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CUSTODY INCIDENT TO DIVORCE IN FLORIDA

LEO M.* AND LOUISE A.** ALPERT

The problem of juvenile delinquency—better called parental failure—has caught hold of legal and social agencies and of the community. As one result, juvenile courts: in which a specialized legal approach has been coupled with social workers professionally trained in the juvenile field. That juvenile courts, by and large, are not what they ought to be, appears less a question of defective basic thinking and more a matter of inadequate funds, together with the usual difficulties in translating theory into practice.

Yet, in divorce actions, so far as the welfare of children is involved, neither the basic thinking of the men of law nor of social agencies nor of the community has approached the level of their consideration of juvenile delinquency. That dichotomy is all the more perplexing because it is known that children of divorced parents are usually disturbed and unhappy, find it difficult to relate themselves properly to a community in which the broken home is not natural, have extremely weighty burdens of adjustment, especially in their own marriages, and, as a result of the broken home, are given a strong shove toward neuroticism and delinquency both as persons and as citizens.¹

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1. The case-histories of any social agency dealing with children record the difficulties children from broken homes face in making a satisfactory social adjustment. There in graphic form one finds the life-histories behind such statistics as those following, which are taken from *Juvenile Delinquents Grown Up* (1940), by Sheldon & Eleanor Glueck, at pp 172-174: Juvenile delinquents who have made a success of parole; coming from unbroken homes, 60.9%; coming from broken

The hiatus between the way in which the child's welfare is served in the juvenile court and in the divorce court is all the more appalling, it is suggested, in view of the fact that general agreement would probably be captured on the considerations which follow.

First, the community is a party in interest in divorce litigation, especially where children are involved, because the home is the basis of our society and the maintenance of the family unit a matter of public-social-concern.

Second, a custody award is not the conclusion of a case but really the beginning; because, to be effective, continuing supervision is required.

Third, the study necessary for a sound decision on custody must be directed at "non-legal" factors.

Fourth, the mere fact of divorce may be a danger signal warning of some sort of immaturity and hence requiring careful examination of the people involved. This observation is not to be taken as a plea for less divorce nor as a condemnation of the divorced; but the naked fact of divorce may be essentially a negation of fitness for family relationships or may indicate, at bottom, a type of behavior or personality not compatible with parental responsibilities.

Fifth, present judicial procedure is defective. Custody issues are determined almost solely by an adversary proceeding. The parents are free to use the children as weapons against each other. There is almost invariably no detailed and exhaustive study, by a trained caseworker interested in the child's welfare, of the parents, of the child, of the prospective home and of the matrix in which the child will live. After a custody award has been made, there is no supervision in fact of the way the custody decree is working; for there is no one to call to the attention of the court bad handling of the child by the parent in custody, no one except the other parent who may not be interested, who may be away, or who may have a personal axe to grind.

Examination of the Florida decisions on custody in divorce suits, decisions which, with some exceptions, are

homes, 39.1%; of those who have failed under parole, coming from unbroken homes, 48.9%; coming from broken homes, 51.1%.

fairly typical of those in the other states, should establish for the doubting Thomas the validity of the above generalizations and make plain the need for a solution to the problems exposed. For there is a solution, relatively easy of application, rather inexpensive, and quite sound.

I

Apparently the first case to discuss custody, though by way of obiter dictum, was *Phelan v. Phelan*, decided in 1868². The facts of the case are not helpful, as the court dealt mostly with technical aspects of the bill for divorce; but during the discussion said: ". . . the court may in every case take [make?] such order concerning the care and maintenance of the children as may be just."****³ And Judge Hart, in his concurring opinion, quoted Bishop to the effect that a divorce proceeding, though on its face a controversy between only the parties of record, was in fact "a triangular suit, sui generis, the government or public occupying the position of a third party without counsel, placing on the court the duty to protect its interest."⁴

Such recognition of the community interest—the social aspects—in divorce litigation is triply important: The tough-minded lawyers and judges who need the authority of an adjudication to be convinced of anything were told that they should abandon their narrow legal approach; the community was informed that it had an interest; the strong legal foundation was laid for an effective procedure in custody cases. And if blame is to be cast for the present deplorable state of custody law and procedure it is more than an even question that the community and the so-called social agencies had their notification to step forward some eighty years ago.

