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Parent and Child--Custody of Child Where Father Overseas in Armed Forces and Wife Operating Boarding House (Walch v. Walch, 52 N.Y.S.2d 697 (1945))

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Whether complete disability existed and whether the condition was known to the employer are ultimate questions of fact to be decided by the jury under proper instructions from the court. In the case under review, there was sufficient evidence adduced at the trial to establish all the elements necessary to charge the employer with liability under the exception and the determination of the jury in the plaintiff's favor on these questions will not be disturbed by an appellate court.

The decision symbolizes the tendency of the courts to further social and industrial relationships. It illustrates the elasticity of legal concepts and rules and indicates an attempt on the part of the courts to transform into legal duties accepted moral obligations.

G. S.

PARENT AND CHILD—CUSTODY OF CHILD WHERE FATHER OVERSEAS IN ARMED FORCES AND WIFE OPERATING BOARDING HOUSE.—A proceeding in the nature of a writ of habeas corpus was brought by Evelyn Walch to determine the custody of her child, Lorena Mae Walch, four years old. Evelyn Tiffany and Donald Walch were married when they were very young, and although his parents at first objected because of the extreme youth of the couple, they accepted the situation and received them on friendly terms. The child was born a year later. The only home of their own which the couple established was an apartment which they occupied for a very short time. They moved back and forth between the home of the husband's parents and the home of the wife's mother. Donald was a farm boy and Evelyn had been brought up in a small city, and their tastes as to recreation and the location of a home differed considerably. They parted temporarily in 1942 and Evelyn took the child first to her mother and then left her with relatives in Pennsylvania while she made a trip to California. In September of that year the Welfare Department of Pennsylvania instructed the senior Walches to go to Pennsylvania to get the child from the place where her mother had left her. In 1943 when Donald was inducted into the army Evelyn returned to him and accompanied him to various posts during his training period, leaving the child during this time, with his parents. When he went overseas she returned to his parents' home and to her child. Becoming dissastisfied with rural life, in 1944, she left the Walch home and went to Beaver Dams to her brother who, without having divorced his wife, was living there with another woman. After five weeks, during which the child was left in the care of this household, the brother, becoming enraged because of Evelyn's having stayed overnight in town with her mother, phoned

the Walches to come and take the child. Evelyn is now living in Corning with her mother who within two months after the death of her husband married one Wayne Griffin, a mere youth who is now in the armed service. Mrs. Griffin runs a boarding house with a promiscuous assortment of dwellers, including a drunkard, a person of shady character and the son with whom Evelyn had stayed at Beaver Dams. It is to this home that Evelyn seeks to bring her daughter from the quiet country home of the senior Walches. *Held,* the health and welfare of Lorena Mae Walch will best be safeguarded and her interest promoted by a continuance of her custody with the grandparents until the return of Lt. Donald Walch or until the further order of the court, with complete freedom to the mother of access to the child and the right to visit at all reasonable hours. The Walch home is open to Evelyn if she desires to visit or live there. *Walch v. Walch,* 52 N. Y. S. (2d) 697 (1945).

At the time that Donald said farewell to his family, there was no rift in the marital relations of the couple and correspondence which had passed between them since he has been overseas indicates that no estrangement has taken place. There was no friction between Evelyn and her mother-in-law and the arrangement which he made that she and the child should live in his parents' home was agreeable to all when he left. It is the husband's duty to provide a home for his wife and family and, while he may not force his wife to live in the home of his mother under the domination of the older woman,[1] where the relations between the women are pleasant and a benefit to the wife, she is obliged to accept the arrangement made.[2] A "state of separation" [3] which would deprive either parent of a *prima facie* right to custody and control [4] does not exist here. The right of a mother to the guardianship and control of her child is equal to that of the father.[5] A court of equity, in its capacity of *parens patriae,*[6]

[1] In *Field v. Field,* 79 Misc. 557, 558, 139 N. Y. Supp. 673 (1913), the court said, ". . . if the husband's mother makes discord where there should be harmony, interferes with the wife's control and management, even at the request of the son, or by her own improper conduct and thoughtless language makes the home unpleasant and distressing to the defendant (wife) then the wife would be justified in leaving her husband and requiring support from him elsewhere."

[2] Brewer v. Brewer, 79 Neb. 726, 113 N. W. 161, 162 (1907). "The husband has the right to direct the affairs of his own house, and to determine the place and abode of his family, and it is in general the duty of the wife to submit to such determination."

[3] Lee v. Lee, 182 N. C. 61, 108 S. E. 352 (1921). "Separation in matrimonial law means a cessation of cohabitation of husband and wife by mutual agreement or in the case of judicial separation, under decree of court."

