AWARDING CUSTODY OF CHILDREN

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ANALYTICAL LIMITS OF EMANCIPATION AND CUSTODY

CUSTODY is a slippery word. The courts do not always use it to cover the same things. For instance, is custody co-extensive with the parent's rights in and duties toward the child, so that the parent can "give" all these rights and duties to another when he gives custody? And again, if the parent did give custody for the whole minority of the child, would this be tantamount to emancipating the child so far as any residuum of rights and duties in the parent was concerned? Although the language of the courts (and worse still, their thought) on these points is highly confusing, it seems fair to say, summarily, that custody is a term applied to interests less than all the rights and duties of the parent. Even after the parent has given the longest and fullest rights of custody that he possibly could to another, he still has a residuum of rights and duties.¹

This basic confusion has in turn been brought about by the persistence of courts in talking about "total" and "partial" emancipation.² But when

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¹ *Regina v. Smith*, 22 L.J.Q.B. 116 (1853); *In re Edwards*, 42 L.J.Q.B. 99 (1873); *Washaw v. Gimble*, 50 Ark. 351, 7 S.W. 389 (1888); *Hernandez v. Thomas*, 50 Fla. 522, 39 So. 641 (1905); *Chapsky v. Wood*, 26 Kan. 650 (1881); *Wood v. Shaw*, 92 Kan. 70, 139 Pac. 1165 (1914); *Stapleton v. Poynter*, 111 Ky. 264, 62 S.W. 730 (1901); *Marks v. Wooster*, 199 S.W. 466 (Mo. App. 1917); *State ex rel. Hodgdon v. Libbey*, 44 N.H. 321 (1862); *Cook v. Bybee*, 24 Tex. 278 (1859).

² For instance, the courts often say there is total emancipation by consent of the parent and the child, which is properly evidenced. *Memphis Steel Construction Co. v. Lister*, 138 Tenn. 307, 197 S.W. 902 (1917). But in saying this the courts seem to forget that this is only what the parties agree to, and that the state itself through its public policy fixes the duty of the parent to care for a minor child in need regardless of any and all agreements of the parties themselves. Cf. *Hall v. Hall*, 44 N.H. 293 (1852); see 34 Harv. L. Rev. 334 (1921); 16 Ill. L. Rev. 243 (1921).

It is also said that emancipation occurs by operation of law 1) where the parent abandons the child; 2) where the child marries, with or without parents' consent; 3) where the child attains his majority. But these situations (except the last, under which, of course, the child is of age and there is no more problem) are merely situations where the rights and duties of parent and child are inoperative, and do not affect the ultimate duty of the parent to the child in case of need, and the child's corresponding duties if the parent does care for him. And this is true even though under emancipation the child's earnings are his own and cannot be reached by the parents' creditors, and pass to the child's administrator on the child's death. *Partridge v. Arnold*, 73 Ill. 600 (1874); *Smith v. Knowlton*, 11 N.H. 191 (1840); cf. 33 Yale L.J. 663 (1924); 24 Mich. L. Rev. 862 (1926).

we examine the actual holdings of the cases, it seems that there is no such animal as "total" emancipation, in the sense that a parent, even with the express agreement of the child himself, or the agreement of third persons as well, can ever free himself from all obligations to the child, or all consequent rights in the child.³ For instance, no court has ever held squarely that a parent is not liable for the care of a child who later becomes sick or disabled, no matter how "complete" the previous emancipation may have been.⁴ The courts avoid saying this flatly by calling it "partial" emancipation, when they want to hold the parent still liable to the child under the circumstances.⁵ But this is obviously an evasion (though often unconscious or well intended), to construct a category in which they shall be free to say that a parent is still liable to the child because there never was a "complete" emancipation.⁶ This innocent sleight-of-hand in analytical reasoning is brought to book by the plain fact that no instance of "complete" emancipation can be found in the reports, in the sense that the parent is held to have absolved himself completely from all duties to his child in time of need and under unexpected circumstances, no matter how sweeping and unequivocal were the terms of the alleged emancipation or the purported grant of custody.

The plain truth is that the unqualified granting of rights in the parent-child relationship is not possible under the common law, and is equally restricted in the courts of equity, where most of the rights of parent and child are usually determined. "Giving" and "granting" are terms that have grown up with the law of property, and are not literally comparable to the varied and complicated rights and duties within the family. We would expect the words "giving" and "granting" to deal with the transfer of the possessory interest in property or of the property itself. But even the parent does not have "possession" of his own child and he cannot transfer a possession to another when he does not have it himself. The only place where we have literal possession in the case of human beings is in the case of chattel slavery, and there are a number of cases decided in the southern states before the Civil War that seem to put decided limits to

³ *People v. Mercein*, 3 Hill (N.Y.) 399, 410 (1842). As an incident to this, the awarding of custody by a parent is held to be revocable in a basic sense, since it is revoked on the death of the parent making it, if the other parent survives. *Smith v. Young*, 136 Mo. App. 65, 117 S.W. 628 (1908).

⁴ *Lufkin v. Harvey*, 131 Minn. 238, 154 N.W. 1097 (1915); *Porter v. Powell*, 79 Iowa 151, 44 N.W. 295 (1890).

⁵ *Torrington v. Norwich*, 21 Conn. *543 (1852).

⁶ *Commonwealth v. Graham*, 157 Mass. 73, 31 N.E. 706 (1892); *Cochran v. Cochran*, 196 N.Y. 86, 89 N.E. 470 (1909).

the doctrine even in this instance.⁷ In a word, the rights and duties of a parent in his child at law and in equity are far too complicated and far too elusive to be subsumed under such rule-of-thumb property terms as "give" or "grant," in the sense that the parent, even with the assent of the child and of third persons, can finally release himself of all his rights and duties to a child, no matter how completely he may intend to do so.⁸ Any other result makes us talk of "giving" custody, or "granting" emancipation, as if we were selling a slave, or transferring a piece of land, and is as offensive to moral values, and to the requisites of modern culture, as it is unsound in legal analysis and unsupported by court decisions.⁹

CUSTODY IS A MATTER OF VARYING RELATIONS, RIGHTS, AND DUTIES

We rightly think of custody as the immediate supervision and control of a child.¹⁰ By reasonable implication, it usually carries with it various duties to the child by way of care and support, and it may also carry rights to the child's services and other advantages.¹¹ But these rights and duties may be said to vary with circumstances. In other words, they are not inseparable from the right of custody alone, and they may remain with the parent and be exercised by him in spite of his granting custody generally to another.¹² Thus even in divorce proceedings where complete custody is granted to the wife, although the husband is ordered to support the child, some courts will hold that the right to the child's earnings is given to the mother, as incident to her right of custody; other courts will award this right to the father, feeling that such earnings are more nearly incident to the duty of support which the father, in this instance, is discharging.¹³ But the courts do talk about complete emancipation, as if

⁷ *State v. Taylor*, 2 McCord (S.C.) 483 (1822); *Commonwealth v. Carver*, 5 Rand. (Va.) 660 (1827).

