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Domestic Relations -- Custody -- Evidence -- Has the Polar Star Been Obscured by Statute in North Carolina?

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is not limitless to another person.[32] The burdens which the other person imposes may well outweigh the benefits he might bestow.[33]

It does not necessarily follow from the above that recovery should be allowed in *Custodio*. It is merely to stress that the difficult ironies in the "wrongful life" cases are not present in this case. It is for this reason that the court would do well to keep the "wrongful life" cases on the periphery of the decision making process. Recovery in *Custodio* and other unwanted child support cases would not be internally paradoxical. Recovery would depend on whether, in judicial opinion, the subjective fear of undermining family life and psychologically harming the child is outweighed by the objective financial damage to the plaintiff. It is this question that the court must consider if it receives the case again on appeal.

RICHARD J. BRYAN

Domestic Relations—Custody—Evidence—Has the Polar Star Been Obscured by Statute in North Carolina?

"[T]he welfare of the child is the polar star by which the discretion of the court is to be guided. . . ." This oft quoted[2] phrase appears to be the guiding precept for the North Carolina courts in custody cases except where it collides with the conflicting policy of judicial economy.[3]

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expressed; and could not, without incursion into the metaphysical, be measured against the hypothesis of a child or imagined entity in some way identifiable with claimant but of normal and lawful parentage and possessed of normal or average advantages.

269 N.Y.S.2d 786, 787 (1966).

[32] To use an extreme example: The value of the life of someone attacking an innocent victim with a knife would be *de minimis* from the viewpoint of the innocent victim.

[33] One commentary glossed over this distinction. Referring to Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964), an unwanted child support case, and *Zepeda*, the writer said:

> In both . . . the claim is essentially that life could be damaging. Viewed in this light, the claims seem contrary to a concept, fundamental to our legal system, that life is inherently valuable. The practical importance of all ramifications of this concept may be doubted in view of the current population explosion. However, it is only realistic to consider that it would seem extraordinary for a court to declare that life under any adverse condition or to any person could be damaging.

9 UTAH L. REV. 808, 814 n.37 (1965).

[1] *In re* Lewis, 88 N.C. 31, 34 (1883).

[2] R. LEE, NORTH CAROLINA FAMILY LAW § 224 (1963).

[3] "Should we accept the contentions of the defendant and forbid the use

In *Gustafson v. Gustafson*[4] Judge Mintz awarded custody of a minor child to the mother after a preliminary hearing at which *ex parte* affidavits were submitted to establish her mental stability. The defendant husband's requests to cross examine the affiants and to examine the physicians who treated Mrs. Gustafson for the illness allegedly caused by the defendant's conduct were refused. The supreme court[5] found that Judge Mintz did not abuse his discretion in disallowing the cross examination of the affiants, and further stated that he was not *authorized* under the proviso to the physician-patient privilege statute[6] to compel the disclosures sought by the defendant since he was not a "presiding judge of a Superior Court in term."[7] The court in the instant case appears to have foreclosed the "polar star" in future cases by stating that the judge conducting the preliminary hearing does not have the power to compel disclosure under N.C. GEN. STAT. § 8-53 (1953) even though the proper administration of justice requires it.

Custody was granted to the plaintiff approximately six months after her return from a two year rest in a mental institution. Plaintiff twice attempted to take her own life while at the institution. In light of the above facts, the welfare of the child dictates a full investigation into the fitness of the mother before awarding custody to her. It is impossible to perceive how the welfare of the child has been enhanced by snatching her away from a home where she has spent two years, especially in light of the fact that the defendant's fitness is unchallenged[8] and the plaintiff's is so questionable. The

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of affidavits and require the presence, examination and cross examination of each of the witnesses at preliminary and temporary hearings and motions pending trial, it would cause serious and unnecessary delay." Gustafson v. Gustafson, 272 N.C. 452, 455, 158 S.E.2d 619, 621 (1967).

[4] 272 N.C. 452, 158 S.E.2d 619 (1967).

[5] *Id.*, 158 S.E.2d 619 (1967).

[6] N.C. GEN. STAT. § 8-53 (1953): Communications between physician and patient.—No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

Id.