[4] DOMESTIC REL. LAW § 70.

[5] *Id.* § 81.

[6] Fladung v. Sanford, 51 Ariz. 211, 75 P. (2d) 685 (1938); People *ex rel.* Noonan v. Wingate, 367 Ill. 244, 33 N. E. (2d) 467 (1941); *In re* Santillanes,

independent of statute, has jurisdiction over the custody and control of infants.[7] Where a proceeding is instituted to determine custody, even though the parents are living together,[8] the child immediately becomes a ward of the state.[9] In New York, the Supreme Court, acting as a court of equity, has jurisdiction over the persons and estates of infants,[10] and in a proper case has power to take the child even from its general guardian.[11] The controlling considerations in determining the custody of an infant are the best interests and welfare of the child.[12] The principle is laid down in a long line of cases, that in a controversy for the custody of a minor, the court will consider the physical, moral, mental and financial welfare of the child.[13] "It is not enough that the children have not been naked and have not been hungry" [14] but the surroundings of the home, such as schools, churches and moral atmosphere must also be considered.[15] The question as to the custody which will best protect the interests and promote the welfare of the child rests in the discretion of the trial court and except in a case of clear abuse of that discretion, the appeal court will not disturb the decision of the lower court.[16] In a special proceeding such as this, the court is not bound by the strict rules of evidence which obtain in trials of actions at law, but may exercise its discretion to suit the exigencies of the matter.[17]

M. G. D.

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47 N. M. 140, 138 P. (2d) 503 (1943); People *ex rel.* Converse v. Derrick, 146 Misc. 73, 261 N. Y. Supp. 447 (1933).

[7] *In re* Vanderbilt, 153 Misc. 884, 276 N. Y. Supp. 745 (1934); Bedrick v. Bedrick, 151 Misc. 4, 270 N. Y. Supp. 566, *aff'd*, 241 App. Div. 807, 271 N. Y. Supp. 949 (1934).

[8] People *ex rel.* Delaney v. Mt. St. Joseph's Academy of Buffalo, 198 App. Div. 75, 81, 189 N. Y. Supp. 755, *aff'd*, 234 N. Y. 565, 138 N. E. 448 (1922).

[9] Esco v. Davidson, 238 Ala. 653, 193 So. 308 (1940); Chase v. Bartlett, 176 Ga. 40, 166 S. E. 832 (1932).

[10] Petition of Travers, 177 Misc. 1044, 32 N. Y. S. (2d) 742 (1941); *In re* Vanderbilt, *supra* note 7.

[11] Matter of Lee, 220 N. Y. 532, 116 N. E. 352 (1917).

[12] People v. Duryee, 188 N. Y. 440, 81 N. E. 313, *rev'g*, 109 App. Div. 533, 96 N. Y. Supp. 371 (1907); People *ex rel.* Mahoff v. Matson, 139 Misc. 21, 247 N. Y. Supp. 112 (1931).

[13] Fletcher v. Preston, 226 Ala. 665, 148 So. 137 (1933); Hodgen v. Byrne, 105 Colo. 410, 98 P. (2d) 1000 (1940); State *ex rel.* Bullard v. Clark, 141 Fla. 684, 179 So. 657 (1938); Kilgore v. Tiller, 194 Ga. 527, 22 S. E. (2d) 150 (1942); People *ex rel.* Noonan v. Wingate, *supra* note 6; Maddox v. Maddox, 174 Md. 470, 199 Atl. 507 (1938); Gardner v. Hall, 132 N. J. Eq. 64, 26 A. (2d) 799, *aff'd*, 133 N. J. Eq. 287, 31 A. (2d) 805 (1943); *In re* Thoemmes' Guardianship, 238 App. Div. 541, 264 N. Y. Supp. 829 (1933).

[14] Lawson v. Lawson, 111 App. Div. 473, 98 N. Y. Supp. 130 (1906).

[15] Ridgeway v. Walter, 281 Ky. 140, 133 S. W. (2d) 748 (1939).

[16] Wilkinson v. Lee, 138 Ga. 360, 75 S. E. 477 (1912); *In re* Hickey, 85 Kan. 556, 118 Pac. 56 (1911).

[17] People *ex rel.* Congress Hall v. Ouderkirk, 120 App. Div. 650, 105 N. Y. Supp. 134 (1907); People *ex rel.* Sutliff v. Board of Supervisors of Fulton County, 74 Hun 251, 26 N. Y. Supp. 610 (1893).