⁸ *Wallace v. Cox*, 136 Tenn. 69, 188 S.W. 611 (1916).

⁹ *Lufkin v. Harvey*, 131 Minn. 247, 114 N.W. 763 (1908); *Merrill v. Hussey*, 101 Me. 439, 64 Atl. 819 (1906).

¹⁰ Pound, *Individual Interests Involved in Domestic Relations*, 14 Mich. L. Rev. 177 (1916); 15 Va. L. Rev. 492 (1929).

¹¹ 4 U. of Pitt. L. Rev. 302 (1938).

¹² *Keller v. St. Louis*, 152 Mo. 596, 54 S.W. 438 (1899). There is no action solely to determine custody of children. The remedy is by habeas corpus at common law, or under state statutes that regulate the parent-child relationship in its entirety. *People ex rel. Sisson v. Sisson*, 271 N.Y. 285, 2 N.E. (2d) 660 (1936); *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925). See *Custody and Control of Children*, 5 Ford. L. Rev. 460, 464 (1936).

¹³ That the mother must support the child where she is given custody upon divorce, see *Husband v. Husband*, 67 Ind. 583 (1879); *Stone v. Duffy*, 219 Mass. 178, 106 N.E. 595 (1914); but that the father remains obligated for support where the alimony does not expressly cover the children, see *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N.E. 471 (1887). See 39 Harv. L. Rev. 901 (1926).

there were no rights or duties left in the parent at all after it has occurred; and they do talk about custody as if it were a property interest, like "possession," or "title," which carried with it a complete and well-understood set of legal rights and duties.¹⁴

This literal and artificial presentation of custody which we have today can be explained in part by its ancestors. The notion of custody goes back to early times when personal rights were very few, and these few in turn were tied up with the land itself through the feudal system.¹⁵ Custody of his children was a thing that the father could and often did transfer to another than his wife by appointing another guardian of these children in his will.¹⁶ But at this time the rights of wardship and marriage were also tied up with the land law and were important items of sale, purchase, and investment in feudal times.¹⁷ Particularly, custody was tied up with the "binding out" of children as apprentices to learn a particular trade or profession.¹⁸ On a more plebeian level, it was also tied up with indentured servants.¹⁹ In all these cases, the master to whom the parent had bound the child for a term of years had a very considerable interest in his labor, much as a slave buyer had an interest in the labor of his slaves, or as any commercial concern may now have an interest in the work of its employees, who are engaged by contract for an indefinite period.²⁰ Custody of the child, and the general parental authority going with this custody, was an integral part of this large commercial interest.

Under such circumstances we can readily understand (though we need not approve) that the parties and the courts would talk about "giving" custody in these apprenticeship cases, where the master had a straight commercial interest in the work of the child. The real trouble is that this notion of "giving a child" is in constant use today without apparent of-

¹⁴ *Nelson v. Wilson*, 97 S.W. (2d) 287 (Tex. Civ. App. 1936), noted in 15 Tex. L. Rev. 375 (1937). But see *Mulkey v. Allen*, 36 S.W. (2d) 198 (Tex. Com'n App. 1931), noted in 30 Mich. L. Rev. 155 (1931).

¹⁵ 1 Vinogradoff, *Historical Jurisprudence* 163-369 (1920); Maine, *Ancient Law* c. 10 (Pollock's ed. 1906).

¹⁶ 1 Bl. Comm. *453; *Matter of Andrews*, L.R. 8 Q.B. 153 (1873); *Rex v. Greenhill*, 4 A. & E. 624 (1836).

¹⁷ See generally 1 Pollock and Maitland, *History of English Law* 318 et seq. (2d ed. 1899).

¹⁸ For a collection of authorities on apprenticeship and indentured servants, see *Musgrove v. Komegay*, 52 N.C. *71 (1859); cf. *United States v. Bainbridge*, Fed. Cas. No. 14,497 (1816).

¹⁹ Note 18 supra.

²⁰ *Miller v. Miller*, 123 Iowa 165, 98 N.W. 631 (1904), is by way of dictum contra to these cases, not in expressly holding that a parent could give all his rights irrevocably in giving custody to another, but in stating that such a result might perhaps be possible if this intent were sufficiently precise and unequivocal.

fense either to the courts or the parents themselves. When a mother dies leaving a baby, and the father is not equipped to care for the child, he is said to "give" the child, to his deceased wife's sister perhaps, and if the sister in turn retains custody of the child for more than a year or so she feels that the "gift" is permanent, and that the father cannot recover his own child.²¹

To meet this situation, the courts use varying language. They say that the transfer of custody will be considered permanent, unless its temporary nature was expressly indicated;²² or they may make matters worse by hiding what they really do under talk about "presumptions." In fact the actual decisions do not establish more than we found in the emancipation cases: there is no such thing as a parent "giving" custody of his own child to another, in the irrevocable sense that under no circumstances could he again have custody of the child solely because of this alleged gift.²³ The rights and duties of parent and child inter se involve a relationship which may be varied by the introduction of third parties in keeping with the intent of all concerned; it is not a property right that can be sold or possessed like a haunch of beef sold for cash on the barrel head.²⁴

THE BEST-INTERESTS-OF-THE-CHILD TEST V. THE INTERESTS- OF-ALL-THE-PERSONS-INVOLVED TEST

Under the early common law the father had exclusive custody of his children,²⁵ and this custody could not be taken from him, unless, through his own fault, he actually kept the child in such degraded conditions that the child itself might become delinquent. Poverty of the father, laziness on his part in failing to provide better living conditions for the child, even the degraded nature of the father's own life, provided that this was not literally impressed upon the child in his daily living—all these were not sufficient to take custody from the father.²⁶ But later, when the courts

²¹ *Chapsky v. Wood*, 26 Kan. 650 (1881); *In re Rosenthal*, 103 Pa. Super. Ct. 27, 157 Atl. 342 (1931), noted in 18 Va. L. Rev. 458 (1932).