Yet the next Florida case, *McGill v. McGill*, decided in 1882,⁵ laid no stress on the sound law previously enunciated but merely remarked that the father's claim to custody, superior to the mother's by the "unwritten law", could be forfeited by ill conduct, and that the court could

² 12 Fla. 449.

³ 12 Fla. at 458.

⁴ 12 Fla. at 465.

⁵ 19 Fla. 341.

interfere, if necessary, with the ordinary rights of both parents. Thus again there was recognized the social interest in custody.

Perhaps, however, the most striking of the Florida cases, the one that illustrates best the theoretical generalizations anent custody incident to divorce, is *Williams v. Williams*, decided in 1887.⁶ There the husband sued for divorce and the wife filed a crossbill. After apparently extensive hearings it was determined that the husband had driven his wife away by physical and mental cruelty—the mental cruelty having consisted in part of unfounded accusations that the wife had engaged in an unnatural practice. The husband had kept with him the three children of the marriage, daughters, aged at the time of the hearings, nineteen, fifteen and eleven, who, the court found, had their minds “poisoned” by their father. For the record was replete with letters written by the girls to their mother in which she was called a “low, mean, lying creature”, accused of “rotten meanness” and so on. Though the court determined that the accusations against the wife were unfounded, and in an opinion covering almost five pages exonerated the wife and upheld the grant to her of the divorce on her cross-bill, the court stated in two lines its decision on the question of custody: which was that due to the wife’s want of means and the “preference of the children” their custody would remain in the father.

There may have been factors in the case not dealt with by the opinion, or there may have been matter known to the court outside the record, but, standing on the opinion, which is supposed to state the reasons for the decision, a number of important observations can be made.

If the minds of the children were “poisoned” by their father, was it to the welfare of the girls that they remain in the custody of such a parent? The court, having found the accusations against the mother unfounded, how was that poisoning to be purged? What valid preference as to parent could be made by children whose minds were in fact perverted? Should the wife’s want of means stand

⁶ 23 Fla. 324, 2 So. 768.

in the way of her custody of the children if her husband be financially able to provide support?

Those questions are questions with which the divorce courts and lawyers cannot deal, it may be said. But those questions are the questions that arise in custody incident to divorce and they are as important as the legal decree. It is those questions that must be handled in the divorce courts if the courts really mean that the public has an interest which the courts protect. Of equal importance—and appalling enough—is the fact that so far as legal thinking and procedure is concerned that decision of 1887 could easily be repeated today.

The several decisions from 1887 to 1930 present little of interest⁷ but *Fagg v. Baker*⁸ poses a pretty, and not so minor, question. There the divorced husband refused to give his ex-wife \$80 to enable her to visit their son at a Military Academy. The refusal was upheld because, said the court, there was no legal warrant for such award and on the basis of the record we cannot see how such an item would come under the category of support, nurture, protection or education of the child.

It may be that this opinion simply reflects a record that was not built up to show the need for the child to have a visit from his mother at his school. That would be the charitable interpretation. Here again, however, and in this perhaps minor way, is exemplified the necessity for a technique that would not leave the welfare of the child to be determined solely by the contentions of his parents, and the keenness of their lawyers in winning cases.

