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## Comment

### CUSTODY OF CHILDREN: BEST INTERESTS OF CHILD VS. RIGHTS OF PARENTS

The rule is generally established that natural parents, unless declared unfit, have the right to the custody and care of their children upon the severing of marital ties by divorce or separation.<sup>1</sup> This is, of course, the common law rule, and is also the rule adhered to in California. In many jurisdictions following this rule, including California, the statutes, however, state specifically that upon awarding custody of minors, the best interests of the child, rather than "parental right", shall be paramount.<sup>2</sup>

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<sup>1</sup> 27 C.J.S. (Divorce) §308 at 1169 ("... The parent's right by nature and by law, to the custody of children, should never be denied, except for the most cogent reasons, and unless it is clearly shown that both parents are unqualified.").

In declaring parents to be unfit to have custody of their children, the courts, almost unanimously, do not consider financial unfitness as a criterion, but confine the term "unfitness" to mental or moral incompetence. When the parent has abandoned his child, even though otherwise "fit", he is deemed, universally, to have forfeited his rights to custody. Abandonment, however, must be more than mere physical separation, and must include the *intent* to abandon as well. *Estate of Mathews* (1914) 169 Cal. 26, 145 Pac. 503, *In re Green* (1923) 192 Cal. 714, 221 Pac. 903; 13 CALIF L. REV. 54. (The author of the note, working from the accepted rule, confines himself to the factors determining unfitness of parents. This question is beyond the scope of this note).

<sup>2</sup> CAL. CIV. CODE §138; MICH. COMP. LAWS (1929) §§12737, 12738, 12852; MO. REV.

In the recent case of *Roche v. Roche*,<sup>3</sup> the Supreme Court of California followed the prevailing view in reiterating its established position on this question. The trial court, in the principal case, awarded physical custody of the child to the paternal grandparents. Joint control and privileges of visitation were given to both parents, neither of whom were found to be unfit or to have forfeited in any manner their claim to custody. In making its award, the court stated that, "The best interests of the said minor child will be subserved. . . ."<sup>4</sup> The district court of appeal affirmed the judgment of the superior court,<sup>5</sup> but judgment was reversed on appeal. Thus, despite the wording of section 138 of the Civil Code, which reads in part as follows:

" . . . In awarding the custody the court is to be guided by the following considerations: (1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question; (2) As between parents adversely claiming the custody, neither parent is entitled to it as of right . . . ."

the court manifestly declares that regardless of the interests and well-being of the minor child, the parent must be found unfit before an award of custody may be made to a third person.

It should be noted, however, that the court in coming to this conclusion is guided by its own earlier opinion in *Stever v. Stever*<sup>6</sup> where-

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STAT. (1939) §1528; ORE. COMP. LAWS ANN. Vol. 2 (1939) CODE CIV. PROC. §9-914; FLA. STAT. (1941) §65.14; MINN. STAT. (1941) §§518.17, 518.18; OKLA. STAT. (1941) 30 §11; KY. REV. STAT. (1942) 403.070; ILL. REV. STAT. (1943) 40 §14; NEB. REV. STAT. Vol. 3 (1943) §§42-310, 42-311, 42-312; MASS. ANN. LAWS Vol. 6 (1944) c. 208, §§31, 32.

<sup>3</sup> (Nov. 1, 1944) 25 A.C. 126, 152 P. (2d) 999.

<sup>4</sup> *Ibid.* at 127, 152 P. (2d) at 999.

<sup>5</sup> (1944) 147 P. (2d) 687.