²² *Bonnett ex rel. Newmeyer v. Bonnett*, 61 Iowa 199, 16 N.W. 91 (1883).

²³ *State v. Baldwin*, 5 N.J. Eq. 454 (1846); *In re Galleher*, 2 Cal. App. 364, 84 Pac. 352 (1905); *Cormack v. Marshall*, 122 Ill. App. 208 (1905).

²⁴ *Commonwealth v. Graham*, 157 Mass. 73, 31 N.E. 706 (1892); *State ex rel. Scott v. Lowell*, 78 Minn. 166, 80 N.W. 877 (1899); *Cochran v. Cochran*, 196 N.Y. 86, 89 N.E. 470 (1909).

²⁵ See *Wellesley v. Duke of Beaufort*, 2 Russ. 1 (1827). For a very just attack on the assertion that custody of the parent and services of the child are correlatives of the father's duty of support, see *Reciprocity of Rights and Duties between Parent and Child*, 42 Harv. L. Rev. 112 (1928).

²⁶ *Vercer v. Ford*, 37 Ark. 27 (1881); *Rex v. Greenhill*, 4 A. & E. 624 (1836).

held that the mother necessarily had custody on the father's death,²⁷ and still later in this country when statutes were passed in most states giving custody to the father and mother jointly,²⁸ the courts began to talk about the "presumptive" right of the father (or the father and mother) to the custody of the child—a presumption that could not be overcome unless "the best interest of the child required it."²⁹ If the courts met the question, should custody be awarded to a person other than a parent merely because that person was of high character,³⁰ entertained real affection for the child,³¹ or could give the child much greater cultural and educational advantages (because he had more money) than could the parents,³² then the courts usually avoided a straight answer to this question, by talking of presumptions again and by saying that under the particular facts in that case, the best interests of the child were not sufficient to take custody from the parent in view of the initial presumption in the parent's favor.³³

There is very impressive authority for all this.³⁴ When the courts gave up talking of absolute rights of custody in the parents (short of proved injury to the child from their own disgraceful conduct), they took to talking of the "best interests of the child" as the true basis for awarding custody,

²⁷ For the statutory change in England, see *Guardianship of Infants Act* 1886, 49 & 50 Vict., c. 27, § 5. The American cases dealing with this shift in recognizing the mother's right to custody at least on the death of the father are well collected in *Matter of Badger*, 286 Mo. 139, 226 S.W. 936 (1920).

²⁸ For a summary of the statutes on joint custody see 4 Vernier, *American Family Laws* 18 (1936).

²⁹ "To abandon this comparison and to make use of the ordinary legal phraseology, the father will be preferred over the mother if all other things are equal and either parent will be even more clearly preferred over a third person, unless, the third person is better fitted for the custody of the child; but in all cases the test is not the 'rights' of the persons claiming custody but the welfare of the child." Brown, *The Custody of Children*, 2 Ind. L.J. 325, 326 (1926). This rule has received recent restatement in *Lancey v. Shelley*, 2 N.W. (2d) 781 (Iowa 1942).

³⁰ See *Kelsey v. Green*, 69 Conn. 291, 37 Atl. 679 (1897).

³¹ *Chapsky v. Wood*, 26 Kan. 650 (1881).

³² *Corn v. Hollon*, 191 Ind. 248, 132 N.E. 587 (1921); *Clayton v. Kerbey*, 226 S.W. 1117 (Tex. Civ. App. 1920).

³³ For an excellent discussion of this innocent sleight-of-hand in juggling legal concepts, see the statement of Mr. Justice Story in *United States v. Green*, Fed. Cas. No. 15,256 (1824).

³⁴ See *Chapsky v. Wood*, 26 Kan. 650 (1881). Indeed one could almost say that there is no case which does not fully affirm that the "best interests of the child" is the ultimate test, if indeed the court has gotten beyond the mere juggling of legal presumptions of rights to custody in the father, mother, and others. After a full discussion of all the cases in his article, Professor Brown reaches this conclusion, "... the general attitude of the court that the welfare of the child is controlling . . . is entirely correct and praiseworthy." Brown, *op. cit. supra* note 29, at 330.

and they tended to let this principle crowd out the presumptions in the parent's favor, until this test of the "best interests of the child" has grown in emphasis so that it is now in fact, though not always in theory, almost the sole basis for the award of custody.³⁵ For that matter, the law reviews and critical writers generally approve this test without exception and hail the high achievement of the courts in deciding this delicate question by such worthy principles.³⁶ Courts and legal writers alike seem so pleased with themselves in hitting on the best-interests-of-the-child test, that they are both unable and unwilling to think of anything else.³⁷

Mr. Justice Brewer set the fashion and did much to establish the whole doctrine by his famous opinion in *Chapsky v. Wood*,³⁸ when he was a member of the Supreme Court of Kansas before going to the Supreme Court of the United States. The case involved an equity proceeding brought by a father to recover custody of his young daughter, whom he himself had "given" to his deceased wife's sister. The child was given by the father to this sister soon after birth upon the death of the mother, when the father was in no position to provide an adequate home for the baby. The gift was not expressly for any length of time, though the child did stay with this sister for five years before the father was able to provide an adequate home with his father (the child's grandfather) and his own unmarried sister. The mother's sister who wanted to retain the custody was married, had children of her own, and was conscientiously providing a wholesome home for the child. The court did not say unqualifiedly that the gift of the child was not revocable under proper circumstances, but it did say, first, that such a gift could not be revoked where the parent had caused the third person reasonably to rely on continued custody where that person was worthy; and, second, that custody would not be taken from the third person under the circumstances of this case because the best interests of the child required that she remain with the mother's sister.³⁹ With evident relish, the court repudiated the former rule which affirmed the

³⁵ *Chapsky v. Wood*, 26 Kan. 650 (1881), and cases there cited.