To skip *Duke v. Duke*,⁹ in which the statement was again made that it is the distinctive duty of chancery to protect children, brings *Frazier v. Frazier*,¹⁰ the first of the divided custody cases, in which respect Florida law differs from that generally prevailing. The prevailing climate of judicial opinion holds divided custody to be

⁷ *Dickinson v. Dickinson*, 58 Fla. 214, 50 So. 572 (1909); *Harris v. Harris*, 65 Fla. 50, 60 So. 122 (1913); *Benjamin v. Benjamin*, 78 Fla. 14, 82 So. 597 (1919); *Meadows v. Meadows*, 78 Fla. 576, 83 So. 392 (1919); *Baker v. Baker*, 94 Fla. 1001, 114 So. 661 (1927).

⁸ 100 Fla. 1415, 131 So. 385 (1930).

⁹ 109 Fla. 325, 147 So. 588 (1933).

¹⁰ 109 Fla. 164, 147 So. 464 (1933).

dangerously unsound and an expedient only rarely—if ever—to be adopted.¹¹ For divided control means confusion to the child mind; an absence of a sense of security that a child can develop only if he knows just where and to whom he belongs; a conflict of loyalties varying with the calendar; emotions based on whoever caters most to the child's comforts and desires; an opportunity to play one parent against the other; and, basic to all these, the absence of a home.¹²

In the Frazier Case the wife had obtained the divorce on the ground of desertion. The child, Diana, after being decreed into the temporary custody of her paternal grandmother, had her custody divided every twelve months between father—from October 15th to May 15th—and mother—from May 15th to October 15th. Some two years after the decree, the mother, having remarried, petitioned for modification and was awarded exclusive custody, with the father having the usual right of visitation and two weeks a year. On appeal, such modification was reversed and the Supreme Court of Florida, calling neither parent a paragon of virtue as a parent, in a lengthy opinion reached the somewhat Solomonic conclusion that the father should have custody for three months and the mother for nine. The gist of the opinion was that the welfare of the child was the chief consideration but the "inherent rights of the parents" were important, too; that the primary duty of support and maintenance rested on the father and he could not discharge that duty without control of the child.

Indeed, the Florida Supreme Court would seem to exhibit some vacillation on the question of weighing the welfare of the child against or with the "inherent rights of the parents" and more especially of the father.

In *Minnick v. Minnick*¹³ the husband sued and obtained divorce for desertion. He was awarded custody of the

¹¹ See 27 *C. J. S. Divorce*, ss. 308 d at p. 1167. *Corpus Juris*, in its usual non-evaluative style, cites cases on both sides. By far the greater number of cases, however, refuse to divide custody.

¹² See, for a tabulation of the reasons, *Comment, Custody and Control of Children*, 5 *Fordham L. Rev.* 460 (1936) at 469, footnotes 85 to 88.

¹³ 111 Fla. 469, 149 So. 483 (1933).

eleven year old son of the marriage. The decree was affirmed on appeal with the court stating that fathers are generally entitled to custody. Of interest, also, but probably no longer valid law, was the holding of the court that, having had jurisdiction to render a decree of divorce, there was power also to award custody even though the child in question was out of the state with its mother throughout the litigation.

In *Lewis v. Lewis*¹⁴ the husband was again the successful complainant in the divorce action but the trial court decreed custody to the mother with the father's right of visitation limited to two afternoons a week for six months in each year. On appeal, such decree was reversed as being an unreasonable limitation of the right of visitation and the case remanded to the Chancellor for a fresh determination.

*Gedney v. Gedney*¹⁵ separated children from each other: a decision reached with the utmost reluctance in most states,¹⁶ though a great deal depends on the ages and relationship of the children and unfortunately the *Gedney* opinion does not reveal those facts. Unless there are circumstances which indicate that the children's welfare, and not parental desire, are best served by separating brothers and sisters, the keeping of children together seems to cement relationships important both in childhood and adult life.¹⁷

In the *Gedney* Case the wife had obtained the divorce and custody of the daughters; the husband, custody of the son. Some two years later the ex-wife petitioned for and obtained custody of the son also. The Florida Supreme Court reversed:

It appears that custody of the boy was decreed from the husband to the wife as a sort of penalty on the hus-

¹⁴ 112 Fla. 520, 150 So. 729 (1933).

