

CHILD CUSTODY

*Quintin Johnstone**

Custody of children is the legally recognized right and duty to control and supervise them. The person with custody can determine where they will live, their standard of living, and the nature of their training. He is responsible for seeing that their health, training, and care meet certain minimum standards; and to a degree he is responsible for their behavior. If these minimum standards are not met, he may be deprived of custody, and possibly even subjected to criminal penalties. But custody usually is something that is highly prized, and most judicial contests involving it are between competitors for child awards.

This article is concerned with some of the more important phases of custody law, with particular emphasis on the law of Kansas. A word of warning is needed as to the influence of this law. The courts have developed some practices in custody matters not consistent with abstract rules declared in the statutes and appellate opinions. For example, in contests between parents, children are awarded to the mothers as against the fathers in a far larger percentage of cases than can be justified under the formal law. Further, custody cases are so steeped in emotion that the results are often hard to predict because judges frequently give greater weight to human interest sidelights than is expected under abstract rules of custody law.

I. PERSONS ENTITLED TO CUSTODY

No one, not even a parent has an absolute right to the custody of a child under all circumstances. The state, through the courts, can take custody away from one person and award it to another if the well-being of the child makes it necessary.¹ In this sense, custody is always a qualified right.

But in the ordinary, normal family, one or both parents have legal custody of the children; and there is little possibility of this right being

*Associate Professor of Law, University of Kansas School of Law.

¹ "While the prima facie right to the custody of the child is in the parent, it is not an unconditional right." *Pinney v. Sulzen*, 91 Kan. 407, 412, 137 Pac. 987, 989 (1914).

disturbed as long as the family remains as a unit. At common law, the father had custody of the children when the family was living together harmoniously, and his custody rights remained when he and the mother were separated.² In Kansas, parents have always been held to have equal custody rights in their children unless a specific court order to the contrary is made.³ The father has no common-law custody priority in this state.⁴ If the parents are divorced or separated and contesting custody of their children, the well-being of the children will control in determining which parent will be awarded custody by order of the court.⁵ The court may order that custody be divided between the parents, giving it to one parent for part of each year and to the other for the remainder. Or, custody may be awarded to one parent, with visitation rights granted to the other. If the parent with custody then dies, the other parent will be awarded the child.⁶

The Kansas position on equal custody rights of the father and mother is based on the Kansas Constitution, article 15, section 6, which states: "The legislature shall provide for the protection of the rights of women . . . and shall also provide for their equal rights in the possession of their children." In addition, the legislature has provided that both parents are the natural guardians of the persons of their minor children.⁷

Even though parents have equal custody rights, this does not justify a husband separated from his wife in forcibly taking their child from her.⁸ Nor do equal custody rights entitle one parent to exclusive custody.⁹

If a child is adopted, the adopting parents have the same custody rights as natural parents before adoption.¹⁰ After adoption, natural

² *State v. Stigall*, 22 N. J. L. 286 (1849); *In the matter of Thomas Hakewill*, 12 C. B. 223 (1852); 1 SCHOULER, *DOMESTIC RELATIONS* 790 (6th ed., 1921).

³ *Moyer v. Moyer*, 171 Kan. 495, 223 P.2d 711 (1951); *Miller v. Morrison*, 43 Kan. 446, 23 Pac. 612 (1890); *State v. Angel*, 42 Kan. 216, 21 Pac. 1075 (1889); *State v. Jones*, 16 Kan. 608 (1876).

⁴ *Ibid.*

⁵ *Prier v. Lancaster*, 169 Kan. 368, 219 P.2d 358 (1950).

⁶ *In re Hollinger*, 90 Kan. 77, 79, 132 Pac. 1181, 1182 (1913): "The natural rights of the father were not completely annulled by the order in the divorce proceeding awarding the custody of the child to the mother; they were suspended for the time being, but they were revived in full force by the mother's death."; *May v. May*, 162 Kan. 425, 176 P.2d 533 (1947).

⁷ KAN. G. S. 1949, 59-1802.

⁸ *State v. Taylor*, 138 Kan. 407, 26 P.2d 598 (1933).

⁹ *Ibid. But cf. State v. Angel*, 42 Kan. 216, 21 Pac. 1075 (1889).

¹⁰ KAN. G. S. 1949, 59-2103; *Denton v. James*, 107 Kan. 729, 193 Pac. 307 (1920).

parents lose their custody rights and have no more rights in the child than a stranger.¹¹

If a child is illegitimate, there is not much law in Kansas on the custody rights of the parents. The guardianship statute apparently applies to the parents of illegitimate children;¹² and if such parents are natural guardians, it would seem that they are entitled to custody. There is authority in Kansas and other states that the mother of an illegitimate child has the right to its custody if she is a fit person to care for children.¹³ Some courts have also held that the father of an illegitimate child has a parental right to its custody.¹⁴ If both parents of an illegitimate child are fit to care for it, there are cases holding that the mother has preferred rights to custody over the father.¹⁵

It is generally true that for someone other than a parent to obtain custody, a court order or decree is necessary. And when a parent once loses custody, he can reobtain it only by judicial action. However, there appears to be a minor qualification to this rule. Apparently in Kansas, children's aid societies can secure custody of children by agreement with those who have custody.¹⁶

Custody contests rather frequently develop between one or both parents and other persons, usually grandparents, aunts, or uncles. In such cases, the parents are preferred if they are fit persons to care for their children.¹⁷ This tendency seems to be stronger in recent years

¹¹ KAN. G. S. 1949, 59-2103; *Morrison v. Chamberlain*, 119 Kan. 803, 241 Pac. 115 (1925); *Whittaker v. Coffman*, 112 Kan. 594, 211 Pac. 1116 (1923), *rehearing denied* 112 Kan. 597, 212 Pac. 912 (1923).