³⁶ Madden, *Persons and Domestic Relations* 372-75 (1931); Brown, *op. cit. supra* note 31; 22 Minn. L. Rev. 899 (1938); 30 Mich. L. Rev. 155 (1931); Friedman, *The Parental Right to Control the Religious Education of the Child*, 29 Harv. L. Rev. 485 (1916).

³⁷ The cases and the commentaries indicate that the courts and writers are content with the "best interests of the child" and do not press further even to discuss "the best interests" of other persons (father, mother, etc.) who are necessary parties to the custody proceedings. Note 36 *supra*.

³⁸ 26 Kan. 650 (1881).

³⁹ The court does not directly discuss the effect on any other person of the award of the custody to the aunt.

parent's primary right to custody, and, having rejected this, the court luxuriated in the solemn self-righteousness of applying the best-interests-of-the-child test against all comers. The last part of Mr. Justice Brewer's opinion has been widely quoted by other courts and text writers and uniformly approved.⁴⁰

Again, and lastly, the child has had, and has today, all that a mother's love and care can give. The affection which a mother may have and does have, springing from the fact that a child is her offspring, is an affection which perhaps no other can really possess; but, so far as it is possible, springing from years of patient care of a little, helpless babe, from association and as an outgrowth from those little cares and motherly attentions bestowed upon it, an affection for the child is seen in Mrs. Wood that can be found nowhere else. And it is apparent that, so far as a mother's love can be equaled, its foster mother has that love, and will continue to have it.⁴¹

On the other hand, if she goes to the house of her father's family, the female inmates are an aunt just ripening into womanhood, and a grandmother; they have never seen the child; they have no affection for it springing from years of companionship. While she is a child of perhaps a favorite son or brother, she is also the child of a disowned or repudiated daughter-in-law and sister-in-law, and the appeal which the child will make naturally—and the child is one to make a strong appeal to anyone—will always be shadowed and clouded by the fact that she comes from one who was not a favorite in that family.

Human impulses are such that doubtless they would form an affection for the child—it is hardly possible to believe otherwise; but to that deep, strong, patient love which springs from either motherhood, or from a patient care during years of helpless babyhood, they will be strangers.

They cannot have this; and to my mind, I am frank to say, this last is the controlling consideration. And these three considerations are those which compel us to say that we cannot believe it wise or prudent to take this child away from its present home, where it has been looked upon as an own child; and, if we should see a child of ours in the same circumstances, we cannot believe that we should deem it wise or prudent to advise a change, notwithstanding the pecuniary advantages that might seem to be offered to it.

The judgment of the court therefore is, that the child will be remanded to the respondents; and the petition is dismissed, at the cost of the petitioner.⁴²

⁴⁰ Note 36 supra.

⁴¹ The court had previously commented on the greater wealth on the father's side, but dismissed this as unimportant on the ground that the grandfather was an elderly unresponsive man and the father was also somewhat cold. "He [the father] seems to us like a man still and cold, and a warm-hearted child would shrink and wither under the care of such a nature rather than ripen and develop." *Chapsky v. Wood*, 26 Kan. 650, 656-57 (1881). Of course, this estimate of the facts may be fair but since it seems clear that the court was prejudiced in judging other facts, it seems at least likely that this also is an overstatement. In litigation of this kind in open court, the father might well feel a certain diffidence and embarrassment which would make him seem unduly reserved, while this aunt, in her self-assertive emotionalism, could give free expression to her affections, which put her in an attractive light before the court.

⁴² *Chapsky v. Wood*, 26 Kan. 650, 658 (1881).

Apart from the question of whether all this amounts to good law, is it good morals, or honest sentiment, or even fair comment on the actual facts of the case? For instance, the court says that as a practical matter, this sister of the deceased mother is the only one who could give even a fair substitute of mother's love to this child, or receive the love of the child herself. But the child is only five years old, this sister of the mother has a home and other children of her own to absorb her interests, and there is nothing of an affirmative nature to show that this child got more than routine, wholesome care in this home; certainly there is nothing to support this sweeping conclusion that even routine care could not be obtained for the child elsewhere. After going into these fantastic raptures over the mother's sister, the court has this to say of the father's home and the father's sister: "On the other hand, if she goes to the house of her father's family, the female inmates are an aunt just ripening into womanhood, and a grandmother. . . ." ⁴³ This is so extreme in its prejudice that it does not have even sufficient contact with the facts to be funny. Even extreme irony or riotous humor must have some connection with the facts in order to make its point by contrast. Isn't the mother's sister also "female," isn't she also an "inmate" of her home, and isn't she also the "aunt" of the child involved? In all these respects, the two persons in question are identical, yet the court goes out of its way to heap terms of slurring contempt upon one while it flies off into lyrical encomiums of the other. The sole difference that the court mentions is that the aunt on the father's side is "just ripening into young womanhood." Is that a crime? In keeping with the best psychological and sociological opinion, is it not rather the indication of a time of life when the sympathies and the generous instincts are most active, so that *this* aunt might serve the child's interests much better than the other one?

Perhaps a fair view of the case comes down to this. Justice Brewer and his brethren, engaged for the most part with legal problems of a very different nature, took hold of this one with the relish that comes from dealing with attractive new material, and were guilelessly anxious to show that the impressive weight of their judicial labors did not make them impervious to human interests of a more elusive nature. Justice Brewer was a fine man, a very competent technical lawyer, and a jurist of considerable vision in the field of judicial statesmanship. But he was not at home in juvenile court work. Does not the decision itself in fact submerge the higher interests of childhood? True, the aunt on the mother's side seems able to provide a normal home with other children, giving advantages of

⁴³ *Ibid.*, at 657.

wholesome general surroundings that the father's home might find it hard to duplicate. But the court does not decide the case on that fair and understandable basis. On the contrary, it is determined to rest its decision on effusions about "mother love" that are entirely unsupported by the facts.