¹⁵ 117 Fla. 686, 158 So. 288 (1934).

¹⁶ See *Kartman v. Kartman*, 163 Md. 19, 161 Atl. 269 (1932), for an extreme example. *White v. Seward*,Md....., 48 A (2d) 335 (1946).

¹⁷ From many years of experience with the placing of children in foster homes, social agencies have found that there is usually a better chance of adjustment if siblings are placed together in one home.

Compromises in selecting the foster home itself are made in order that the children can be kept together.

band for having harassed and annoyed the wife about custody of the girl. There is no finding that the husband is not a proper person to have custody of the boy. Neither is there anything in the record to show that the son is subjected to any untoward influences; that he is not properly cared for; that he is not properly reared; or that his best interests would in any way be served by the proposed change of custody. The order of the Chancellor was therefore not warranted in law.¹⁸

There need be no cavil at this decision, but is the procedure sound which permits children to be buffeted around because of their parents' disagreements and thus subjected to the conflicts between father and mother without the intervention of a person who is concerned with neither and whose function it is not to judge a controversy but to protect the child?

Putnam v. Putnam,¹⁹ to skip several intermediate cases,²⁰ is the best proof that the question just raised is weighty and must be answered.

The parents were divorced in 1932 and the two minor children decreed to each parent for six months every year. Dividing custody again. After one child died, the wife was given custody of the surviving girl for ten months and the husband for two months (July and August) each year. When that decree was again modified to give the father custody from July 15th to September 15th, the girl, then aged sixteen, unusually keen, with a fine high school record, and apparently in every way an exceptional person, refused to go with her father. So the Chancellor decreed that, if she persisted in her refusal, all support and maintenance payments by the father were to be suspended so long as she remained recalcitrant.

The question in the case was put sharply by the Florida

¹⁸ 158 So. at 289. Paraphrase of opinion.

¹⁹ 136 Fla. 220, 186 So. 517 (1939).

²⁰ *Fekany v. Fekany*, 118 Fla. 698, 160 So. 192 (1935), *Simmons v. Simmons*, 122 Fla. 325, 165 So. 45 (1936), *Heckes v. Heckes*, 129 Fla. 653, 176 So. 541 (1937), *Mooty v. Mooty*, 131 Fla. 151, 179 So. 155 (1938), and *Kennard v. Kennard*, 131 Fla. 473, 179 So. 660 (1938); *Pottinger v. Pottinger*, 133 Fla. 442, 182 So. 762 (1938), contributes little to the present discussion.

Supreme Court: Had the Chancellor power to suspend support to the girl because she persistently and arbitrarily refused to go into the custody of her father?²¹

The question was answered affirmatively with equal sharpness: The Chancellor has a broad discretion; no reason is given by the girl for her refusal—there must be something more than an arbitrary refusal; for years the father has met every requirement of the court and he is a fit and proper person greatly interested in his daughter; decrees must be enforced; and the means of enforcement here employed were not harsh.

Again, of course, the caveat must be taken that there may have been matter in the record not disclosed by the opinion or there may have been matter outside the record of which the court was aware. But the mere fact of the refusal of the girl, when normally the child of divorced parents looks forward to a vacation with father, should have been a danger signal to the Chancellor that something was amiss with one or two or all three of the parties. Under present legal procedures, of course, the Chancellor and the parties were left to stew in the situation without such assistance or technique that would have enabled them to come to grips with what may well have been the real facts in the case.

The basic, though not the "legal", question in the Putnam Case, was not "Had the Chancellor power to suspend support etc.?" but "Who could best get inside a sixteen year old girl's mind to discover her feeling and their basis or lack of it and thereafter handle the pathological situation?"