¹² *Id.* 59-1802; *Johnson v. Best*, 156 Kan. 668, 135 P.2d 896 (1943).

¹³ *Johnson v. Best*, *supra* note 12; *Wood v. Lee*, 123 Kan. 669, 256 Pac. 797 (1927); Application of the New York Assn. for Jewish Children, 182 Misc. 651, 654, 44 N.Y.S. 2d 879, 880 (1943): "A natural parent in preference to all others is entitled to the custody of her child, in the absence of compelling reasons to the contrary. . . ."; *Pratt v. Nitz*, 48 Iowa 33 (1878); *Ware v. Muench*, 232 Mo. App. 41, 89 S.W.2d 707 (1935); *In the Matter of Mabel Nofsinger*, 25 Mo. App. 116 (1887); *Hesselman v. Haas*, 71 N.J. Eq. 689, 64 Atl. 165 (1906); *Commonwealth v. Bush*, 152 Pa. Super. 580, 33 A.2d 57 (1943); *Binion v. Mathis*, 171 S.W.2d 512 (Tex. Civ. Ct. App. 1943).

¹⁴ *French v. Catholic Community League*, 69 Ohio App. 442, 44 N.E.2d 113 (1942): "When the father of such a child [illegitimate child] publicly acknowledges its paternity, and continuously contributes to its support and welfare, and is a proper person, he is next in law entitled to its custody, when the mother relinquishes or abandons its control."; *People v. Spear*, 174 Misc. 178, 20 N.Y.S.2d 249 (1940); *Pote's Appeal*, 106 Pa. 574 (1884); *Templeton v. Walker*, 179 S.W.2d 811 (Tex. Civ. Ct. App. 1944).

¹⁵ *Pratt v. Nitz*, 48 Iowa 33 (1878), evidence existed that both parents were unfit but the child was awarded to the mother; *Wright v. Wright*, 2 Mass. 190 (1806); *In re Byron*, 83 Vt. 108, 74 Atl. 488 (1909).

¹⁶ KAN. G. S. 1949, 38-305, 306.

¹⁷ Parent preferred over grandparent: *Ramey v. Ramey*, 170 Kan. 1, 223 P.2d 695 (1950); *Stout v. Stout*, 166 Kan. 459, 201 P.2d 637 (1949); *Balieu v. Bailey*, 164 Kan. 653, 192 P.2d 190 (1948); *Jones v. Jones*, 155 Kan. 213, 124 P.2d 457 (1942); *Ex parte Windell*, 152 Kan. 776, 107 P.2d 708 (1940); *Andrews v. Landon*, 134 Kan. 641, 7 P.2d 91 (1932);

than in the years immediately after the often-cited Kansas decision of *Chapsky v. Wood*¹⁸ in which the court awarded a child to its aunt rather than its father, even though a strong case had been made out for the father. Parents have this preference merely from the relationship of parent and child. There is a presumption that a parent is fit to take custody, if there is no evidence submitted to the contrary.¹⁹ If the parent is a fit person to have custody, it is immaterial that the other person claiming custody is also fit and has been giving the child proper and suitable care,²⁰ or can offer the child greater comforts, wider education, and the promise of a larger inheritance.²¹

When a child is awarded to one parent alone, it is not uncommon for the child to be left much of the time with its grandparents while the parent works. This does not amount to a custody award to the grandparents. In the Kansas case of *Dodd v. Dodd*,²² a child was awarded to the father from September to May, following divorce of the parents. The custody order read: ". . . during the months in which plaintiff [the father] has custody of said child, said child shall remain with and be in the home of his paternal grandparents. . . ." The mother appealed this order on the grounds that in effect this was an award to the grandparents and thereby violated her parental preference to the