For instance, what if a married couple, unfortunately, have only one child, while a sister or brother of the husband or wife has a family of several children. Would this in itself justify a court in taking their only child from these parents, substantially breaking up their home, and destroying the interdependence of their lives, merely because this brother or sister could give this more "normal" home life? One doesn't need to read Emerson to know that there is a great flexibility and a high degree of adjustment in the compensations of life.⁴⁴ The only child, in the case we are supposing, would lose in companionship of other children in the home, but surely this could be largely made up to him through his companionship at school and the hospitable atmosphere of his home to the free and happy visits of other children, while the high quality (though not unduly intense) companionship of his parents, and their complete devotion to his welfare, would be a compensating source of cultural wealth which a child in a large family might miss.

We can be almost certain that these compensating advantages of the single child in the home should prevail, where, as in the *Chapsky* case, the alternative is to have the child grow up in a foster home, where he is not even an adopted child, and where this divided allegiance might well become a source of emotional conflicts and unhappiness as the child grew older.

But such unfair results are quite likely where the court uses a test that covers only a part of the interests involved, and, as it were, forces a partial view from the beginning. The test laid down here and approved elsewhere is "the welfare of the child." But such a test will in fact injure the child, and, from its very partiality, shows a lack of understanding of the child itself. In its artificial parade of taking high moral ground, it really sinks to a very low level, since it decides cases by ignoring the actual needs of the child, and throws the child's relationships generally into a condition that is unnatural, and unwholesome. Is the ideal of rough and tumble mediocrity, which the court decisions tend to realize, the best the courts can do in this situation? For instance, in the *Chapsky* case, the little girl is going to grow up, and when she is a few years older she will begin asking questions, and, even more important, the other children with whom she plays will ask questions. "Why don't I live with my father, if I have a

⁴⁴ Emerson's *Essay on Compensations*.

father?" "Is he a bad man?" "Is he in jail?" she may ask. Or, coming from the other children, "You must be ashamed of your father, or you would live with him, the way we do, or at least he would be dead, and you would have him in the cemetery like respectable people do!" "So your father was so bad, that the police had to go and take you away from him! Isn't that awful? You poor thing!" Is this altogether the wholesome result that the court envisaged?

Perhaps the trouble here is basically somewhat the same as we noted in the alleged doctrine of "complete emancipation" and the alleged power of a parent to "give" his child to another. We are dealing with relationships, not with property interests, in all three cases, and this is particularly important in this third case, where the courts have fixed upon the test of "the best interest of the child" as conclusive. Would it not be better to use the same sociological approach that would be involved in situations generally where there is a basic conflict of interests between the parties to the litigation?⁴⁵ Thus in deciding custody cases the court could try to give effect to all the individual interests subsumed under all the social interests involved.⁴⁶ In this way the court would not have to use artificial presumptions of any kind—either presumed rights of the parents to custody, or a presumption for or against the alleged permanence of the "gift" of the child, where the parent has transferred custody without expressly delimiting its duration.

Much good might come of this. Even the best interests of the child cannot be served in fact without considering the interests of other members of the family. The effects of custody are more important for the welfare of the child (bearing as it does on his interests in daily life in a thousand ways) than they are for the adult members of the family, and particularly the claimants to custody. In addition to this, and apart from sentiment or affection, we quite justly put the emphasis on the children, because with them lies the future, and it is only through them that any (whether or not they are parents themselves) can hope to have a continued world for their efforts. This is a demonstrable fact. If there are no children, the world must come to an end with the death of those now living. Such a situation would not only remove incentive for daily effort of every kind among all people everywhere, but it would also bring a general

⁴⁵ See generally, Korkunov, *General Theory of Law* § 25 (Hastings' transl. 1922); Charmont, *The Conflict of Interests Legally Protected in French Law*, 13 *Ill. L. Rev.* 461, 693 (1919); Pound, *Preventive Justice in Social Work*, *Proceedings of the National Conference of Social Work* 151 (1923); Pound, *Interests of Personality*, 28 *Harv. L. Rev.* 343 (1915).

⁴⁶ Pound, *op. cit.* *supra* note 10.

despair which would cause disintegration and destruction of the people now living at a much earlier date than their life-span under normal conditions would make probable.

On these two definite bases, we gladly grant the primacy of the child's interest, but it is none the less extremely superficial to state the problem in terms of these interests alone. For instance, in the *Chapsky* case, the young father who is asking the custody certainly has interests which the true welfare of the child itself should cause the court to respect. This young man has no wife or other children. It might well be that his companionship with this little girl would become a matter of priceless value to both of them and that both their lives would be enriched by it. And this relationship might very probably be far deeper and richer for the child than any she would find in her aunt's family, where she was not even adopted, and had at most the legal and social status of an outsider. And here we must note again what we mentioned in an indirect way at first: it is of primary importance that the court should keep its eye on excellence, and seek to secure the very richest, finest life for the child, rather than fix its eye on mediocrity and feel that its duty is done when it has secured so-called normal home life. Here again the old analogies of "market value" and "fair value" that the courts use in fixing their crude approximations of real value when working out their remedies in disputes over property, are sadly inadequate when applied to children. Custody is determined in a court of equity, custody involves human lives, and (more important still) custody involves *new* human lives with nearly all their future before them. Perhaps we get on fairly well with general standards for fixing the price of hogs, but the result would be ridiculous, if it were not so degrading, to use these standards in the case of children. Platitudes that tend to glorify apple-faced mediocrity and to defeat the higher joys, excellencies, and achievements of life are particularly offensive when the future welfare of children is involved.

The best-interests-of-the-child test is inevitably artificial and tends to produce unfair or even vicious results when applied in fact, unless one uses this test as a philosophical concept, and thinks of the child in an abstract or ideal sense, as an Hegelian might do. Under this approach, one can think of the best interests of the child, as an idealistic *persona*, in keeping with the highest cultural values, and in a manner that is entirely compatible with a like complete idealistic realization of all the interests of all the other members of the family, as well as of third persons who are connected with the custody proceedings.