<sup>6</sup> (1936) 6 Cal. (2d) 166, 56 P. (2d) 1229. This view has been set out in a series of cases, but the *Stever* case was the first supreme court decision which was handed down after codification changes were made in 1931. Most important of these changes, perhaps, was the omission of the words of section 1751 of the Code of Civ. Proc. which had been cited and relied upon in many California cases. (Amended by Stats. 1931, p. 1298 by adding the last sentence in the first paragraph, and subds. 1 and 2, similar to subds. 1 and 2, §246, *infra* note 9). Estate of Mathews, *supra* note 1 (without first finding parents incompetent to care for the child, the court cannot award its guardianship to strangers); Eddlemon v. Eddlemon (1938) 27 Cal. App. (2d) 343, 80 P. (2d) 1009; *In re White* (1942) 54 Cal. App. (2d) 637, 129 P. (2d) 706. The latest holding in accord is *Heinz v. Heinz* (1945) 68 A.C.A. 849, 850, 157 P. (2d) 660, 661 "The law is established in California that a court does not have the jurisdiction to award the custody of a minor child to a stranger as against a parent who is found to be a fit and proper person to have its custody . . .").

The leading case on guardianship, *In re Campbell* (1900) 130 Cal. 380, 62 Pac. 613, held that sections 246 and 197 of the Civil Code should be read in conjunction with section 1751 of the Code of Civ. Proc. The net result, the court stated, is ". . . but a

in it approved the district court of appeal case of *Newby v. Newby*,<sup>7</sup> and stated that it adopted the principles of custody expressed therein.<sup>8</sup> In a situation similar to that found in the principal case, the court in the *Newby* case had held that former subdivision 1 of section 246 of the Civil Code<sup>9</sup> (wording of which is identical with that of section 138(1) of the Civil Code, *supra*) should be construed with section 197 of the Civil Code which reads in part as follows:

"The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings. . . ."

The court held that these two sections construed together, ". . . contemplate that the natural right of the parent to the care of a minor

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re-expression of the principles of the common law governing the subject." (130 Cal. at 382, 62 Pac. at 614.) This section, deleted in the 1931 recodification, required that, "The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child in preference to any other person. . . ." (Repealed c. 281 Stats. of 1931; Appendix CODE CIV. PROC. §1700 (Deering, 1931), and now appears in PROBATE CODE § 1407 with former §246(3) of the CIVIL CODE).

<sup>7</sup> (1921) 55 Cal. App. 114, 202 Pac. 891.

<sup>8</sup> *Stever v. Stever*, *supra* note 6, at 169-170, 56 P. (2d) at 1231, "This case [*Newby v. Newby*] seems to be upon 'all fours' with the instant action, and in our opinion should control our decision of the question as to the necessity of a finding as to the unfitness of the parents to have custody of said minor before it can award the custody of said minor to a stranger."

<sup>9</sup> Repealed c. 281 Stats. of 1931, in the changes which were made when the Probate Code was adopted; Appendix, CODE CIV. PROC. §1700. Former CIVIL CODE §246 read as follows:

"In awarding custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations:

"1. By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question;

"2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; and if it is of an age to require education or preparation for labor and business, then to the father;

"3. Of two persons equally entitled to the custody in other respects, preference is to be given as follows:

- (1) To a parent;
- (2) To one who was indicated by the wishes of a deceased parent;
- (3) To one who already stands in the position of a trustee of a fund to be applied to the child's support;
- (4) To a relative.

"4. Any parent who knowingly or willfully abandons, or having the ability so to do, fails to maintain his minor child under the age of fourteen years, forfeits the guardianship of such child;

Child in orphan asylum. . . ."

Subd. 1—basis of first sentence §1406 PROB. CODE.

Subd. 2—basis of §1408, *ibid.*

Subd. 3—basis of §1407, *ibid.*

Subd. 4—and last paragraph—basis of §1409, *ibid.* (CAL. CIV. CODE, Deering, 1931).

child, if a fit and proper person, shall prevail as against an entire stranger."<sup>10</sup> The court went one step further, and set forth a presumption of law which can be said to give "lip service" to subdivision 1 of section 246 (§138(1)), by stating, "The law, however, presumes that the interest of a child will be best subserved by awarding its care to a parent, unless he or she is unfit to have its care."<sup>11</sup>

The question which readily comes to mind is whether this presumption of law is really giving expression to the legislature's intent, as stated in section 138(1), i.e., that the interests of the child shall be paramount. It would appear that underlying this presumption that the child's welfare is promoted by parental custody unless the parent is unfit, is the basic common law doctrine of "parental right" which the courts will not easily be persuaded to discard. The presumption, by setting up an arbitrary standard as to what constitutes the best interests of the child, precludes a factual determination of the question.

