DOMESTIC RELATIONS

CUSTODY OF CHILDREN — CHILD'S RIGHT OF CHOICE UNDER OHIO G. C. SECTION 8033.

The father of a ten year old boy brought a proceeding in the Juvenile Court to modify the court's former order awarding custody of the boy to the mother. The child, being permitted to choose which parent he desired to live with according to Ohio G.C. sec. 8033,[1] chose the father and the mother appealed. The Court of Appeals affirmed the Juvenile Court, holding that the statute is mandatory in operation unless the parent chosen is unfit by reason of moral depravity, habitual drunkenness or incapacity.[2]

Under the English common law the father's right to the custody of his child was practically absolute,[3] but in the United States the common law rule is that the court should award the custody according to what is best for the welfare of the child.[4] The Ohio cases involving children under ten years of age appear to be in accord with this,[5] but where the children are over ten years of age the choice of the child has been substituted as the determining factor by Ohio G.C. sec. 8033.[6]

[1] OHIO G. C. sec. 8033: "Upon hearing the testimony of either or both of such parents, corroborated by other proof, the court shall decide which one of them shall have the care, custody and control of such offspring, taking into account that which would be for their best interest, except that, if such children be ten years of age or more, they must be allowed to choose which parent they prefer to live with, unless the parent so selected, by reason of moral depravity, habitual drunkenness or incapacity, be unfitted to take charge of such children, in which event the court shall determine their custodian. . . ."

[2] Schwalenberg v. Schwalenberg, 65 Ohio App. 217, 29 N.E. (2d) 617, 18 Ohio Op. 397 (1940).

[3] *Ex Parte* Skinner, 9 Moore 278 (1824); Rex v. Greenhill, 6 N. & M. 244 (1836); *In Re* Agar Ellis, Agar Ellis v. Lascelles, 24 Ch. D. 317, 13 Ruling Cases 30 (1883).

[4] Corrie v. Corrie, 42 Mich. 509, 4 N.W. 213 (1880); People *ex rel.* Sinclair v. Sinclair, 91 App. Div. 322, 86 N.Y.S. 539 (1904); Hernandez v. Thomas, 50 Fla. 522, 39 So. 641, 7 Ann. Cas. 446, 2 L.R.A. (N.S.) 203 (1905); Heresy v. Heresy, 271 Mass. 545, 171 N.E. 815, 70 A.L.R. 518 (1930).

[5] *In Re* Taylor, 19 Ohio N.P. (N.S.) 438 (1913); Schultz v. Schultz, 18 Ohio C.C. (N.S.) 402 (1910); Carr v. Carr 18 Ohio C.C. (N.S.) 124, 32 Ohio C.D. 630 (1910); Vincent v. Vincent, 8 Ohio Dec. 160, 6 Ohio N.P. 474 (1896); here children under ten were awarded to the mother, while the children over ten were permitted to choose, and selected the father. In *Lawyer v. Lawyer,* 14 Ohio L. Abs. 33 (1933), the court followed the ancient rule of practice that the mother of a young child especially a girl is better able to care for the child; *Patterson v. Patterson,* 12 Ohio N.P. (N.S.) 601 (1912), father awarded custody of twenty-year-old afflicted son who had been committed to an institution. Boy's right of choice was not raised; *In Re Lutkehaus,* 22 Ohio N.P. (N.S.) 120 (1919), welfare of child not sole determining factor so as to overshadow father's inherent right to custody as against maternal grandmother.

[6] Schwalenberg v. Schwalenberg, note 2, *supra;* Parker v. Parker, 28 Ohio L. Abs. 49 (1938); Campbell v. Campbell, 20 Ohio L. Abs. 605 (1935); Mollencamp v. Mollencamp, 18 Ohio L. Abs. 90 (1934); Slater v. Slater, 15 Ohio L. Abs. 572 (1933); Blaisdell v. Blaisdell, 7 Ohio L. Abs. 685 (1929); Foster v. Underwood, 2 Ohio L. Abs. 565 (1924); Jenkins v. Coulson, 2 Ohio L. Abs. 13 (1923).

It is not the purpose of this note to say that the choice of the child in the principal case was unwise, for here it appears both parents were well qualified to care for him. Perhaps in most cases which have been determined under this statute the child chose the proper parent, but this is not true of every case nor is it likely to be. Undoubtedly the child's preference should be a factor in awarding custody but welfare should control choice,[7] and an improper custody is not excusable because the child preferred it that way.