In keeping with the dominant sociological approach at the present

time, especially in the field of family law, it does seem preferable in this case to consider *individual interests* and *social interests* in reaching a result that gives effect as fully as possible to the social interests involved, subsuming the individual interests of each person connected with the award of custody in a fair way under the appropriate and fully recognized social interests.⁴⁷ Inevitably when custody is awarded the lives of those who formerly had custody of the child are affected, as well as the lives of those to whom the court will give custody in the proceedings before it. All of these people have legally recognized interests in this relationship. It is of decided social and cultural importance for the entire community where the law is in force. If ever the law should keep its eye on the dynamic quality of the facts involved when juggling legal concepts, this is such a case. The one who has custody is a good person, we hope, and everything about his character and way of life will affect the child favorably; but, by common experience everywhere, the child may have even more influence on those with whom it lives than they have on it. In a word, it is not a field for fixed legal concepts adapted to isolated instances, like a single contract or a single tort. It is a relationship that has within it almost all the complexity of life itself. If ever there was a case in which the courts should weigh carefully all the individual interests and all the social interests involved, this would seem to be that case. Perhaps the final thing to note is that the growth of the child itself requires this, and this can be given effect sociologically, although the idealistic approach may seem the more convincing in this one aspect. In a word, we grow by what we do and by what we give (however you phrase it psychologically) more than by what others do for us or by what we receive. Thus in considering the interests of other persons in a custody proceeding, we quite justly are concerned for these other persons themselves; but here again the best-interests-of-the-child test itself requires that the interest of others be realized, in order that the child may have the richest, fullest life through what it does and what it gives.⁴⁸

But whether the courts use an idealistic or sociological approach in determining custody, it does seem of the first importance that they consider ethical values, even those of a somewhat elusive nature. Perhaps the

⁴⁷ Pound, *op. cit.* *supra* note 10.

⁴⁸ On the reciprocal nature of legal rights, and the growth of individuals through what they give as well as what they receive, see Hocking, *Present Status of the Philosophy of Law and Rights* 58 et seq. (1926); Thorndike, *Human Nature and the Social Order* 403 et seq. (1940).

On some phases of the ethical side in a sociological approach, see *Modern Theories of Law* (Essay on Roscoe Pound by Sir Morris Amos) 86 et seq. (1933); Sayre, *Mr. Justice Holmes—Philosopher*, 27 *Iowa L. Rev.* 187 (1942).

chief objection to an idealistic approach generally, is that this *idea*, which is the assumed test, tends to lose its dynamic quality so that the courts as well as able jurists everywhere come to accept things as they are as the actual equivalent of the realization of the idea in fact. Like poor Hegel, they come to defend the status quo regardless of the high quality of their ethical criteria. On the other hand, the danger with the sociological approach is that courts and jurists generally do not realize that consciously or unconsciously they must evaluate the material which they secure through their readings of the cases, or their so-called "factual" surveys of the way people live in society. Because of this self-deception, they too come to look at things as they are so long and so reverently that they come to be self-hypnotized by these alleged "facts" and defend the status quo, just as the idealist is hypnotized by a too intense concentration on his own "idea." For both the idealist and the sociologist, it may finally all come down to a matter of gazing in the crystal ball.

It is supremely important in custody cases, which deal so intimately with human lives, that these twin follies shall not frustrate the actual accomplishment of the court, whatever method is used. In custody cases we deal directly with complicated ethical and psychological values for all the people involved. For instance, however much one may want another's welfare, he may in fact be injured if he is given no opportunity to work and play with other people, and find his growth and his happiness in seeking the welfare of others. But for this kind of growth in a child, there must be not merely heavy-handed mediocrity or well-intentioned ignorance, but the highest possible degree of excellence and understanding in the one having custody. This essential emphasis on excellence is not only not realized, but not sought after or even discussed, in these very opinions that talk in high-flown language about the welfare of the child. And in striving to have the courts consider all the interests involved, on the highest possible plane, we will still fail if the courts, in using either an idealistic or sociological approach, become hypnotized by their own method and fail in fact to give effect to the actual ethical values involved. If you ask exactly what this method should be, I hesitate to say more than this: ethical values are elusive things. Many of our jurisprudential methods are excellent in theory, but often so evolved and so indirect that the ethical content itself is lost or hopelessly diluted before it reaches the actual result in daily life from the decision of the court. Perhaps the best method is the one that gets the ethical content discussed directly and immediately and in fact gets this ethical content into the results of a court decision in terms of the daily living of those affected by this decision.

CUSTODY IN THE CONFLICT OF LAWS AND IN DIVORCE CASES

Apart from the criminal law, and the situations affecting custody generally in private law, the problems of custody in the conflict of laws and in the law of divorce and separation must receive our attention. So far as the conflict of laws goes, the bases of custody have, from very early times, been considered different from other matters, and especially different from the determination of marriage, annulment, separation, and divorce, with all of which the custody of children is, of course, closely connected. With certain qualifications of great importance, the validity of a marriage (or its annulment) is determined by the law of the state of the marriage, while the validity of a divorce or a separation decree is determined by the law of the state issuing it. This assumes, of course, that the parties were domiciled there for divorce purposes, and that the decree conforms to the requirements of the matrimonial domicile under the *Haddock* doctrine.⁴⁹ And, more important for our purposes, perhaps, these decrees, once validly made, are, within rather wide limits, given full and, if necessary, detailed enforcement in every other state. Not so in the case of custody.⁵⁰ No uniformity is even attempted in this field. A court of another state may have decreed divorce or separation, and as an incident have made detailed provision for alimony and custody of the children. Everything, including complicated arrangements for the alimony, may be enforced in other states except the requirements about the custody of the children. These are determined *de novo* by the courts of the domicile of the one having the custody at the time (this being also by law the domicile of the child).⁵¹

The main reason for this seems to be that under the doctrine of *patria potestas* the state of the child's present domicile not only is ultimately liable for its support in case of need but also is vitally interested in its education. Hence it has an inherent right to determine the maintenance of the child, and, if necessary, the custody of the child, for itself.⁵²

This breaks down a desirable uniformity in the foreign enforcement of equity decrees affecting family relations. But it seems that there is real

⁴⁹ *Haddock v. Haddock*, 201 U.S. 562 (1905).

⁵⁰ Rest., Conflict of Laws §§ 144, 146 (1934); *Warren v. Warren*, 127 Cal. App. 231, 15 P. (2d) 556 (1932). See generally on jurisdiction in custody cases, *Jurisdictional Bases of Custody Decrees*, 53 Harv. L. Rev. 1024 (1940).

⁵¹ This is in keeping with the latitude allowed by the Restatement, *op. cit. supra* note 50, at § 144.