Hollis v. Brownell, 129 Kan. 818, 284 Pac. 388 (1930); *Melroy v. Keiser*, 123 Kan. 513, 255 Pac. 978 (1927); *Entzminger v. Hess*, 110 Kan. 312, 203 Pac. 734 (1922); *Jendell v. Dupree*, 108 Kan. 460, 195 Pac. 861 (1921); *Crews v. Sheldon*, 106 Kan. 438, 186 Pac. 498 (1920); *In re Meyer*, 103 Kan. 671, 175 Pac. 975 (1918); *In re Zeigler*, 103 Kan. 901, 176 Pac. 974 (1918); *In re Underwood*, 103 Kan. 505, 175 Pac. 380 (1918); *Purdy v. Ernst*, 93 Kan. 157, 143 Pac. 429 (1914); *Wood v. Shaw*, 92 Kan. 70, 139 Pac. 1165 (1914); *Swarens v. Swarens*, 78 Kan. 682, 97 Pac. 968 (1908); *In re King*, 66 Kan. 695, 72 Pac. 263 (1903). Grandparent preferred over parent: *Hayn v. Hayn*, 162 Kan. 189, 175 P.2d 127 (1946); *In re Snook*, 54 Kan. 219, 38 Pac. 272 (1894). Parent preferred over aunt or uncle: *Monroe v. Slaughter*, 171 Kan. 614, 237 P.2d 372 (1951), after the aunt and uncle had cared for the child for eleven years; *In re Jackson*, 164 Kan. 391, 190 P.2d 426 (1948); *Loucka v. State Department of Social Welfare*, 163 Kan. 1, 179 P.2d 791 (1947); *May v. May*, 162 Kan. 425, 176 P.2d 533 (1947); *McGrath v. Vail*, 140 Kan. 312, 37 P.2d 3 (1934); *Smith v. Scheuerman*, 133 Kan. 348, 299 Pac. 616 (1931); *In re Kailer*, 123 Kan. 229, 255 Pac. 41 (1927); *Pinney v. Sulzen*, 91 Kan. 407, 137 Pac. 987 (1914). Aunt preferred over parent: *Chapsky v. Wood*, 26 Kan. 650 (1881). Parent preferred over non-relatives: *Tucker v. Finnigan*, 139 Kan. 496, 32 P.2d 211 (1934); *Wood v. Lee*, 123 Kan. 669, 256 Pac. 797 (1927); *In re Brown*, 98 Kan. 663, 159 Pac. 405 (1916); *In re Hollinger*, 90 Kan. 77, 132 Pac. 1181 (1913); *In re Carter*, 77 Kan. 765, 93 Pac. 584 (1908), an illegal adoption. Non-relative preferred over parent: *Hodson v. Shaw*, 128 Kan. 787, 280 Pac. 761 (1929), even though an attempted adoption by the persons awarded custody held to be void; *In re Guber*, 105 Kan. 515, 184 Pac. 850 (1919); *In re Hickey*, 85 Kan. 556, 118 Pac. 56 (1911). Older brother preferred over father: *In re Beckwith*, 43 Kan. 159, 23 Pac. 164 (1890). Stepmother preferred over father: *State v. Taylor*, 125 Kan. 594, 264 Pac. 1069 (1928).

¹⁸ 26 Kan. 650 (1881).

¹⁹ *In re Jackson*, 164 Kan. 391, 400, 190 P.2d 426 (1948).

²⁰ *Stout v. Stout*, 166 Kan. 459, 201 P.2d 637 (1949).

²¹ *Wood v. Lee*, 123 Kan. 669, 256 Pac. 797 (1927); *Jendell v. Dupree*, 108 Kan. 460, 195 Pac. 861 (1921); *Swarens v. Swarens*, 78 Kan. 682, 97 Pac. 968 (1908).

²² 171 Kan. 46, 229 P.2d 761 (1951).

child's custody. In ruling against the mother, the Kansas Supreme Court said:

We have never held that a father whose home has been broken up and who is otherwise entitled to custody of his child can be deprived of that custody simply because the exigencies of making a living compel him to keep it in the home of his parents. . . .²³

A child's next of kin are preferred over non-relatives in a custody award if the next of kin are fit. In *Paronto v. Armstrong*,²⁴ a child's parents both died when he was about three years of age. Habeas corpus proceedings were then promptly started in the Supreme Court of Kansas by the child's grandparents against a couple whom the mother had employed to care for the child. This couple had refused to give up the boy to his grandparents. The court awarded him to the grandparents, saying:

. . . it is now well settled that under the common law, guardianship by nature of the person of children was vested in the father and in the event of his death in the mother, and in the event of the death of both parents in the next of kin. [Citations omitted.] In this state by our constitution, article 15, section 6, and by our statute, G. S. 1945 Supp. 59-1802, the rights of the father and mother are made equal. We have no statute which denies common-law rights of guardianship to the next of kin when both parents are deceased. Under G. S. 1935, 77-109, the rule of the common law as applied to next of kin remains in force in this state, unless we should say it is not suitable to the conditions and wants of our people. We would not be justified in so holding where, as here, the next of kin are able and willing to assume the care of the child and promptly took appropriate steps to do so.²⁵

An institution or children's aid society may be awarded custody of children who are dependent, neglected, or delinquent.²⁶ Such children may also be awarded to private persons, even non-relatives.²⁷ In fact, whenever it is necessary for the well-being of a child, he may be awarded to private persons who are not his relatives.²⁸

The doctrine of *parens patriae* is sometimes invoked by courts to justify the state's action in custody cases. This is an old equity concept by which the state exercises its sovereign power of guardianship over

²³ *Id.* at 49.

²⁴ 161 Kan. 720, 171 P.2d 299 (1946).

²⁵ *Id.* at 725; accord, *In re Bullen*, 28 Kan. 781 (1882), in which the court ordered a child sent to its grandmother in England rather than remain in an institution for children in Kansas.

²⁶ KAN. G. S. 1949, 38-303, 305, 306, 407, 409.

²⁷ *Id.* at 38-407.