In *Green v. Green*²² and *Mehaffey v. Mehaffy*²³ the doctrine was reiterated that the welfare of the child is the prime objective of the law and that a very large discretion is accorded the Chancellor; but then in *Fields v.*

²¹ 186 So. at 518.

²² 137 Fla. 359, 188 So. 355 (1939). *Riesnen v. Riesner*, 136 Fla. 129, 186 So. 669 (1939), apparently awarded an infant son to a wife guilty of adultery but the facts are not clear from the opinion.

²³ 143 Fla. 157, 196 So. 416 (1940). *Gratz v. Gratz*, 137 Fla. 709, 188 So. 580 (1939), contributes little to the present discussion.

Fields,²⁴ where the wife was granted the divorce and the Chancellor awarded custody of the three children, three, five and seven years old, to their paternal grandfather, the Supreme Court of Florida reversed, placed the youngest child in the exclusive custody of the mother and the two others in her custody also except for the months of June, July and August when they were to be in the custody of their father. Said the court:

While the welfare of the children is paramount to the comfort, desires and welfare of the parents, the statutes of this state recognize the natural, inherent and consequently legal right of parents to have the custody of their children. The rights and wishes of the parents will not be subordinated unless they are opposed to the welfare of the children.²⁵

Finally *Randolph v. Randolph*²⁶ may be said to have tipped the scales toward recognizing the welfare-of-the-children theory, if that decision is to be followed. There the husband sued for divorce for extreme cruelty and habitual indulgence in violent and ungovernable temper. The wife cross-billed on the same grounds. The Chancellor decided that both parties had proved their cases; and awarded custody of the five year old child to the father and the two year old to the mother. Both parents, as the court remarked, tried "to smut each other's character" and each claimed that, having been found fit for custody of one child, custody of both should follow. In addition, the father set up a claim of paramount right. The affirming opinion of the Supreme Court of Florida, written by Justice Terrell in his best style, strongly emphasized the "ultimate test" as being the spiritual and moral well-being of the child; insisted that women, in modern life, were as able as men (if not more able, hinted

²⁴ 143 Fla. 886, 197 So. 530 (1940). *Davis v. Davis*, 143 Fla. 282, 196 So. 614 (1940), and *Boyer v. Andrews*, 143 Fla. 672, 196 So. 825 (1940), contribute little to the present discussion.

²⁵ 197 So. at 531. Paraphrase of opinion.

²⁶ 146 Fla. 491, 1 So. (2d) 480 (1941). *Bergman v. Bergman*, 145 Fla. 10, 199 So. 920 (1940), and *Grizzard v. Grizzard*, 146 Fla. 17, 200 So. 209 (1941), (both children of drunken wife awarded to husband), contribute little to the present discussion.

the court) and buried the doctrine of paramount right of a father.

Yet, either the United States Supreme Court misread Florida law, or the developmental interpretation here given is mistaken, to judge from New York *ex rel. Halvey v. Halvey*.²⁷

In that case the wife had obtained a Florida divorce and custody of the eight year old son of the marriage. The husband came to Florida from New York and the day before the entry of the decree took the child to New York where the wife sued for custody by way of habeas corpus. The New York court ordered that the custody remain with the mother, that the father have rights of visitation including the right to keep the child with him during stated vacation periods, and that the mother file a surety bond to ensure her performance.

The case is important in several respects but at this point is cited on the question of just what significance the "ultimate test" of welfare of the child may be. Mr. Justice Douglas, in his review of the Florida law, remarked that the interest of the child is paramount; but then went on to say that "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 rights of custody as between parents in ordinary cases."²⁸

If that be correct, then the welfare of the child is not paramount but must be taken as of no more weight than the "inherent rights of the parents". It would appear from this review of the cases that Florida law has gone beyond that point.

On divided custody, however, as has already been remarked, the Florida law remains static, even though the dangers of divided custody were noted in *Phillips v. Phillips*.²⁹ The wife there had obtained divorce when the

²⁷ 67 S. Ct. 903 (1947).