The principal case does not refer directly to this presumption of law, and, with perhaps a more candid approach, flatly declares that the parental right is such as to require the court to award custody to a parent unless he is found to be unfit. The court quotes, for support of this contention, from the Supreme Court of the United States in *Prince v. Massachusetts*,<sup>12</sup> in which the Court said, "It is cardinal with us that the custody, care and nurture of the child reside first in its parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Reference is likewise made to *In re White*,<sup>13</sup> an earlier decision of a California district court of appeal. In that case the court stated, "The right of a parent to the care and custody of a child cannot be taken away merely because the court may believe that some third person can give the child better care and greater protection. One of the natural rights incident to parenthood, a right supported by law and sound public policy, is the right to the care and custody of a minor child, and this right can only be forfeited by a parent upon proof that the parent is unfit to have such care and custody."<sup>14</sup>

Schauer, J., in the dissenting opinion in the principal case (in which Gibson, C. J., concurred), took issue with the court's requirement that before an award could be made to a third person it was necessary to find that the parents had, through unfitness, forfeited

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<sup>10</sup> *Newby v. Newby*, *supra* note 7, at 116, 202 Pac. at 892.

<sup>11</sup> *Ibid.* at 116, 202 Pac. at 892.

<sup>12</sup> (1944) 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645, 652 (It should be noted, however, that this case does not concern the award of custody in a divorce action).

<sup>13</sup> *Supra* note 6.

<sup>14</sup> *Ibid.* at 640, 129 P. (2d) at 708.

their rights. Emphasizing that the rights of the child had been completely ignored, the dissent rested upon what, from the very topical subdivision of section 138 seems apparent, namely, that the legislature had directed, in section 138(1), that the well-being of the child should be the paramount consideration in custody cases. As Mr. Justice Schauer points out, "The fact that subdivision 2 [section 138] is specific in its limitation of applicability to *parents* suggests quite clearly that subdivision 1 contemplates the possibility of an award of custody to a person other than a parent when the best interests of the child require such drastic action."<sup>15</sup> The court, however, as a result of reading sections 138 and 197 together, concludes that parental right is placed above the child's welfare in making an award of custody.

The weighing of "parental right" against the child's welfare is usually presented to the court in a situation which involves a home broken by the separation of the parents or the death of one of them, and a child placed for a longer or shorter period of time with third persons. The basic conflict in social principles which appears to face the courts in such custody cases is whether to treat the child as a detached individual, apart from and aside from his blood-ties, or to emphasize the family unit from the standpoint of the parent. When faced with the problem, the courts will generally align themselves with the view which will maintain and preserve the sanctity of the blood-tie by upholding the "parental-right" of the "fit and competent" parent, and thereby will keep the child and parent together.<sup>16</sup> It may be questioned, however, whether there are not certain situations, short of technical "unfitness" of the parents, where these blood-ties have been so disrupted that the "parental-right" should give way. The importance of the family unit ordinarily cannot be overemphasized, but when, for example, the parent has voluntarily broken that unit, usually through complete separation over a long period of time, any attempt to re-unite the parent and child may be extremely disadvantageous to the child. The child, during this period away from the natural parent, has substituted new ties of love, affection and companionship which should weigh heavily against the traditional "superior rights" of parents. One of the earliest cases to break away from the common law concept of quasi "property-right" of the parent to custody of his child was that of *Chapsky v. Wood*<sup>17</sup> wherein Mr.

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<sup>15</sup> *Supra* note 3, at 131, 152 P. (2d) at 1001.

