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RIGHTS OF GRANDPARENTS, STEP-PARENTS, FOSTER PARENTS, GUARDIANS, RELATIVES AND FRIENDS TO CUSTODY AND ACCESS ARE THERE ANY GUIDELINES?

The Honourable Mr. Justice John H. Gomery

GRANDPARENTS, STEP-PARENTS, FOSTER PARENTS, GUARDIANS, RELATIVES AND FRIENDS TO CUSTODY AND ACCESS

ARE THERE ANY GUIDELINES?

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Most and probably all provinces have egislation over the years permitting custody and iers to be made in favour of persons other than the f the child concerned. In proposed divorce legis- posited by former Justice Minister MacGuigan section) of Bill C-10 proposed to confer jurisdiction upon e court to make a custody or access order in favour ents or «any other person» making an appropriate n. This draft legislation died on the order paper. onding provision is to be found in Bill C-47, deposited sent Minister of Justice on May 1, 1985 as a complete f the Divorce Act.

However, this does not signify that in tters subject to federal legislative jurisdiction her than parents do not have the right to apply for custody or access. The better opinion would appear no legislation is necessary on this subject since

jurisdiction with respect to infants is not dependent upon legislation but derives from the «parens patriae» jurisdiction of the court, at least in cases where there is no contrary legislation.

The «parens patriae» jurisdiction is of ancient origin and was reiterated in England in the leading case of R. v. Gyngall (1893) 2 Q.B. 232 where Lord Esher M.R. said at page 239:

> « I take it that at common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct ... Where the common law jurisdiction was being exercised, unless the right of the parent was affected by some misconduct or some Act of Parliament, the right of the parent as against other persons was absolute .....
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> But there was another and an absolutely different and distinguishable jurisdiction, which has been exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent ..... The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate, and may be intending to act for the child's good, but may be unwise, and may not be doing what a wise, affectionate, and careful parent would do. The Court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate, and careful parent would not do .... The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can

> be said to have any religion, and the happiness of the child. Primâ facie it would not be for the welfare of a child to be taken away from its natural parent and given over to other people who have not that natural relation to it .... »

The Supreme Court of Canada reaffirmed in 1983 that the «parens patriae» jurisdiction is part of the law of this country, in Re Beson and Director of Child Welfare for Newfoundland (1983) 142 D.L.R. 20. For a full analysis of the «parens patriae» jurisdiction and a review of the common law authorities see Re Perry, a decision of the Nova Scotia Court of Appeal reported at (1962) 33 D.L.R. (2d) 216. For additional and more recent examples of its application see Re Fulford and Townsend (1971) 5 R.F.L. 63 (Ont. C.A.) and Re Squire (1974) 16 R.F.L. 266 (B.C.C.S.).

FACTORS TO CONSIDER

The well-known dictum of Lord Simonds in McKee v. McKee (1951) 2 D.L.R. 657 is that the welfare and happiness of the infant is the paramount consideration in questions of custody. It continues to have application in cases where persons other than parents apply for custody or access, but the primary rights of parents to have custody and to raise their children as they wish cannot be ignored. The situation arises frequently that the court must decide between

leaving a child with grandparents or other relatives to whom it has been entrusted at some moment in time by the parents, or returning the child to one or both of its parents who decide that they would prefer to care for their children after all. These and similar situations have led to the creation of a considerable body of jurisprudence in which the factors which the court must consider have been identified.

In Wiltshire v. Wiltshire (1975) 20 R.F.L. 50, Mr. Justice O'Leary of the Ontario Supreme Court deals with the problem in the following terms at page 56:

> « I think perhaps I should make it clear that I do not interpret Re Moores, 12 R.F.L. 273 .... to mean that in all cases in a contest for custody between a parent and a non-parent the sole question is what is in the best interest of the child. In this case the child was separated from its father through the misconduct of the mother, who deserted the father to begin with and then three months later, while the matter of custody was before the Court, broke the arrangement she had made in regard to access and took the child from the father. Just because on a nice balancing of all those considerations that relate to the welfare of the child it can be said that the child would be better off with its maternal grandmother, would not be sufficient reason to deny custody to the child's father. Parents do not stand the risk of losing custody of their children just because a non-parent can establish that it would be in the best interest of those children that the non-parent have custody.
>
> If the respondent had been able to establish that he could properly look after his son I would have awarded custody to him even though on a weighing of all factors it appeared the child would have been better off with the grandmother.
>
> On the other hand, in such a contest a parent will be denied custody when to give him custody is likely to endanger the child's welfare - such as by separating him from those he has come to know as his parents for four years without good reason to believe others

> could fill that void as in Re Moores, or by taking him from an orderly household where he is being properly looked after and where he is happy and «at home», and placing him on a shift basis with his father and with his father's friends as would be the case here. ..... »
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> (Underlining added)

The primary rights of parents have similarly been asserted in Hayes and Hayes v. Hayes (1982) 16 Sask. R. 136 by Madam Justice Mary Carter where she says at page 140:

> « It is true that no presumption in law exists as between one parent and the other as to children of tender years, etc., because the amendments specifically took that presumption away. But surely where the natural mother or father of a child is blameless in every way in the care and upbringing of their child or children, grandparents or strangers with sufficient interest cannot gain custody simply by showing that their home is the best one, materially or culturally or in religious matters, for the child. It seems to me impossible to consider the welfare of the child without considering the suitability of the natural parent or parents first. »