²⁸ 67 S. Ct. at 905. Italics supplied.

²⁹ 153 Fla. 133, 13 So. (2d) 922 (1943). *Tenny v. Tenny*, 147 Fla. 672 3 So. (2d) 375 (1944); *Todd v. Todd*, 151 Fla. 134, 9 So. (2d) 279

baby boy was seventeen months old but the father had been awarded custody. About a year later, the wife having re-married the day after the decree, she petitioned for custody and was awarded the child; but the decree also provided that the father was to have custody the first week in every month. This, fairly obviously, carried divided custody to its *reductio ad absurdum* and the Chancellor was reversed. Mr. Justice Buford in the course of the opinion stated that experience showed divided custody to be dangerous because the child becomes confused by the shift from one household to another. The cutting edge of the decision, however, was the legal doctrine that the Chancellor once having passed his decree (the original decree in the case), some change in circumstance must be shown for an alteration; and that in the case at bar nothing had been shown rendering the father unfit.

*Pittman v. Pittman*³⁰ may be said to be the first case in which the court ruled that neither parent was fit. The husband sued on the ground of desertion and asked for custody of the five year old son. The wife denied the charge and prayed that custody be awarded to her mother who had had the child for over four years, ever since the boy had been about eight months old. The Chancellor granted the husband divorce and awarded custody to the father, the child to be kept at the home of the father's sister. The wife was denied any visitation. Said the Florida Supreme Court: The maternal grandmother's place is better for the child; she loves the child, the child knows her; she lives on a farm, a farm is a natural sanctuary and breeding ground for democracy, etc.; neither parent is fit but both may visit the child at the farm.

Yet in *Watson v. Watson*³¹ the admittedly dangerous course of dividing custody was again employed. There, custody of two girls, five and three, was awarded to the mother (who had obtained the divorce) for six months and to the father for six months each year. The mother's

(1942); and *Slade v. Slade*, 153 Fla. 125, 13 So. (2d) 917 (1943), contribute little to the present discussion.

³⁰ 153 Fla. 434, 14 So. (2d) 671 (1943).

³¹ 153 Fla. 668, 15 So. (2d) 446 (1943).

appeal for full custody was rejected. The decided weight of authority, said the Court, supports the position of the mother (because of the age and sex of the children) but both mother and father work; the mother lives with her sister who has children of her own, the father lives with his mother; there is no showing that the best interests of the children are not served by divided custody; the mother's preferential right to custody (because of age and sex of the children) depends on her not working; nurseries cannot develop moral background, spiritual culture, a sense of social responsibility, or reverence of God.

It is difficult to reconcile the fact that the same judge, Justice Terrell, wrote the opinion in that case and in *Pittman v. Pittman*.³² To the point that there was no showing that divided custody was not in the best interests of the girls, the common experience of men, as well as the remarks in *Phillips v. Phillips*,³³ come to mind. To the point about the mother working, there is a very real question; but would it not have been more wise to remand the case with instructions, than to affirm the Chancellor? For the mother's appeal may well have been based on counsel's feeling that, in law, the Chancellor was wrong and the mother could both work and have her children.

In effect, and probably due to astute counsel, *Jones v. Jones*³⁴ did just that and, speaking practically, knocked the *Watson Case* into a cocked hat.

In the *Jones Case* the wife had obtained the divorce and custody of the two children, a boy six and a girl four. About two years later, on petition of the husband, the Chancellor divided the custody. At first, when the wife worked in a restaurant operated by her sister, she and

³² *Supra*, n. 30.

³³ *Supra*, n. 29.

