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Charles Rothenberg

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# CUSTODY OF CHILDREN IN MATRIMONIAL ACTIONS: THE LAWYER'S FUNCTION AND RESPONSIBILITY

CHARLES ROTHENBERG\*

Infant children whose custody is in dispute in matrimonial controversies are wards of the court. The lawyers representing the contending parties are officers of the court. Hence, counsel share with the court a responsibility towards the children which is equal to their obligations to their respective clients. These obligations are measured precisely by their responsibility to the children, for the reason that the parents can have no greater rights than those of the children.

The lawyer representing the father or mother of a child whose custody is in dispute can only discharge his duty to the extent that he serves the child's best interests. The child's benefit is the parent's gain; the child's detriment is the parent's loss. Parents are benefited when their children are properly fed, clothed, housed; when they have the advantages of good schooling, spiritual guidance, vacation and play; when they are happy and free of emotional and psychological conflicts. The lawyer discharges his duty to the client who has paid him and entrusted him with the advocacy of his cause when he strives to bring about these high objectives. Counsel for both sides are therefore in the truest sense the child's advocates.

This is an important consideration for lawyers to bear in mind when they come into court to press or oppose claims for custody. Too often they misconceive their true function. They act on the assumption that their clients have rights which in some vague and undefined way are independent of and to be distinguished from the rights of the child. To be sure, they invariably acknowledge the supremacy of the child's rights, but fall into the error of identifying them with the client's rights, when it should be the other way around. This is an error unfortunately which is often attributable to the courts as well. A Missouri court states:

In awarding the care and custody of the infant child, the court is concerned primarily with the welfare of the child; but the rights of the parents may not be altogether disregarded.<sup>1</sup>

A Wyoming court puts it as follows:

The controlling question in awarding custody of children is their welfare, but rights of parents must be considered if not conflicting with such welfare.<sup>2</sup>

And a Florida court goes even further and suggests that the parents' rights are paramount to those of the child:

The welfare of the child must, of course, be regarded as the

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\*Faculty Member Practicing Law Institute; Member New York Bar.

1. *Des Roche v. Des Roche*, 287 S.W. 786 (St. Louis Ct. of App., Mo., 1926).  
2. *Stirett v. Stirett*, 35 Wyo. 206, 248 Pac. 1 (1926).

chief consideration . . . but the inherent rights of parents to enjoy the society and association of their offspring, with reasonable opportunity to impress upon them a father's or a mother's love and affection in their upbringing, must be regarded as being of an equally important, if *not controlling consideration* in adjusting the right of custody as between parents in ordinary cases.<sup>3</sup>

This attitude finds support in our very statutes. In every jurisdiction there is legislation which in one form or another establishes the right to the custody of children. This is something which is taken more or less for granted. Yet, it runs counter to the universal policy of making the child's welfare the chief if not the exclusive issue in determining custody.

Properly speaking, and in the very strictest sense of the word, the client has no rights in the matter—only the child has rights. For example, we are all familiar with the universally accepted principle that where children of tender years are concerned, the mother is the preferred custodian. At Common Law (and, in varying degree, in some five states today), the father had the priority. It must be apparent that both ideas are predicated upon a fundamental fallacy. If either parent has a paramount claim to administer the child's guardianship, it is not merely because he or she is more competent to do it—*i.e.*, that it would be in the child's best interests for him or her to do it—but that the parent's own true interest in the matter must be protected and secured. But the question presents itself—what rights or interests of the parent are at stake? If any such rights or interests exist, it is only because the child's welfare creates them. The first stem from the other. That is why we find more and more of our courts making the child's welfare the only issue. The Maryland court holds that this matter of the child's welfare must be the "sole consideration;"<sup>4</sup> the New York<sup>5</sup> and Texas<sup>6</sup> courts call it the "controlling consideration;" even the Missouri court, which was quoted earlier, now seems to take a different position. In two recent decisions it declared that the child's welfare is the "sole objective"<sup>7</sup> and the "only end to be sought."<sup>8</sup>

A very good and concise statement on the subject came from an Oklahoma court which held that in custody disputes, it must be guided by "the best interests of the child in respect to temporal, mental and moral welfare, and should consider the influence and protection afforded by parental affection, if such be manifest." This puts the parents' "rights" in correct perspective. Parents are entitled to enjoy the society of their children only in the measure that they have earned it—and this, in turn, comes about not by force of their regard or solicitude for the children, but by the degree in which it has been demonstrated.

If these latter statements are more truly representative of the correct

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3. *Frazier v. Frazier*, 109 Fla. 164, 147 So. 464 (1933) (emphasis supplied).

4. *Swoyer v. Swoyer*, 157 Md. 18, 149 Atl. 190, 195 (1929).

5. See *People ex rel Way v. Williams*, 101 N.Y.S.2d 383, 385 (1950).

6. *Fannett v. Tompkins*, 49 S.W.2d 896 (Tex. Ct. of Civil App. 1932).

7. See *Glass v. Glass*, 37 S.W. 2d 467 (St. Louis Ct. of App., Mo., 1931).

8. *Abel v. Ingram*, 223 Mo. App. 1087, 24 S.W.2d 1048 (1930).

policy which the courts should adopt in determining the question of custody, then it follows that the procedure as it currently operates in the courts of our land, runs counter to that policy. As a single example of such inconsistency, a matrimonial decree usually provides that custody of the child is awarded to one or another of the contestants, most often a parent, whereas it should provide that it is the child who is allowed the right to be with one or the other. It is the child, in other words, who should be the beneficiary of the judgment—it is he who should be awarded guardianship by his father or mother.

There is more involved here than a matter of emphasis. It is not a question of formulation but of principle. The lawyer who seeks to serve his client's cause does not accomplish his purpose by merely stressing the child's interest. It is not enough that he elaborate this aspect of the matter: he must espouse it. Thus, it is a basic error to dwell on the harm which may befall the child if his client is denied custody, or the benefits which will accrue to the child if his client is granted custody, *so long as these considerations are in any sense identified with the client's rights.*

An understanding of all this is necessary to guide counsel in the correct representation of his cause. If he is the advocate of the child, then it means that he must assume that role and do so both in avowal and deed. Someone must speak up for the child: the contestants themselves are usually too subjective to be of any help: and since the child is generally too young to do it himself, the lawyer does it for him. The fact that his opponent purports to act in the same capacity, raises no contradiction: on the contrary, it represents a collaboration between them insofar as they pursue the same objective, with the sole difference that they disagree as to the best means of achieving it. This, in turn, means that counsel must be free to exercise his independent understanding and untrammelled judgment as to the correct position which he should take. It behooves him to make the decisions, chart the course which is to be followed and determine the means by which it should be done.

Let counsel by their uncompromising devotion and adherence to the child's cause, serve notice not only to their clients but to the community as a whole that they recognize the real import of custody, that it creates obligations not prerogatives, and that it is not a privilege but a trust. In that way they will be true to the tradition of service which distinguishes their high calling and at the same time make themselves incomparably more effective in achieving a successful result.