<sup>16</sup> Sayre, *Awarding Custody of Children* (1941-42) 9 U. OF CHI. L. REV. 672 (See criticism of tests applied in making custody awards at pp. 676-688; *cf.* note 1.

<sup>17</sup> (1881) 26 Kan. 650, 40 Am. Rep. 321; Notes (1895) 27 L.R.A. 57, 60; (1913) 41 L.R.A. (N.S.) 594-7.

Justice Brewer, in 1881, eloquently presented his views in giving support to the best-interests-of-the-child-test.

Several jurisdictions, as previously remarked, have statutes, similar to that of California Civil Code section 138, which speak of the necessity of awarding custody on the basis of the child's best interest and welfare. These jurisdictions may be divided into two groups. GROUP ONE consists of those jurisdictions which despite statutory change carry over the "dominant parental right" view sanctified by the long tradition of the common law, and subscribed to by the supreme court in the principal case. GROUP TWO comprises a few jurisdictions which have statutes similar to section 138 of the Civil Code and whose courts, in following their statute's mandate, treat the interests of the child as paramount to "parental right" even when the parents are not, in a legal sense, "unfit".

#### GROUP ONE

Typical of the decisions of the courts in this group is the case law of ILLINOIS.<sup>18</sup> In *Kulan v. Anderson* it was stated that "The rule that a parent has a right of the custody of his child against all the world, unless he has forfeited that right, was born of the natural desire of mankind to create and maintain a home . . . . Deprive worthy parents of their natural right to the custody of their children, when they have not forfeited that right, and you undermine the home."<sup>19</sup>

The OKLAHOMA custodial statute<sup>20</sup> is very similar to that of California. In the *Hight* case the court said: "We are committed to the rule that in order to deprive a parent of the custody of a minor child the evidence must clearly establish the unfitness of the parent. . . ."<sup>21</sup>

MISSOURI's statute<sup>22</sup> authorizes the court to decide custody awards on the grounds of what shall be for the best interests of the child. It is interesting to note, however, that the presumption of law adopted by California in the *Stever* and *Newby* cases is also in effect in this jurisdiction. Under the presumption of law that the best in-

<sup>18</sup> ILL. REV. STAT. (1943) 40, §14, "The court may . . . awards the custody of the minor child or children . . . as the interests of the child or children require . . . ."

<sup>19</sup> (1939) 300 Ill. App. 267, 277, 20 N.E. (2d) 987, 991 (custody of the child had been awarded to the mother, and upon her death she expressed the desire to have the child placed with her parents); *Stafford v. Stafford* (1921) 299 Ill. 438, 132 N.E. 452.

<sup>20</sup> OKLA. STAT. (1941) 30, §11, ". . . the court or judge is to be guided by the following considerations: 1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare . . . ."

<sup>21</sup> *In re Guardianship of Hight* (Okla. 1944) 148 P. (2d) 475, 480 (custody was awarded to the father who later remarried. The children, now eleven and ten years of age, lived with father and stepmother. Upon the death of the father, the stepmother petitioned for custody—denied).

<sup>22</sup> 1 MO. REV. STAT. (1939) §1528, ". . . but in each case the court shall decide only as the best interests of the child itself may seem to require."

terest of the child is to be in the custody of its parents, the *Madigan*<sup>23</sup> case held that it was error to award custody of the child to its grandparents while the father was found to be a fit and proper person.

In *Gorsuch v. Gorsuch*, a NEBRASKA case, the court clearly and unequivocally stated that "The proper rule in a divorce case, where custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper and suitable parents. Where both parents are affirmatively found to be *unfit*, the custody of the child will be determined solely by the welfare and best interests of the child."<sup>24</sup> The statutes<sup>25</sup> in this jurisdiction, however, say nothing about the "superior rights of parents" in awarding the custody of children, but, on the contrary, stress the best interests of the child.