³⁴Fla....., 23 So. (2d) 623 (1945), *Gaster v. Gaster*, 154 Fla. 62, 16 So. (2d) 517 (1944), *Chiapetta v. Jordan*, 153 Fla. 788, 16 So. (2) 641 (1944), *Vinson v. Vinson*, 154 Fla. 393, 17 So. (2d) 965 (1944), *Blanton v. Blanton*, 154 Fla. 750, 18 So. (2d) (1944), *Sauer v. Sauer*, 154 Fla. 827, 19 So. (2d) 247 (1944), *Hart v. Howell*, 154 Fla. 878, 19 So. (2d) 317 (1944), *Loomis v. Loomis*, 155 Fla. 355, 20 So. (2d) 125 (1944), and *Snider v. Snider*, 155 Fla. 788, 21 So. (2d) 546 (1945), contribute little to the present discussion.

the children lived with her sister; but later she placed the children in a boarding school. Said the Court: The welfare of the children is paramount; ordinarily in the case of children of tender years, divided custody is not to the child's welfare, nor is taking the child from the mother; the original decree awarded custody to the mother; that decree should be changed only on the showing of new conditions; the fact that the mother had to work and so placed the children in a boarding school is not sufficient justification to divide custody; the mother now offers to take the children back if the court thinks that best; we will remand to the Chancellor for a fresh determination guided by our opinion.

Despite this well-handled effort at resolving a complex situation, in *Stewart v. Stewart*³⁵ the Chancellor divided the custody of a two year old girl between mother and father, two months off and two months on. The decree was of course reversed, on the authority of the Phillips Case.³⁶

Thus is presented the case law on custody incident to divorce in Florida.

II

Two observations in particular need to be made on these cases, on the legal level.

The first is that the concept of "custody" appears to be confused, or misapplied, or not thought through.

The Florida decisions use the same word—"custody"—and apparently mean it in all its legal significance—to apply to the parent who is placed in temporary control of the child, as for example on vacations, holidays, and so on, as well as to the parent placed in permanent control. By permanent, of course, is meant, control subject to further order of the chancery court.

The wisdom of not distinguishing between "custody" and "control" is most questionable. The person who has "custody" is the guardian of the child, the "natural guard-

³⁵ Fla....., 24 So. (2d) 529 (1946). *Stafford v. Stafford*, Fla....., 23 So. (2d) 673 (1945), contributes little to the present discussion.

³⁶ *Supra*, n. 29.

ian" in the case of the mother or father.³⁷ A guardian has definite legal obligations and rights. It is the guardian who can deal, without order of court, with the child's personal property up to \$500 and settle tort claims not exceeding \$100.³⁸ It is the guardian who must determine the legal, medical, support and educational needs of the child. "Custody" therefore imports these legal responsibilities and is so recognized by the Florida Guardianship Law which covers the contingency of divorce:

"* * * In the event of a divorce between the parents, the natural guardianship shall belong to the parent to whom the custody of the children was awarded. If the parents are given custody, then both shall continue as natural guardians. In the event a divorce is granted, and neither the father nor the mother is given custody of the children, then neither can act as natural guardian of the children.* * *"³⁹

The Florida cases which divide "custody"—to the father for three months and to the mother for nine (*Frazier v. Frazier*), to the father for two months and to the mother for ten (*Putnam v. Putnam*), and so on—thus create, needlessly, perplexing legal complications. In the event of an injury to the child during the two months in the custody of the father, who is the legal guardian? Can the two month guardian determine matters that the ten month guardian might oppose? Can the two month guardian act to the detriment of a possible course of action planned by the ten month guardian? In the case where custody is divided six months to each parent during the calendar year, the problems become even more complicated.

Generally, other courts denominate one parent as the parent who has "custody" and speak of the other parent as having a right to keep the child for stated periods.⁴⁰ It is suggested that such use of the concept "custody" be adopted in Florida. One parent should be looked to for

³⁷ ss 744.13 Florida Statutes 1941, as amended.

³⁸ ss 744.13(2), Florida Statutes 1941, as amended.

³⁹ ss 744.13 Florida Statutes 1941, as amended.

