as did the majority of the court in the *Johnson* case,[30] that the proper remedy is in habeas corpus or an independent equitable action for custody. Hence, the statute which the majority of the court in this case relied on as authority for the rendition of custodial orders would actually confer no new power over children to the courts. Rather, it would broaden the scope of equity's jurisdiction over custody to actions where a decree of divorce or separation is sought as well as preserving it in actions where custody is the sole issue.[31]

Unfortunately, the historical background of this authority over divorce and custody is overlooked by a considerable number of the courts. If the jurisdiction over custody is an inherent equitable power,[32] and not conferred in any sense by the legislature, it would seem that no statute could remove or limit the jurisdiction unless it was done in clear and unequivocal language.[33] In the absence of such a clear limitation, as is the case in most states, no inference of a contradiction in existing equitable powers of the court should be made.

Answering the problem by this statutory distinction based on the historic antecedents of equity's jurisdiction over custody would at least have the virtue of unifying the varying judicial approaches to a difficult sociological issue which can ill-afford legalistic hair-splitting.

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27. CLARK, PRINCIPLES OF EQUITY § 24 (1st ed. 1919).

28. 1 POMEROY, EQUITY JURISPRUDENCE § 294 (4th ed. 1914).

29. Cairnes v. Cairnes, 211 Ala. 342, 100 So. 317 (1924); Knoll v. Knoll, 114 La. 703, 38 So. 523 (1905); Power v. Power, 65 N. J. Eq. 93, 55 Atl. 111 (1903); Urbach v. Urbach, 52 Wyo. 207, 73 P. 2d 953 (1937).

30. Johnson v. Levis, 38 N. W. 2d 115, 117 (1949).

31. 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 1185 (1st ed. 1891).

32. See note 4 *supra* and accompanying text.

33. 1 POMEROY, EQUITY JURISPRUDENCE §§ 279, 281 (4th ed. 1918). 2 VERNIER, AMERICAN FAMILY LAWS § 95 (1st ed. 1932) states: "It seems at least doubtful that a statute giving the court discretionary power when a divorce is granted would, by implication, deny the power pending suit or if the decree is denied and the parties remain separate."