²⁸ *Hodson v. Shaw*, 128 Kan. 787, 280 Pac. 761 (1929); *State v. Taylor*, 125 Kan. 594, 264 Pac. 1069 (1928); *In re Hickey*, 85 Kan. 556, 118 Pac. 56 (1911).

persons under disability, including children.²⁹ When children are not properly being cared for by their parents or if children become delinquent, the state, through its courts, may use its *parens patriae* powers and make custody changes.³⁰ The same doctrine has been used to require school attendance, restrict child labor, and prevent the public sale of religious tracts by minors.³¹

II. STANDARDS USED BY COURTS IN AWARDING CUSTODY

There are three common standards used by courts in custody award cases. These are that the welfare and well-being of the child are the paramount consideration; parents, if fit, have a preference over others in securing custody; and only a fit person may be awarded custody.

There is a close correlation between the first and third standards. It will not contribute to the well-being of a child to award his custody to one who is unfit.

There is a basic inconsistency between the first and second standards. Even if a parent is fit, it frequently would be better for the well-being of the child to award him to someone other than a parent. A grandparent, foster parent or adopting parent could often do more for the child financially and otherwise than could the parents in those cases in which custody is litigated.³² But whether they could or not, the parent is given custody, if fit.³³

An effort has been made in some Kansas cases to resolve this inconsistency. This is done by saying that giving custody to a fit parent is better for the well-being of the child than giving custody to anyone else.³⁴ The reasoning behind this argument seems to be that fit parents

²⁹ *In re Turner*, 94 Kan. 115, 145 Pac. 871 (1915).

³⁰ The doctrine is referred to by name in the following Kansas custody cases: *Moloney v. Moloney*, 167 Kan. 444, 206 P.2d 1076 (1949); *White v. White* 160 Kan. 32, 159 P.2d 461 (1945); *Wear v. Wear*, 130 Kan. 205, 224, 285 Pac. 606 (1930); *Kailer v. Kailer*, 123 Kan. 229, 255 Pac. 41 (1927); *Harmon v. Harmon*, 111 Kan. 786, 794, 208 Pac. 647 (1922); *In re Turner*, 94 Kan. 115, 145 Pac. 871 (1915).

³¹ *Prince v. Massachusetts*, 321 U.S. 158 (1943).

³² This idea is developed in Note, *Custody of Children: Best Interests of Child vs. Rights of Parents*, 33 CALIF. L. REV. 306 (1945).

³³ See note 17 *Supra*.

³⁴ "In the argument much is said about the welfare of the child. While that is a question which always enters into cases of this character, it is the settled policy of this state that, unless parents are unfit, the welfare of the child is always best conserved by its being in their custody." *Tucker v. Finnegan*, 139 Kan. 496, 499, 32 P.2d 211, 212 (1934).

"Casuists could make a good argument that, in the legendary case of the old woman who lived in a shoe, who had so many children she did not know what to do, the welfare and best interests of those children would be to rescue them from the scant regimen and Solomonic discipline of the worthy dame who had brought them into the world, and to place them in homes of well-to-do, kindly foster parents; but so long as the old woman did

will, through their affection and devotion, do more for their children than can anyone else.³⁵ In a recent California case, the court denies that this is always true.³⁶ The court then says that California has resolved the inconsistency between the welfare of the child standard and the parental preference standard by holding that where there is a conflict the parental preference standard controls if the parent is fit. In the language of the court:

California has, in effect, adopted the harsh rule that the right of a fit and proper parent to have the custody of his child is somewhat in the nature of a property right and paramount to the welfare and best interests of the child.³⁷

This realistic statement of the California rule is equally applicable to the Kansas law.

Although they talk in terms of parental rights, what the courts may have in mind in these cases of parental preference is that the well-being of parents also should be considered in custody matters. And if a parent is a fit person, his well-being in the form of emotional benefits from close association with his child should be advanced even though the child would probably benefit more by being awarded to someone else.³⁸ This argument is a valid one. Close family ties are needed by adults as well as children.

her duty by her numerous progeny according to her ability, no court would have the right to displace her as their natural and lawful custodian.

"Putting the matter in another way, it is quite correct to say that the welfare of children is always a matter of paramount concern, but the policy of the state proceeds on the theory that their welfare can best be attained by leaving them in the custody of their parents and seeing to it that the parents' right thereto is not infringed upon or denied." *In re Kailer*, 123 Kan. 229, 231, 255 Pac. 41, 42 (1927).

³⁵ "Ordinarily the love of a parent is more advantageous to the child than any creature comforts or other advantages that a stranger may offer." *In re Zeigler*, 103 Kan. 901, 903, 176 Pac. 974, 975 (1918). Child awarded to its father.

"It has repeatedly been held that the welfare of the child is the paramount consideration. In determining that welfare, however, regard must be had to a mother's affection, devotion and care in all the trying vicissitudes of the life of a child. . . . Mother love and care may far outweigh financial means and prospects." *Buchanan v. Buchanan*, 93 Kan. 613, 616, 144 Pac. 840, 841 (1914). Child awarded to its mother.

"There remains only the welfare of the child to be considered. The court knows of no better custodian for a little girl than her mother, when the mother is of high character, well situated to take care of her, has proved her ability to rear a daughter, and bears for her children the full measure of a mother's love. The search for someone to stand 'in loco parentis' is very brief when a capable, worthy, and affectionate mother, who has done nothing to impair her right, pleads for the privilege in respect to the child she bore. The better financial resources of the respondents cannot be allowed to turn the scale. Children born in mangers and in the humblest log cabins have been known to do well." *In re Carter*, 77 Kan. 765, 766, 93 Pac. 584 (1908). Child awarded to its mother.