In Legault v. Figueroa (1978) C.A. 82 (Que. C.A.) the custody of a child of eleven years was awarded to the father whom he had not seen for many years, since his parents divorced. On the death of his mother his maternal grandparents unsuccessfully claimed custody. It was held that the father was not shown to have abandoned the child or to have disqualified himself in any way to exercise custody, and the court stated that only in exceptional circumstances should the concept of the best interests of the child have priority over

the natural rights of a parent. At page 85 Mr. Justice Mayrand says:

> « En règle générale, le père et la mère sont plus motivés que d'autres à veiller sur leur enfant et l'intérêt de ce dernier est mieux servi par ceux qui lui ont donné naissance. La correspondance naturelle de l'intérêt de l'enfant au droit de garde de ses parents est maintenant la véritable raison d'être de l'autorité paternelle. Il en résulte une présomption que l'intérêt de l'enfant mineur est de demeurer avec son père et sa mère ou avec l'un d'eux. Cette présomption ne peut être écartée facilement. Seuls des circonstances exceptionnelles et des motifs graves peuvent justifier qu'on enlève l'enfant à son père ou à sa mère pour le confier même à des proches tels que les grand-parents. »

Nevertheless there is an understandable tendency to ignore the priority of parental rights when the interest of the child seems to be favoured by the maintenance of the status quo, even where no particular disability on the part of the natural parent has been demonstrated. In Taylor v. McLenaghan (1983) 47 N.B.R. (2d) 284 the court held as follows:

> « Although a claim by a parent was a weighty factor to be considered in awarding custody, the determining factor was the best interest of the child. Applicant (the father of one of the two children) had not contributed significantly to the upbringing of the children previously, could not describe certain plans for their future and had not demonstrated the ability to assume the financial burden of their care. Among the factors considered in awarding custody to respondents, were stability of respondent's household including the likelihood that the children would not again change residences, love for children already displayed and expressed desire of the children to remain with respondents. »

For other examples of this tendency, see Forner v. Forner (1977) 3 A.R. 216 (Alta. S.C.); Re Hall (1957) 7 D.L.R. (2d) 563 (N.S.S.C.); Humphreys v. Humphreys (1970) 4 R.F.L. 64 (N.S.S.C.); Re Brenton (1983), 33 R.F.L. (2d) 394 (Nfld. T.D.).

The courts have not limited awards of custody to relatives such as grandparents, aunts and uncles, but have in some circumstances granted custody to a person having no blood relationship with the child.

For example in Fullerton v. Richman (1983) 40 O.R. (2d) 395, the father of a child had been awarded its custody and lived in a common law relationship with a woman who acted as a mother to the child. When the father died in an accident, custody of the child was awarded to the «step-mother» as opposed to the biological mother, on the grounds that it would be in the best interests of the child to do so.

There are a variety of reasons for finding that the basic right of natural parents to have the custody of their child should give way to custody granted to a non-parent, in the best interests of the child. The following are a few examples of the kinds of situations which have been held to justify such a decision:

In Nicholson v. Nicholson and Major (1952) O.W.N. 507 the continuing adultery of a mother disqualified her from having the custody of her infant child, which was placed in the custody of its grandmother until the mother learned to «conduct herself as to qualify herself». It is hard to imagine that a judge today would make a similar decision.

In Re Perry op. cit. it was found that the child feared her mother and her care was confided to a foster parent, at least until the child's fear abated.

In Re Squire op. cit. the parents of the child were drug addicts and unstable and the child was awarded to its grandmother.

In McQuillan v. McQuillan (1975) 21 R.F.L. 324 (Ont. S.C.) the mother was incapable of providing the necessary physical care to the child due to her adherence to a particular religious sect, and custody was given to the grandmother.

In Re Fitzgerald (1976) 12 Nfld. and P.E.I.R. 271 the mother was found to have an unstable lifestyle and a demonstrated lack of capacity to care fo the children adequately; their custody was given to their grandparents.

In Re DeSaulniers (1979) 29 N.B.R. (2d) 18 the court was of the opinion that both the mother and father of the child had not matured sufficiently to care for the child on their own, both being reliant upon their parents for support; the custody of their child was given to the grandparents.

In Hayes and Hayes v. Hayes op. cit. the parents were similarly found to be immature and custody was granted to grandparents.

In M. v. D. (1982) 29 R.F.L. (2d) 288 (Ont. H.C.) the children were placed by their father with an aunt at the time that the parents separated. Ten years passed before the parents applied for custody. Custody was awarded to the aunt and uncle.

In Re Brenton op. cit. it was held that any disturbance in the life of a seven-year-old who had been cared for from birth by its grandparents was against its best interests and the mother's application for custody by way of habeas corpus was dismissed.

In F.W. v. D.W. (1983) 45 B.C.L.R. 319 a single mother was a prostitute who had left her child in the care of her sister-in-law; she was denied custody of her child but given liberal access.

PROCEDURE

It has been held that because of its «parens patriae» jurisdiction the court is not obliged to wait until a formal demand for custody has been made by appropriate legal proceedings: custody may be awarded at any time that the court is seized with the issue of the child's welfare: see Droit de la Famille 110 (1984) C.S. 99 (Que. S.C.) It may be assumed that the same principles apply with respect to access.

The person wishing to claim custody of the child is not obliged to wait until one of the parents has initiated a custody application: the demand can be initiated at any time, at least in Ontario. Smith v. Hunter and Sears (1979) 15 R.F.L. (2d) 203, (Ont. S.C.).