⁵² *Keenean v. Keenean*, 5 Ohio N.P. (N.S.) 12 (C. P. 1906); cf. Nutt, *Juvenile and Domestic Relations Courts*, 5 Social Work Yearbook 201 (1939); *The Child, the Family and the Court* 57 (U.S. Dep't Labor, Children's Bureau 1929).

need for this and that the benefits are worth the price.⁵³ It does seem important, however, that here, as in the other instances we have considered, the courts should not decide these cases on the basis of the best-interests-of-the-child test in keeping with their most excellent intentions. Here, as in the other instances, this test is too narrow, and works injury to the child as well as injustice to others whose interests are inextricably involved. A consideration of all the interests involved in this conflict of laws situation would in most cases tend to give fuller effect to the decree of the court of original jurisdiction that had the problem of divorce, alimony, and many other matters before it for determination all at one time, and presumably with a view to the interests of everyone concerned. Hence in an indirect way at least this emphasis on the interests of everyone involved in custody cases would not only result in a wiser determination of the custody and maintenance problems themselves, but would also aid the extraterritorial effect of equity decrees and the security and dignity that come from uniformity in the enforcement of such decrees throughout the country.⁵⁴

As for custody in divorce cases, the problem is quite similar to the one involved in "total" as against "partial" emancipation which we have already considered. Where, under the local law, the father had this custody or custody was jointly in the father and mother, and the court upon divorce gave custody to the mother, does this impliedly carry with it all the rights and duties incident to the parent-child relation (subject, of course, to further order by the court) so as to be tantamount in its effect to "total" emancipation? Here again some courts have substantially reached this result, and in doing so they have proceeded on what perhaps we may now call the *property* theory of custody, rather than the *relational* one. But we have viewed the theory of "total" emancipation with regret no matter where it appears, and whether or not it is directly or indirectly involved. Similarly, the "property" theory of custody (in the sense that custody is regarded as a fixed and complete body of rights and duties to be transferred like ownership of a hog or a bushel of potatoes) seems to be inadequate. The transfer of custody in divorce cases as in other cases should not irrevocably take all the rights and duties from the parent in keeping with the false theory of total emancipation. The scope of the custody should be expressly delimited wherever that is reasonable under the cir-

⁵³ Jurisdictional Bases of Custody Decrees, 53 Harv. L. Rev. 1024 (1940).

⁵⁴ Goodrich, Custody of Children in Divorce Suits, 7 Cornell L.Q. 1 (1921); Bingham, The American Law Institute v. The Supreme Court in the Matter of Haddock v. Haddock, 21 Cornell L.Q. 393, 402 (1936).

cumstances; and where it cannot fairly be so delimited it should be construed in keeping with the other provisions and purposes of the decree. In no case, however, should it be construed as a complete alienation of all the parents' rights and duties in this relationship. Even if the parents freely and by their own indenture tried to transfer all these rights and duties under alleged giving of custody or "total" emancipation, still the courts should not give this effect to their acts. At common law, and apart from our Constitution, no one under any circumstances can legally bind himself to become a slave, or to commit a crime, or to do acts involving moral turpitude that are not crimes, or to agree not to resort to the courts or the law-enforcing agencies for the protection of his rights. There is (or should be) no such thing as a complete severance of rights and duties between parent and child, apart from statute.⁵⁵

This general result makes for good sense and efficiency as well as the preservation of cultural values in the divorce situation. Thus where custody is given to the mother and the mother dies, custody would revert automatically to the father, so that at no time would the child be left defenseless, without anyone responsible for his welfare.⁵⁶ This result does not in any way qualify the power of the court by express decrees to give custody to someone other than the father in these or other cases. Similarly the right to the child's earnings would go to the father and would continue with him, unless it passed impliedly or expressly to the one having custody.⁵⁷ But such granting of the right to the earnings of the child may impliedly pass to the one having custody, even though the parent continues liable for the child's support.⁵⁸

CUSTODY IN THE CRIMINAL LAW AND IN THE FIELD OF COURT PROCEDURE

Some may well think that the most objectionable part of the present law of custody has not yet been mentioned. Surely he would be a bold man who would venture to fix precedence in these matters, though if anyone were to claim that the procedural methods in custody cases were the worst part of the whole business, it would be difficult to prove him wrong. The basic rule in constitutional law that one is entitled to reasonable notice and a fair hearing quite properly is held to apply in custody cases only

⁵⁵ And, of course, there is no sure statute in the field of custody alone, although there are statutes providing for adoption by court procedure in every state, and after such adoption it may be fair to say that all parental rights and duties in the natural parent are terminated.

⁵⁶ *Jensen v. Sorenson*, 211 Iowa 354, 233 N.W. 717 (1930).

⁵⁷ *Keller v. St. Louis*, 152 Mo. 596, 54 S.W. 438 (1899).

⁵⁸ *Evans v. Kansas City Bridge Co.*, 213 Mo. App. 101, 247 S.W. 213 (1923).

within appropriate limits.⁵⁹ For instance, if a parent were abusing a child, or (perhaps incident to divorce) one parent had kidnapped the child from the other parent to whom custody had been awarded, it would be highly impractical and injurious to the child itself if nothing could be done until the offending parent in these two cases had been given notice that a hearing would be held under which custody might be transferred to another. This would give the offender warning and might cause him either to wreak his vengeance on the child or abscond with the child beyond the jurisdiction of the court and then perhaps go into hiding. In keeping with the provisions of local statutes, interested persons or law-enforcing officers themselves can take the child into the custody of the court, providing only that the parents are given due notice of some later hearing at which the custody shall be determined, and providing that this hearing itself shall be fair.⁶⁰ But all these proceedings concerned with the custody of children are in equity. This means that there is no right to a jury trial, even in matters that would involve the criminal law for adults, unless it happens to involve the more serious criminal offenses for older children, entitling them to jury trial and other safeguards,⁶¹ as in the case of adults. In theory the constitutional provisions about trial by jury and about cruel and unusual punishments do not apply to children in this field.⁶² The glib convention is that these constitutional rights are incident to punishment or to deprivation of liberty or property which do not occur at all in the case of the correction of children. In theory there is no punishment and the criminal statutes do not apply.⁶³ In loving solicitude the court of chancery confines the child in a reform school for perhaps ten or fifteen years, where the officials may work him and beat him as perhaps no state prison in the country would permit, and all this is done in the name of saving him from punishment and guarding and protecting him against all oppression or evil so that he may be prepared to lead the good life when he gets out.⁶⁴ The fact that his fellows in the reform school are quite as efficient in training him in the ways of crime as any hardened convicts would be in a state penitentiary still does not change the theory or affect the law.⁶⁵

⁵⁹ State ex rel. Olson v. Brown, 50 Minn. 353, 52 N.W. 935 (1892).