³⁶ *Shea v. Shea*, 100 Cal. App. 2d 60, 223 P.2d 32 (1950).

³⁷ *Id.* at 34.

³⁸ This idea is never clearly developed in the Kansas cases, but it is hinted at in these cases: *Loucka v. State Dept. of Social Welfare*, 163 Kan. 1, 179 P.2d 791 (1947); *Woodall v.*

Another explanation of the parental preference rule in custody cases is that the state has limited authority over custody, and when a parent is fit, the state has no right to interfere with a parent's custody.³⁹

When a court does not like the result of the parental preference rule because it does not adequately advance the child's welfare, the fitness requirement can usually be applied with strictness so as to justify an award to someone other than the parent. The fitness standard permits of considerable discretion even by trial courts so as to eliminate much of the harshness from the parental preference rule.

There have been many cases in which the Kansas Supreme Court has ruled on what constitutes fitness to have custody of a child. Fitness requires that a person have financial resources available to care for a child's needs, the ability and willingness to provide a proper home, interest in and affection for the child, and a character and personality that will have a favorable influence on a child. Fitness standards are the same for parents and non-parents, although in applying them, courts sometimes seem to be more lenient in holding that parents are fit.

A person may be financially qualified to have custody of a child even though someone else who wants custody is financially much better off.⁴⁰ Questions of financial unfitness arise less frequently today because of the aid to dependent children assistance programs.

The ability and willingness to provide a proper home for a child involves more than financial means. It also requires that a stable home

Alexander, 107 Kan. 632, 193 Pac. 185 (1920), a visitation right case; *In re Guber*, 105 Kan. 515, 184 Pac. 850 (1919).

It may be that the tendency of courts to prefer mothers over fathers in custody contests between parents is due in part to similar reasoning, namely, that it is the mothers who ordinarily are most in need of close association with their children.

³⁹ "The rule of law is absolute that what is the best interest of a child is its parent's exclusive concern—not a matter for judicial arbitrament—except where the parent is an unfit person to have such custody." *Smith v. Scheuerman*, 133 Kan. 348, 351, 299 Pac. 616, 618 (1931), in which custody was awarded to the mother. The same reasoning is used in *Whittaker v. Coffman*, 112 Kan. 597, 212 Pac. 912 (1923).

⁴⁰ *Supra* notes 34 and 35; *Chapsky v. Wood*, 26 Kan. 650 (1881); *cf. Hedding v. Inman*, 172 Kan. 567, 241 P.2d 479 (1952). *Contra, In re Bullen*, 28 Kan. 781 (1882), in which the court ordered that a child be sent to her grandmother in England, where she would receive a legacy, rather than remain in a Kansas institution and not qualify for the legacy. In the *Bullen* case the court justified its ruling in part as follows: "Second. There is a pecuniary consideration. I am not so sordid as to believe that money is the one thing to be regarded; but other things being equal, that certainly is a matter to be considered. If she remains here she will come to maturity without means, and dependent solely on her own labor or the help of others. There she will have a little property—not a great wealth, it is true, but enough to keep want away and to enable her to act freely in her choice of place and work in life. There is also a possibility, though perhaps only a remote one, of her becoming through the death of others the heir to quite a property." *Id.* at 788. *See Roll v. Roll*, 143 Kan. 704, 56 P.2d 61 (1936).

be provided and that a woman be available in the home to care for the children. In *Paronto v. Armstrong*, one reason that the Kansas court took an orphaned child away from a married couple was that they were "unstable as to their home, no one knows where they are likely to be in a few months or a few years," and "unstable in their domestic relations," the husband having been married twice before, the wife once, and they had failed to make a home for the children of their previous marriages.⁴¹ When a man, usually a father who is divorced, widowed, or separated, seeks custody of a child, the courts ordinarily require that he have a woman in his home who can care for the child: a second wife, sister, mother, or housekeeper.⁴² And the woman may not qualify if too old or physically handicapped. In *Cook v. McCabe*,⁴³ custody of a three-year-old girl was taken from her well-to-do foster father because the only women in his home were his eighty-seven year-old mother, and his fifty-year-old, deaf sister with whom he did not get along. The requirement of a woman in the home capable of caring for the child is especially strong in cases involving very young children or girls.

A fit person to have child custody must be one who has an interest in the child and affection for it. If a parent in the past has abandoned the child or left it in the care of others and shown no interest in its welfare, this is strong evidence against later awarding custody to the parent. Where a mother left her infant daughter with grandparents for three years and did not visit the child or inquire about her during this period, the mother was later refused custody.⁴⁴ The Oklahoma court refused custody to a young Indian father when the child's mother was dead and the child had been reared by its grandparents. The father had shown no concern in the child until the Bureau of Indian

⁴¹ 161 Kan. 720, 731, 171 P.2d 299 (1946); *accord*: *Lancey v. Shelley*, 232 Iowa 178, 2 N.W. 2d 781 (1942), father denied custody when he and second wife were living in separate residences and there was evidence that the second wife was contemplating a divorce; *Dietrich v. Anderson*, 185 Md. 103, 43 A.2d 186 (1945), father denied custody when he proposed to establish a home near a Memphis air base where he was stationed, his mother to leave her husband on long visits to stay with the child in Memphis.