⁴⁰ "Custody is a slippery word", says *Sayre, Awarding Custody of Children* (1942), 9 Univ. of Chicago L. Rev. 673.

determination of the legal, medical, support and educational questions affecting the child. The degree to which that parent will consult with the other will depend upon the extent of cooperation between the two in matters affecting the child. But it is important, legally, that one parent become the legal guardian. It is even more important, from the social standpoint, that one parent make those decisions for the child instead of there being a basis for friction between the parents which would result in confusion to the child. It is interesting to note, parenthetically, that this point about "custody" probes down into one of the reasons why divided custody is almost invariably detrimental.

The second observation to be made on the legal level is that the statement in *Minnick v. Minnick*⁴¹ (to the effect that because the Florida courts had the jurisdiction to render a decree of divorce they also had jurisdiction to award custody of a child even though the child was out of the state at the time) is undoubtedly no longer law. *Dorman v. Friendly*⁴² ruled that the Florida courts have no power to award custody unless the child is physically within the jurisdiction of the court; and the discussion of the Supreme Court in the *Halvey Case*⁴³ is rather pointed on that aspect.

III

This review of the adjudications in custody incident to divorce should establish, without more, the significance, meaning and content of the theoretical considerations that prefaced this study. The plain point is that what may be dubbed the "basic facts" in custody cases—the facts of personality, temperament, mental equipoise, parental ability, and the like—are not handled, save superficially, by present procedures. It would be cavalier, however, not to pay this well earned tribute to our judicial system: that judges under inadequate procedures, presented with lop-sided, partial data, have done as well as they have in deciding custody issues.

It is suggested that the interest of the community could

⁴¹ 111 Fla. 469, 149 So. 483 (1933).

⁴² 146 Fla. 732, 1 So. (2d) 734 (1941).

⁴³ 67 S. Ct. 903 (1947).

—and should—be protected by referral of every divorce action involving the custody of children (whether or no the parents have agreed on custody) to an appropriate child agency, welfare board, probation department or some other organization competent to study and treat the situation from the viewpoint of the child's welfare. Such organizations now exist in almost every city; the State Welfare Board, in fact, now acts as an arm of the court in adoption cases.⁴⁴

Indeed, this last sharpens the suggestion. For where adoption used to be merely a petition by the prospective parents and an order of court after hearing the petitioners, today in Florida, as in many other forward-looking states, a study must be made of the child and of the prospective parents by the child placing agency in custody or by the State Welfare Board.⁴⁵

The simplicity and effectiveness of the suggestion of referral of custody cases therefore lies in the firm foundation of already established law and practice. The particular agency could act as the agency acts in adoption cases and the cases could then progress through the usual procedure. Nothing more than a rule of court would be required to establish the procedure.

That the State Welfare Board and other agencies would cooperate, given the status, seems patent because they are later confronted with the after-effects of divorce under unfavorable circumstances.

Thus, in every aspect of a child's relationship to his community, whenever court action is involved, there would result a trained study of the entire pathological situation directed at what is best for the child; including that most toxic situation of all—custody incident to divorce. For death and disaster (because they are socially accepted catastrophies of common risk) can be borne better by most children than the more festering trauma caused by a divorce—the broken home.

⁴⁴ See Ch. 72, Florida Statutes 1941, as amended.

⁴⁵ ss 72.15 Florida Statutes 1941, as amended. By Chapter 23721 of the Laws of 1947 the prior law was wisely amended to require the State Welfare Board to submit, with its recommendations, a written statement of the facts found in its social investigation.

Hard-headed lawyers and judges alike will find in this suggested procedure no "functional nonsense" nor any "esoteric sociology" but only a common-sense and down-to-earth effort to avoid the horrendous decisions in custody cases by handling the basic facts involved. This ounce of prevention in the divorce court might well reduce the pound of cure in the juvenile—and criminal.