As it has been interpreted in the principal case and in previous cases, Ohio G.C. sec. 8033 is mandatory unless the parent selected by the child is unfit by reason of moral depravity, habitual drunkenness or incapacity. Obviously the mention of these three grounds of unfitness does not exhaust the field, for a parent may be unfit to care for a child in many other respects, but that matters not since the court is concluded by the child's choice if the parent chosen does not properly fall into one of the three classifications mentioned as exceptions in the statute. Nor have the Ohio courts tortured the meaning of moral depravity, habitual drunkenness or incapacity in an effort to avoid the hard cases. Rather they have required an affirmative showing of unfitness,[8] placing the burden of proof on the parent not chosen.[9]

In the final analysis the question is one of policy. The courts using all the facts at their disposal and exercising their full discretion have been unable to make a proper custody award in many instances. Assuming that a child of ten years of age or more might be acting free from the undue influence of either parent, it is very doubtful if at such an early age a child can take into consideration and properly weigh the factors necessary to a wise choice. Then too it is not permissible to assume that a child of ten will be acting free from influence, for a young child might easily be influenced by either parent. Parental influence is not bad in itself but the factors which exert the greatest influence are likely to be the things which would commonly be considered as having a tendency to spoil the child. The parent who is willing to go further in this respect would seem to be less qualified for the custodial award,

[7] MADDEN, PERSONS AND DOMESTIC RELATIONS, (1931) p. 377.

[8] See *Vincent v. Vincent*, 8 Ohio Dec. 160, 6 Ohio NP.. 474 (1896), where the court would not declare a father who could not be proven guilty of adultery unfit, though it was definitely established that he was associating with another woman and there was some evidence that he had committed adultery; also Caldwell v. Caldwell, 17 Ohio C.C. (N.S.) 528, 32 Ohio C.D. 266 (1911), finding that four protracted sprees during the course of ten or twelve years did not establish habitual drunkenness; and Schwalenberg v. Schwalenberg, note 2, *supra*, where court refused to entertain evidence of father's habits earlier than one year preceeding the hearing.

[9] Schwalenberg v. Schwalenberg, note 2, *supra;* Slater v. Slater, 15 Ohio L. Abs. 572 (1933).

but the child with whom the choice rests cannot be expected to view it that way.

It seems that a better method could be devised than one which places so much emphasis on the choice of the child. Restoring the court's discretion would be a step in the right direction. The use of specially trained workers to thoroughly investigate the facts surrounding each case would be helpful.[10] In any event we should remember that proper custody is important to the child and to society as well and merits more consideration than the mechanical solution furnished by Ohio G.C. sec. 8033. J. P. M.

EVIDENCE

Admissibility of Hospital Records

In an action for personal injuries caused by the defendant's automobile, the trial court permitted the plaintiff to introduce in evidence a hospital record showing the value of services rendered by the hospital and containing on its face the notation "Man promised to pay hospital bill." The Supreme Court held that the admission of such record over objection duly made was reversible error.[1]

The term "hospital records" in general means the records and charts kept as a part of the case history of all patients in the hospital.[2] They are usually made by several doctors and nurses who at various times enter on these records items which pertain to the care or progress of the patient. It is obvious that if the record is offered as evidence without calling all of the individuals who made the notations or entries it is hearsay, and also it is inadmissible unless it can be placed under some exception to the hearsay rule.

In the principal case the Supreme Court said that the trial court had admitted the hospital record on the basis of the so-called shop book rule, and that under this doctrine such records were not admissible because the hospital was not a party.[3] Admitting this, it does not follow that the record might not be admissible under some other exception to the hearsay rule.

The common law recognized an exception for entries in the usual

[10] Ohio G. C. sec 11979-4, which provides that the court may, in its discretion, appoint one of its officers to make an investigation as to the character, family relations, past conduct, earning ability and financial worth of the parties in divorce or alimony cases, is suggestive of what might be done along this line in connection with problems involving the custody of children.

[1] Petterson v. Lake, 136 Ohio St. 481, 26 N.E. (2d) 763 (1940).

[2] American Jurisprudence, tit. Hospitals, sec. 6.

[3] Peterson v. Lake, 136 Ohio St. 481, 483, 26 N.E. (2d) 763 (1940).