⁴² *In re Zeigler*, 103 Kan. 901, 176 Pac. 974 (1918); *In re Meyer*, 103 Kan. 671, 175 Pac. 975 (1918); *Pinney v. Sulzen*, 91 Kan. 407, 137 Pac. 987 (1914); *In re Hamilton*, 66 Kan. 754, 71 Pac. 817 (1903).

⁴³ 108 Kan. 172, 194 Pac. 633 (1921).

⁴⁴ *In re Snook*, 54 Kan. 219, 38 Pac. 272 (1894). *But cf.* *Swarens v. Swarens*, 78 Kan. 682, 97 Pac. 968 (1908). In *Edwards v. Session*, 48 So.2d 771 (Ala. 1950), a mother was given custody of her three-year-old child even though the mother had left the child at her sister-in-law's restaurant one evening promising to return in a short time, and did not return for two weeks. The court felt that petitioner showed indications of becoming a good mother and there was evidence that she had real love and affection for the child.

Affairs threatened to discontinue his allotment unless he devoted more attention to his child.⁴⁵ And a Pennsylvania court took custody from a mother who gave an undue amount of time to religious work for Jehovah's Witnesses, leaving the care of her children to others.⁴⁶ But leaving a child with grandparents for a time while the father was elsewhere earning a living has been held not to be abandonment justifying removal of custody from the father.⁴⁷

A good reputation and past record of good moral behavior, while not always required, are helpful in securing a custody award.⁴⁸

If parents have a bad reputation or record, this is often not decisive if it appears that there has been a change for the better. The Kansas court has awarded custody to a mother who had been committed to the Kansas Industrial Farm for Women,⁴⁹ a mother who a year earlier was "inclined to drink and swear and keep late hours with men, some of whom were married";⁵⁰ and a mother found to have committed adultery.⁵¹ In all of these cases there was evidence that the parents who were given custody had ceased their previous undesirable behavior.

A court will not award custody to anyone, parent or not, who presently has habits which would have an adverse effect on children. A woman living a secluded life, who is uncleanly, and uses vile language was deprived of custody by the Kansas court.⁵² A father who "is somewhat intemperate in his habits, and often uses vulgar and profane language in his family" was denied custody of his thirteen-year-old

⁴⁵ *Ex parte* Yahola, 180 Okla. 637, 71 P.2d 968 (1937).

⁴⁶ *Derr v. Derr*, 148 Pa. Super. 511, 25 A.2d 769 (1942), *cert. denied*, 317 U.S. 631 (1942).

⁴⁷ *Bierce v. Hanson*, 171 Kan. 422, 233 P.2d 520 (1951).

⁴⁸ *Pinney v. Sulzen*, 91 Kan. 407, 415, 137 Pac. 987, 990 (1914): "It has been satisfactorily shown that the petitioner is sober, industrious, and in good repute in the neighborhood where he resides. The evidence of 25 of his neighbors has been produced, and they testify that he is a man of good character and habits and a fit person to have the custody of his daughter. The district judge, county attorney, collector of customs, clergymen, doctors, mechanics, and officers and members of fraternal lodges to which he belongs all speak well of his character and habits. The manager of the company for which petitioner has been working says that he has known the petitioner for about 20 years, and during that time he has borne a good reputation. . . . Upon the testimony and all the circumstances in the case we are unable to say, under the governing rules of law, that the petitioner is unfit and should be deprived of the custody and guardianship of his child."; *In re Jackson*, 164 Kan. 391, 190 P.2d 426 (1948). A mother with a bad reputation for chastity was denied custody in *Brown v. Brown*, 71 Kan. 868, 81 Pac. 199 (1905).

⁴⁹ *Loucka v. State Dep. of Social Welfare*, 163 Kan. 1, 179 P.2d 791 (1947).

⁵⁰ *Smith v. Scheuerman*, 133 Kan. 348, 299 Pac. 616 (1931).

⁵¹ *Harmon v. Harmon*, 111 Kan. 786, 208 Pac. 647 (1922); *Commonwealth v. Martocello*, 148 Pa. Super. 562, 25 A.2d 855 (1942). *But cf.* *Bunim v. Bunim*, 298 N. Y. 391, 83 N.E. 2d 848 (1949), noted in 24 *NOTRE DAME LAW.* 597 (1949).

⁵² *Foundling Hospital v. Harrington*, 113 Kan. 521, 215 Pac. 303 (1923).

son.⁵³ A father charged with statutory rape was deprived of his adopted daughter's custody, but when the prosecution was dismissed, custody was ordered restored.⁵⁴

The New York Court of Appeals has refused custody to a mother who failed to show complete cure from narcotics addiction.⁵⁵ But when a mother's gambling habits were not known to the child, a New York court refused to take custody from her saying:

A person may have a vice which may be mild or serious, but that vice may be confined to the knowledge of that person and not known to anyone else, and to adjudge this petitioner unfit to take care of the child, the court must find as a matter of fact that the child has been harmed by her conduct or that the child knows of her conduct and that knowledge of her conduct would be harmful to the child and detrimental to its natural and normal growth and development.⁵⁶

Religious beliefs of a person seeking custody and the program of religious training for a child have been held by the Kansas Supreme Court to have no bearing on who is entitled to custody. In *Denton v. James*,⁵⁷ a contest developed between a natural grandparent and parent by adoption as to whether or not the child should be brought up as a Roman Catholic. The court said that this matter was in the control of the parent by adoption, and religious views of the parties should not be considered in determining the right to custody. But a New York court has denied custody to a father who was a Nazi.⁵⁸

There is a close relation between fitness of a person to have custody and the welfare of the child whose custody is in issue. The welfare of a child requires that it be awarded to a person who is fit. A person is fit who can provide the conditions which will contribute to the welfare of the child. The two standards are frequently treated by the law as two sides of the same coin, with the courts sometimes talking in terms of fitness, sometimes in terms of the child's welfare, sometimes both.