The language used by the courts in FLORIDA is unmistakably clear that the "parental right" is superior to the best interests of the child in making custody awards.<sup>26</sup> The statutes,<sup>27</sup> however, are just as clear in making the well-being of the child the primary consideration.

#### GROUP TWO

In the second group, which considers the best interests of the child to be paramount to "parental right" under circumstances which fall short of unfitness of the parent, is found the state of KENTUCKY.

<sup>23</sup> *Madigan v. Madigan* (Mo. App. 1924) 260 S.W. 485; *Armstrong v. Price et ux* (Mo. App. 1927) 292 S.W. 447.

<sup>24</sup> (1943) 143 Neb. 572, 578, 11 N.W. (2d) 456, 458; *In re Guardianship of Peterson* (1930) 119 Neb. 511, 516, 229 N.W. 885, 887. Here the child, fifteen years old, had been living with her stepfather since his marriage to her mother. After her mother's death, the child expressed the desire to remain with him. In denying custody to the stepfather, the court held, "The welfare of the child is paramount, but every presumption is in favor of the competence and suitability of the parents. In a contest between a stranger and a parent, the latter is not to be deprived of the custody of the child, unless unfitness is affirmatively alleged and proved."

<sup>25</sup> 3 NEB. REV. STAT. (1943) §42-310. "The court may . . . make such order concerning the care and custody of the minor children . . . during the pendency of such suit, as shall be deemed proper and necessary and for the benefit of the children."

§42-311 ". . . the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children . . . and may determine with which of the parents the children or any of them shall remain . . ."

§42-312 "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time . . . alter . . . the decree so far as it concerns the care, custody and maintenance of the children . . ."

<sup>26</sup> *Frazier v. Frazier* (1933) 109 Fla. 164, 169, 147 So. 464, 466: "The welfare of the child must, of course, be regarded as the chief consideration [citing case], but the inherent rights of parents to enjoy the society and association of their offspring . . . must be regarded as being of an equally important, if not controlling, consideration . . ."

<sup>27</sup> FLA. STAT. (1941) §65.14 (" . . . the court shall have the power . . . to make such orders touching the care, custody and maintenance of the children . . . as their best spiritual as well as other interests may require.").

The custodial statute<sup>28</sup> of Kentucky is similar to that of California, but the courts, at least in exceptional circumstances, have come to a different conclusion. *Cummins v. Bird*<sup>29</sup> was an action brought by the father to obtain the custody of his child, a girl of twelve. His petition was denied upon a showing that the child had been living with her maternal grandparents for almost eleven years, during which time the father was apparently indifferent as to her existence. Even though he was now in a position to care for the child adequately, and his reputation was not impeached in any manner, the court stated that, "It is obvious, however, that a man may be of good character and financially secure, and yet not suited to the trust of rearing and educating a 12 year old girl, with whom he has had no previous acquaintance or contact, even though it be his own child."<sup>30</sup> Upon a finding that the father would not be able to offer the child as good a home as the one with her grandparents, and that his occupation would necessitate his being away from home while travelling, and that the future home of the child would be with his parents, the court stated, "He is unmarried, and his future domestic relations are unsettled and uncertain. He is not prepared to provide the child with the home, the surroundings, the companionship, or the training she now enjoys. Her welfare would not be enhanced, but well might be endangered, by disturbing her present happy relations with those who have loved and cared for her from infancy, and who possess her confidence and affection."<sup>31</sup>

In a later case, *Noble v. Noble*,<sup>32</sup> it was shown that because of an acute heart affection the child's physical condition required the rest and quiet of country life, which her mother could not give her. The court, without any finding as to the mother's unfitness, held that, "We do not feel that the mother's offering better schools and amusements is of vital importance here where the child's health and life itself is such that she mostly needs quiet and rest, which surely she will best find in the home of her grandparents."<sup>33</sup>

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<sup>28</sup> KY. REV. STAT. (1942) 403.070 ("... the court may make orders for the care, custody, and maintenance of the minor children ... having principally in view in all such cases the interest and welfare of the child.").