⁶⁰ Ibid.

⁶¹ Lee v. McClelland, 157 Ind. 84, 60 N.E. 692 (1901).

⁶² Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905); Pugh v. Bowden, 54 Fla. 302, 45 So. 499 (1907).

⁶³ Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923); State v. Burnett, 179 N.C. 735, 102 S.E. 711 (1920).

⁶⁴ Baldwin, Children's Courts §§ 35 et. seq. (1938).

⁶⁵ Nutt, op. cit. supra note 52, at 201 et seq.

Of course, broad powers in the state on the theory of *parens patriae*, to be exercised by the court of equity, are necessary and inevitable. But the situation in most states, in which there are substantially no limits whatever on these powers, is not to be justified.⁶⁶ We are well within the limits of accurate statement when we say that nowhere else in law does a court of equity have such unregulated power over such vast and important interests as in its power to take custody from one person and give it to another, even to a reform school, thus substantially controlling the lives of all persons under twenty-one years of age.

That equity needs general power in this whole field, none would seriously question. The real issue seems to be one of regulation of this power so that it may be exercised in different ways for particular groups or categories and to further particular purposes that the legislature shall fix upon or that shall be formulated into rather definite principles through the decisions of the courts themselves.⁶⁷ Is the wide discretion which the courts concededly need in this field necessarily co-extensive with unlimited power, and are there no recognized principles or guides whatever in its exercise?

The basic concept is that the state as *parens patriae* protects the children against the application of the criminal law, as well as against the reprehensible conduct of anyone having custody at the time (including the parents). The theory is that commitment of the child to a reform school is not punishment at all, since it is not done on the basis of penalty for particular acts committed; rather it is for the betterment and general welfare of the child's whole life.

The main attack on the practice of the courts within the limits of their general theory is that in fact a juvenile court (exercising equitable powers) may commit a child to a reform school for five years because it has found him guilty (without a trial by jury) of doing an act which, if done by an adult, would entitle the adult to trial by jury and subject him to not more than three months' detention in a house of correction if he were found guilty.⁶⁸ If the basis in both cases is penalty for particular acts done, then this discrepancy between the penalties of the child and the adult is inde-

⁶⁶ Cf. Baldwin, *op. cit.* supra note 64.

⁶⁷ This, of course, is a question of what the courts should do in the future. It is at least in keeping with the approach suggested here, and with critical comments on juvenile courts and the needs of children committed by those courts to juvenile homes. Cf. *The Child, the Family, and the Court*, note 52 *supra*.

⁶⁸ For an analysis of the shortcomings of juvenile courts in performing their function, see 2 Abbot, *The Child and the State* 334-39 (1938); cf. Mack, *The Juvenile Court*, 23 *Harv. L. Rev.* 104 (1909).

fensible. No amount of high-sounding sophistry about the court's sending an adult to prison for punishment while it sends the child to a reform school in loving kindness for its own good, will convince anybody who pays attention to the plain facts. Life in a reform school may be more severe (and for that matter, more injurious to character) than life in a penitentiary. Briefly, it is submitted that where the court acts substantially on the basis of particular acts done, then confinement in institutions for children should correspond roughly in length and in other ways to commitment for particular offenses by adults. This test should go to the power and exercise of reasonable discretion by the judge committing the child. The judge could safely be left with his general equitable powers in the case of children and not be expressly limited by statute as in the case of adults.⁶⁹

In keeping with the real equitable powers in this field, the justification for the court's committing the child to a reformatory for a long period (perhaps the rest of his minority) is that the commitment is *not* for particular acts done, but for the necessary guidance and welfare of the child's whole life. For such commitment, however, there should be detailed showing of the child's character and general needs in addition to his committing any one or more particular offenses.

It may still be urged that this is indeed the theory behind the present practice.⁷⁰ In this abstract sense it might well be substantially impossible to prove the case one way or the other. Where a court has such vast powers, as in the awarding of custody, and where particular theories of a court are not given definite expression in detailed decisions that set forth the particular basis and scope of each case, then the great thing is to note what the court does and judge by this.⁷¹ If in a particular case there is no significant evidence except that the child committed a single act which for an adult would be petty larceny, with a penalty of confinement for a few months, and if in that case the court sends the child to a reformatory for ten years, this should be reversed on appeal on the ground that such a sentence did not correspond to the facts; and in law such a sentence should not be imposed unless 1) there was a substantial showing of general depravity in the child's whole life, and 2) it was reasonable to hold that such commitment to an institution was the best way to further the child's general welfare under the circumstances. These two definite findings very generally are

⁶⁹ Cf. Mack, *op. cit.* supra note 68.

⁷⁰ In this connection, it may be well to refer to the general doctrine of constitutional law that if a particular statute is unconstitutional in its factual results, then the statute is also invalid although this would not appear from its wording alone.

⁷¹ Cf. note 70 supra.

not made by the courts now before committing children for long terms to institutions, and we may safely say that the tests we have suggested have not been met where children have been so committed for long periods. We note finally that the second requirement should also be an important limitation on the court's general discretion in this field. There should be detailed evidence and the court should expressly find that commitment for a long period, on the theory of the child's general welfare, would in fact help the child more⁷² than perhaps a suspended sentence leaving custody with the parents, with a probation officer or other specially equipped person to supervise the living conditions and activities of the child.

⁷² In a word, what is proposed here is clearly constitutional, and does not cut down on the inherent powers of the court of equity. The proposal merely is that express statutes be passed in each state, either 1) fixing the actual punishments in terms of time of confinement in the case of infants for particular offenses, or 2) requiring the court to follow the penalties given for adults in the case of children also. In any case, however, these state statutes should require express and detailed findings by the court before it could confine an infant to a state correctional institution for a considerable period on the theory that the child's general character required a long period of such training both for the child's own sake and for the protection of the community.