When talking in terms of the child's welfare, courts require that custody be awarded to one who will provide food, clothing, a home,

⁵³ *In re Beckwith*, 43 Kan. 159, 23 Pac. 164 (1890). *Contra*, *Jendell v. Dupree*, 108 Kan. 460, 195 Pac. 861 (1921), in which the court said: ". . . if an occasional outburst of temper and the use of coarse or offensive speech were treated as sufficient grounds for depriving parents of the custody of their children, many families might be disrupted." *Id* at 464.

⁵⁴ *Entzminger v. Hess*, 110 Kan. 312, 203 Pac. 734 (1922).

⁵⁵ *Darlington v. Cobb*, 135 Misc. 668, 239 N.Y. Supp. 301 (1930).

⁵⁶ *Oraf v. Oraf*, 47 N.Y.S.2d 45 (1944).

⁵⁷ 107 Kan. 729, 193 Pac. 307 (1920).

⁵⁸ The father "has been contaminated with the germ of Nazism which makes him totally unfit to rear and guide the destiny of any living thing, far less an impressionable and susceptible child of tender years." *Reimann v. Reimann*, 39 N.Y.S.2d 485 (1942).

moral guidance, affection—environment that will be conducive to the healthy physical, mental, and moral development of the child. Stress is on the needs of the child rather than on the capacities of the person who wants custody.

In custody contests in which mothers of very young children are trying to secure custody, it is common for courts to decide that the welfare of these children necessitates maternal care. The Kansas Supreme Court has held that children thirteen, twelve, and five years of age should be awarded to the mother instead of the father because: "They are of an age that they need maternal care, and of course, the appellant [father] is away from home during the day while at work."⁵⁹ But in another case the same court awarded an eight-year-old boy to his father rather than his mother saying:

If a child is of tender age, almost of necessity it must be entrusted to its mother's care, without weighing unduly what may be some possible shortcomings in her character or conduct, and notwithstanding the divorced father may be a man of superior character and attainments. . . . As a child grows out of babyhood or its early minority it may and frequently does happen that its welfare will be better served by changing its custody from an indifferent mother to a more considerate father. We think the present case is a good instance of this sort.⁶⁰

The physical and mental health of children influence custody decisions. When an award will adversely affect a child's health, that award will not be made.⁶¹ A mother has been refused custody of her twelve-year-old son because she continued to live with the boy's stepfather who had severely beaten the child on numerous occasions.⁶² The Kansas courts have permitted a mother to have custody and move with her children to California because associations with their father had been

⁵⁹ *Lamer v. Lamer*, 170 Kan. 579, 585, 228 P.2d 718, 721 (1951); *accord*: *Hedding v. Inman*, 172 Kan. 567, 241 P.2d 479 (1952), mother awarded an eight-year-old girl, the court concluding that when both parents are fit, a mother's love which no one else can give a child, tips the scales in favor of the mother; *Prier v. Lancaster*, 169 Kan. 368, 219 P.2d 358 (1950), four-year-old son awarded to the mother against the father, but the court said that the following statement of the law made by the lower court was too broad: ". . . unless a mother is an unfit person to have custody of a child of tender years, she should have it, unless she is not adequately able to care for it."; *In re Bort*, 25 Kan. 308, 311 (1881), children four and five years of age awarded to their grandmother with whom their mother lived: "They are of that tender age when they need a mother's care. No stranger, however kind, can fill her place."; *see* *Bierce v. Hanson*, 171 Kan. 422, 233 P.2d 520 (1951). *But see* *Maple v. Maple*, 29 Wash. 2d 858, 189 P.2d 976 (1948), where contrary language is used. *Moloney v. Moloney*, 167 Kan. 444, 206 P.2d 1076 (1949), two girls, ages four and three, were awarded to their mother.

⁶⁰ *Janney v. Janney*, 159 Kan. 230, 154 P.2d 131 (1944).

⁶¹ *Roll v. Roll*, 143 Kan. 704, 56 P.2d 61 (1936); Note 48 A.L.R. 137 (1926). In *In re Hudson*, 13 Wash.2d 673, 126 P.2d 765 (1942), the court refused to order a deformed child taken from its parents and operated on against their will when the operation might be fatal.