<sup>29</sup> *Cummins v. Bird* (1929) 230 Ky. 296, 19 S.W. (2d) 959.

<sup>30</sup> *Ibid.* at 299, 19 S.W. (2d) at 961.

<sup>31</sup> *Ibid.* at 301, 19 S.W. (2d) at 962.

<sup>32</sup> *Noble v. Noble* (1942) 292 Ky. 433, 166 S.W. (2d) 991.

<sup>33</sup> *Ibid.* at 443, 166 S.W. (2d) at 995; *cf.* *Horn v. Dreschel* (1944) 298 Ky. 427, 183 S.W. (2d) 22, 25 (the parent did not assert any legal claim to the child, and upon a finding that the children had been living with their grandparents for some years, the court held that, "Under these circumstances, and considering the question solely in the light of the welfare of the children, we are not constrained to alter the situation at this time."). (1943-44) 32 Ky. L. J. 194.



Similarly in MINNESOTA the courts do not require a finding of the parents' unfitness as a prerequisite to awarding custody to third persons in a situation in which an exceptional health problem appeared. In *State v. Anderson*<sup>34</sup> it was found that the father was financially unable to give the children physical care or the medical care which they needed, and that the grandparents had been supplying their needs and desired to continue doing so. The court held that the right of the parent had to yield to the child's welfare.

A strong suggestion is implicit in the later Minnesota case of *State v. Sorenson*,<sup>35</sup> however, that in the absence of some such exceptional circumstances, the award of custody to the parents, at least where the parents present a united home, would be presumed to promote the child's welfare. In this case the custody of a nine year old child who had been with her maternal grandparents from birth, was taken from them and given to the parents. The court made the significant remark after reviewing all the evidence, to the effect that, "In any event the record discloses nothing from which we could find at this time, or for some time past, that the parents are not able to furnish a suitable home for the child."<sup>36</sup>

The MICHIGAN court in carrying out the express intent of this jurisdiction's statutes<sup>37</sup> held in *Smith v. Ritter*,<sup>38</sup> a case which also involved a nine year old child who had been left from birth with his maternal grandparents, that the child's mother and her second husband could not have custody. The court emphasized that the child had known no other home than its grandparents, and held that, "... the welfare of the child could be served best by leaving him with his maternal grandparents."<sup>39</sup>

In a similar case, *Perry v. Perry*,<sup>40</sup> the MASSACHUSETTS court came to the same conclusion, viz., that the "parental-right" should give way to the paramount consideration of the child's well-being. The child,

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It is probable that even the courts in group one would refrain from awarding custody to the parents if the child's health was in so precarious a state that any change would prove fatal. The courts, however, would not openly discard the "parental-right" doctrine, but might find that under these conditions the parent would be "unfit" to care for the child whose health required such exacting attention. Or, the court might award "custody" to the parent, but further decree that the child remain in the physical care of the third person.

<sup>34</sup> *State ex rel. Lund v. Anderson* (1928) 175 Minn. 518, 519, 221 N.W. 868, 869; MINN. STAT. (1941) §§518.17, 518.18.

<sup>35</sup> *State ex rel. Olson et al. v. Sorenson et al.* (1940) 208 Minn. 226, 293 N.W. 241.

<sup>36</sup> *Ibid.* at 230, 293 N.W. at 243.

<sup>37</sup> MICH. PUB. ACTS (1939) No. 255, §17a, "The court shall have jurisdiction . . . to award custody thereof to one of the parents or a third person."; MICH. COMP. LAWS (1929) §§12737, 12738, 12852.

<sup>38</sup> (1939) 292 Mich. 26, 289 N.W. 316.

<sup>39</sup> *Ibid.* at 30, 289 N.W. at 318.

