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The Law of Child Custody: Development of Substantive Law

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THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW. By Shirley Wohl Kram & Neil A. Frank. Lexington: Lexington Books, 1982. Pp. xvi, 176. $21.00.

Reviewed by the Honorable Rose McBrien*

The practice of domestic relations law is both difficult and painful—difficult in that the body of law is complex and unpredictable, and painful in that the client is emotionally involved and does not understand the difficulties. The area of child custody is perhaps the most frustrating to the practitioner and to the client alike.

How does the practitioner explain the obscurities of the child custody law to a parent intent on getting his or her children at any cost? "It is undisputed that 'the best interest of the children' must govern in the adjudication of custody" in the State of New York.[1] The law also tells us that in all cases there shall be no prima facie right to the custody of the child in either parent.[2] "The only absolute in the law governing custody of children is that there are no absolutes."[3] Considering this body of law, it can be argued that such guidance appears to be no guidance at all. Each party believes that the custodial relationship in the best interests of the child would include that party as the custodial parent. This is usually the basis of the custody battle. In order to counsel a litigant and prepare for trial, an attorney must explore the myriad factors which a court may consider and the weight that will be given each one. This book, with its detailed historical overview of child custody, is a valuable aid to attorneys in custody litigation.

The authors of this thoughtfully presented dissertation aim to present a "comprehensive analysis of the conceptual evolution of judicial and legislative policy toward the resolution of disputed child-custody proceedings."[4] The value of this work is in

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1. Nehra v. Uhlar, 43 N.Y.2d 242, 246, 372 N.E.2d 4, 5, 401 N.Y.S.2d 168, 169 (1977).
2. N.Y. DOM. REL. LAW section 240 (McKinney 1983).
3. Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 93, 432 N.E.2d 765, 767, 447 N.Y.S.2d 893, 895 (1982).
4. S. KRAM & N. FRANK, THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW at xiv (1982).

its treatment of historical development in setting the tone for current judicial thought in child-custody disputes. Through historical perspective certain predictabilities can be derived. The authors use the law of New York State to demonstrate the development of the law of child custody; other jurisdictions are compared and contrasted in order that valid conclusions may be drawn on a broad national scale.

This volume is directed to the substantive law in terms of the relief that a court of law may award. A future volume will be devoted to procedural and ancillary topics in this area of the law. The work thus far completed covers three major categories of substantive relief: "(1) custody, or choosing which contestant will have the ultimate control and/or physical possession of the minor child; (2) visitation, or the extent to which an adversary party will obtain the company and limited control of a minor child for a specified time; and (3) counsel fees, which concerns the liability of the parties to the potentially crippling expense of litigating the first two enumerated issues."[5]

The authors begin with a brief discussion of subject matter jurisdiction, averring that the substantive issues cannot be studied in a vacuum. Only the procedural knowledge necessary to gain access to the courts is presented.

The authors then delve into the historical basis for the law of child custody, beginning with the common law preference for custody in the father. In an 1837 decision, *People ex rel. Nickerson,*[6] the New York Supreme Court found a prima facie right in the father to the custody of a child, citing an impressive list of old English decisions as authority. It was felt that "the interference of the court with the relation of father and child, by withdrawing the latter from the natural affection, kindness and obligations of the former, is a delicate and strong measure; and the power should never be exerted except for the most sound and solid reasons."[7]

The Tender Years Doctrine, the rule of law that enshrined the mother as the preferred parent in most custody disputes, developed slowly, originally as exceptions to the common law right

5. *Id.* at xv.
6. 19 Wend. 16 (1837).
7. *Id.* at 19.

of custody in the father. During the late 1800's, although the father's prima facie right to custody was still intact, courts became increasingly more liberal in finding reasons for awarding custody to the mother. In the 1904 decision of *People ex. rel. Sinclair v. Sinclair*,[8] the court found that the "tender years" of the children was reason enough to award custody to the mother.

The presumption in favor of the father eventually gave way under the Tender Years Doctrine, which came to full maturity in the case of *Ullman v. Ullman*.[9] The court held that "[t]he child at tender age is entitled to have such care, love and discipline as only a good and devoted mother can usually give."[10] Up to this point the father had enjoyed a natural right to his children unless the mother could persuade the court otherwise. With this decision, the burden was reversed.

The succeeding sixty years, the authors tell us, found the law presuming that the mother was better suited to care for young children. The major exception to the rule was in cases of flagrant adultery.

Only recently has the law recognized the demise of the presumptions that gave credence to the Tender Years Doctrine. Women are no longer expected to stay home with their children. It is often incumbent upon the wife to enter the work force in order to better provide for the family. Likewise, it is widely recognized that a father may assume much of the responsibility in the care and upbringing of his children. The days when a father remained aloof with regard to such matters are gladly over.

Although there is no longer a prima facie right of custody in either parent, old prejudices die slowly. The painstaking history of the Tender Years Doctrine provided by the authors demonstrates to those new to the child custody field how far the rights of fathers have had to come. The slowness with which the law has evolved suggests that fathers still have some distance to travel before prejudice and misapprehension about their role disappears. Actual parity between fathers and mothers with respect to their right to custody may not occur for some time.

What does this historical perspective mean to the practi-

8. 91 A.D. 322, 86 N.Y.S. 539 (N.Y. App. Div. 1904).
9. 151 A.D. 419, 135 N.Y.S. 1080. (N.Y. App. Div. 1912).
10. *Id.* at 424-25, 135 N.Y.S. at 1083.

tioner counseling a client in a child-custody dispute? It seems incumbent on the father that he show he is capable of caring for and raising the children. In this enlightened age, as previously mentioned, it is no longer unusual for the father to take an active role in these endeavors. Most courts would assume the mother fit unless it is otherwise demonstrated. The threshold question is whether both parents can adequately care for the children. If both are fit, the court must explore other issues, including finances, living arrangements, environment and psychological aspects. Therefore, the first order of business for the father is to prove himself capable of child care, thus clearing the Tender Years Doctrine hurdle. Then he must establish his superiority in terms of other considerations. For her part, the mother must show her superior ability to care for the children, or the father's lack thereof. Then she must turn her attention to the other factors.

The authors next consider the current standards for the determination of custodial disputes. Recognizing that all cases involve degrees of fitness, rather than declaring a parent fit or unfit, a broad spectrum of factors are discussed. Also of interest is the treatment afforded the effect of illegitimacy on custodial disputes, the rights of third parties as against the natural parents, and visitation.

Counsel fees, a subject of noteworthy importance in such disputes, is dealt with thoughtfully and thoroughly at the conclusion of this work.

The authors have written an excellent study of the law of child custody. The insight provided through historical perspective should be helpful to any practitioner immersed in this difficult and painful area of the law.