⁶² *Dornsborg v. McKellar*, 204 Ga. 189, 48 S.E.2d 820 (1948).

detrimental to the children.⁶³ These associations had frustrated the mother's efforts in behalf of the children, given them inferiority complexes, and caused them to do poorly at school. Alternating custody between a parent and grandparents has been refused because it would create friction and be detrimental to the welfare of the child.⁶⁴ A father's request for custody of his fifteen-year-old daughter was denied because the girl was happy with her mother and it seemed to the court unwarranted to transfer her from this home where she had been since she was two years old.⁶⁵

The outcome of a custody case can turn on where the child will have the best home. A mother was ordered to return with her children to a modern ten-room house in Hutchinson or lose custody of the children. The house was provided by the father who was divorced from the mother. She had moved from the Hutchinson home to Wichita with her two children and was living in a small kitchenette apartment.⁶⁶ In another Kansas case, a child was sent to her grandmother in England rather than be left in an institution in Kansas.⁶⁷ Weight has been given to the benefits a child would receive from being in the same home with her sisters, in determining a custody case.⁶⁸

In awarding custody, preferences expressed by the children as to whom they wish to live with have been considered in some cases but not in others. A test commonly applied is whether or not a child is mature enough to make an intelligent choice.⁶⁹ In a recent Kansas case, the court expressed a doubt as to whether this question of preference should ever be presented to children;⁷⁰ and in another Kansas

⁶³ Coats v. Coats, 161 Kan. 307, 167 P.2d 290 (1946).

⁶⁴ *In re* Windell, 152 Kan. 776, 107 P.2d 708 (1940). *But cf.*, Travis v. Travis, 163 Kan. 54, 180 P.2d 310 (1947), alternating custody between the parents in six-month periods following a divorce held not against the best interests of a four-year-old child.

⁶⁵ Wilkinson v. Wilkinson, 147 Kan. 485, 77 P.2d 946 (1938); *accord*, State v. Vorlicek, 229 Minn. 497, 40 N.W.2d 350 (1949).

⁶⁶ *In re* Hipple, 124 Kan. 3, 256 Pac. 1015 (1927).

⁶⁷ *In re* Bullen, 28 Kan. 781 (1882).

⁶⁸ Holmes v. Coleman, 195 Ark. 196, 111 S.W. 2d 474 (1937).

⁶⁹ Chandler v. Whatley, 238 Ala. 206, 189 So. 751 (1939), seven-year-old child's preferences ignored by the court; *cf.* Wooley v. Schoop, 234 Iowa 657, 12 N.W.2d 597, 602 (1944), where the court said: "The child's preference is important when the contest for his custody is between parents. It might be of some value when the contest is between a parent and other relatives, such as grandparents. But it is not very persuasive when the contest is between a parent and one who stands in no blood relationship to the child.", eleven-year-old boy awarded to his father against the child's wishes. State v. Vorlicek, 229 Minn. 497, 40 N.W.2d 350 (1949), eleven-year-old child's preference to live with aunt instead of father considered; Smith v. Smith, 7 A.2d 829 (N.J. Ch., 1939), *sustained*, 125 N.J.Eq. 384, 5 A.2d 774 (1939), ten-year-old boy's preference to remain with his grandmother rather than be awarded to his mother considered.

⁷⁰ Kogler v. Kogler, 163 Kan. 62, 179 P.2d 940 (1947).

case the court treated the statement of a fourteen-year-old boy that he wanted to stay with his grandparents as the expression of an "over-indulgent youth."⁷¹

There are a surprisingly large number of cases involving the validity of agreements in which parents have relinquished the custody of their children to others. In these cases the parents have usually acted during a crisis period: while the mother is fatally ill, just after the mother's death, during great economic stress, immediately after the birth of a child to an unmarried woman. When the crisis passes, then one or both parents want the child back. The Kansas court has uniformly held that unless the agreement has been followed by a valid adoption, it is void, or at least will not prevent the parents from reacquiring the child when they wish to do so.⁷² The reasons for this rule are that parents cannot contract away their obligation to support their children;⁷³ and children are not a form of property, so may not be the subject matter of gifts.⁷⁴

To be consistent with the contract cases, testamentary efforts to transfer custody of a child should not create legal custody or guardian rights in the appointed person. But there is dictum in Kansas to the contrary.⁷⁵ Also, in Kansas, a surviving parent may, by will, appoint a guardian for his children.⁷⁶

⁷¹ *Andrews v. Landon*, 134 Kan. 641, 7 P.2d 91 (1932).

⁷² *In re Windell*, 152 Kan. 776, 107 P.2d 708 (1940); *Tucker v. Finnigan*, 139 Kan. 496, 32 P.2d 211 (1934); *Andrews v. Landon*, 134 Kan. 641, 7 P.2d 91 (1932); *In re Kailer*, 123 Kan. 229, 255 Pac. 41 (1927); *Jendell v. Dupree*, 108 Kan. 460, 195 Pac. 861 (1921); *In re Meyer*, 103 Kan. 671, 175 Pac. 975 (1918); *Wood v. Shaw*, 92 Kan. 70, 139 Pac. 1165 (1914); *Pinney v. Sulzen*, 91 Kan. 407, 137 Pac. 987 (1914).

⁷³ *In re Windell*, *supra* note 72; *Chapsky v. Wood*, 26 Kan. 650 (1881).

⁷⁴ *Tucker v. Finnegan*, 139 Kan. 496, 32 P.2d 211 (1934); *and see Chapsky v. Wood*, *supra* note 73.

⁷⁵ *Delton v. James*, 107 Kan. 729, 193 Pac. 307 (1920); *but cf.*, *Cook v. McCabe*, 108 Kan. 172, 194 Pac. 633 (1921), and *In re Meyer*, 103 Kan. 671, 175 Pac. 975 (1918).

⁷⁶ KAN. G. S. 1949, 59-1802.

[TO BE CONCLUDED]