<sup>40</sup> (1932) 278 Mass. 601, 180 N.E. 512.

also now nine years of age, had practically always lived with its grandparents, and the court stated that, "The words of the governing statute<sup>41</sup> in the case are broad in scope. They are not bounded by limiting restrictions. There is no express or implied requirement that the parent must be found unequivocally to be unfit before the custody of the child can be awarded to some suitable third person . . . There well may be cases where the welfare of the child will be promoted by placing it in the custody of another, and yet where the court cannot say that the parents are actually unfit. The present appears to be a case of that nature."<sup>42</sup> It should be observed, however, that in this case the father merely wished to take the child from its maternal grandparents and place it in the home of its paternal grandparents as he could not give it a home of his own. The court stated that it was in reality faced with the question as to whether or not they should take the child from one grandparent and place it in the home of the other grandparent.<sup>43</sup>

Under less extreme circumstances it is quite apparent that the Massachusetts court will give great weight to the parent's rights. Thus in *Richards v. Forrest*,<sup>44</sup> handed down the same day, this same court awarded custody of the child to the parents, even though the child had lived with its aunt since the age of four months. In this case, certain factors, similar to those found in a previously mentioned Minnesota case,<sup>45</sup> were given considerable weight in favor of the parents. The natural parents were reunited permanently, and the child, only six years old, the court felt was still young enough to adjust herself to the change. Under these circumstances, the court held that the rights of the natural parents were superior to those of a stranger. Even this right, however, the court held, was not absolute. The court intimated quite clearly that a contrary award may well have been made when it stated that, "If the child were older, this circumstance might well be decisive."<sup>46</sup>

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<sup>41</sup> 6 MASS. ANN. LAWS (1944) c. 208, §28 (" . . . the court may make such decree as it considers expedient relative to the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain, or may award their custody to some third person if it seems expedient or for the benefit of the children.")

§31: "In making an order or decree relative to the custody of the children . . . the happiness and welfare of the children shall determine their custody or possession.")

<sup>42</sup> *Supra* note 40, at 604-605, 180 N.E. 513.

<sup>43</sup> In jurisdictions upholding the "parental-right" doctrine, this practical fact would carry no weight, and there would be no question but that the child should be placed in the custody of the father, and that he could board the child wherever he so pleased.

<sup>44</sup> (1932) 278 Mass. 547, 180 N.E. 508.

<sup>45</sup> *Supra* note 35.

<sup>46</sup> *Supra* note 44, at 556, 180 N.E. at 512.

The courts of OREGON likewise apparently consider the welfare of the child as paramount. In the *Johnston*<sup>47</sup> case, even though the father was declared a fit custodian, and two children were already in his custody, the court awarded the custody of a third child to her maternal grandparents with whom the girl and her mother had been living, and with whom she expressed a desire to remain.

The foregoing review of cases, which of course is not exhaustive, indicates that the recent *Roche* case, in reenforcing California's position of rigid conservatism on the subject of parental right in custodial controversies, has solidified for California a custodial principle that no longer finds unanimous support in American case law. The writer firmly believes that the view expressed by the courts in group two is the better. The parent's right to the custody of his children and their companionship, and the right to maintain a home as a family unit is indeed an important, if not a basic factor in our concept of society. However, under particular circumstances, as when the child has exceptional health requirements, or when the normal relationship between parent and child has been disrupted by long separation and the natural ties thus weakened, should not the right of the parent give way to the welfare of the child? The "particular circumstances" calling for the subordination of "parental-right", without doubt, will continue to be the exception rather than the rule, as exemplified in the cases discussed in group two, but when presented they call for attention. The arbitrary rule that a parent must first be found unfit before custody may be awarded to a third person, which our courts enforce, may be easy to apply, but may it not also, on occasion, be ruinous to the physical and psychological well-being of the child?

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<sup>47</sup> *Johnston v. Johnston* (1936) 155 Ore. 256, 63 P. (2d) 209 (the court held that the child's preference, though not conclusive, was very persuasive): 2 ORE. COMP. LAWS ANN. (1939) CODE CIV. PROC. §9-914.