[7] The words "presiding judge of a superior court" refer to the superior court judge who presides at the trial. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

[8] "From the record it appears that both the plaintiff and the defendant

disruptive effect of a change of custody on a child's world should alone prevent a court from shifting custody where both parties appear to be fit guardians.[9]

The court in the instant case appears to be more concerned with establishing that the procedures employed for determining custody did not work an injustice upon the defendant than with providing for the welfare of the child.[10] The court stressed the temporary nature of the custody award. Theoretically, at least, the defendant has not been seriously deprived of any of his rights since after the trial of the case on the merits, the custody question will be considered de novo.[11] But practically he has been denied the companionship of his child for an indeterminate period of time—the length of which depends upon the congestion of the local calendar. Also, this period of time spent with the mother is bound to influence the malleable child's feelings and preference as to her choice of a permanent guardian. The North Carolina Court has stated that "[t]he wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between parents, but is not controlling."[12] Often, in close cases where both parents are fit guardians, the judge at the *de novo* hearing will be reluctant to cast the child's world into chaos by changing the custody order. In the above situation it is possible that the original defeated party has had his rights foreclosed at the abbreviated preliminary custody hearing.

In order to remedy the above mentioned ills, a certain amount

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are of good character and that the court could well have adjudged that both were fit and suitable persons to have custody of this child." 272 N.C. 452, 458, 158 S.E.2d 619, 623 (1967).

[9] "[W]here young children have been placed in one home . . . for a substantial period of time and the situation seems satisfactory, there is a reluctance to uproot the children from familiar surroundings and place them in a strange home with a parent who hardly knows them." 24 Am. Jur. 2d. *Divorce and Separation* § 820 (1966).

[10] "The ultimate right of cross examination will be afforded the parties at the trial of the cause, and this is within the purview of the Court's decision in *Stanback v. Stanback* (citations omitted)." 272 N.C. 452, 455, 158 S.E.2d 619, 621 (1967). "It must be recalled that at the trial of the case affidavits will not be admissible and that the witnesses must appear in person. Therefore the fact that in this hearing for a *temporary* purpose the plaintiff used affidavits of physicians who treated her does not bring into play the proviso of G.S. 8-54." *Id.* at 457, 158 S.E.2d at 622.

[11] Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

[12] James v. Pretlow, 242 N.C. 102, 105, 86 S.E.2d 759, 761 (1955).

of judicial economy[13] will have to be sacrificed in the interest of justice and the welfare of children. It will be necessary to grant a full judicial hearing in the first instance on the custody question. At present, the presiding judge has the authority to make these hearings as broad or as narrow as he, in his discretion, deems necessary. This power is nugatory when mental or emotional stability is the critical issue since the judge does not have the authority to compel disclosure from treating physicians under N.C. GEN. STAT. § 8-53 (1953). A statutory amendment will be necessary to extend the N.C. GEN. STAT. § 8-53 (1953) proviso power to a judge presiding at custody hearings.[14]

The legislature will be required to amend N.C. GEN. STAT. § 8-53 (1953) in order to avoid the inconsistency and embarassment of having, in effect, two different physician-patient privilege statutes —one absolute, and one qualified. The privilege in the newly created district courts would be absolute since the district court judges do not possess the power to compel disclosure under the present statute.[15] This factor gains added significance since the district court has exclusive jurisdiction over custody matters.[16] The legislature need only take a short, but prudent, step to extend the proviso power to judges presiding at custody hearings. The rationale behind the pro-

[13] Much of the evidence presented at the custody hearing will be duplicated at the trial on the merits.

[14] The court has construed the proviso power to be limited to "the presiding judge of a Superior Court in term." A superior court judge in chambers has been denied the proviso power. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

[15] The only possible method of avoiding this result would be for the courts to construe N.C. GEN. STAT. § 7A-291(6) (Supp. 1967) as a catch-all phrase granting the proviso power to district court judges. The language of this section does not appear broad enough for such a construction:

> To issue all process and orders necessary or proper in the exercise of his powers and authority, and to effectuate his lawful judgments and decrees.

Id.

It is doubtful that the court will adopt such a liberal construction of this section in order to grant the proviso power to district court judges in light of the court's marked reluctance to construe liberally the proviso power in the past. *See* Sims v. Insurance Co., 257 N.C. 32, 125 S.E.2d 326 (1962); Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

[16] *See* N.C. GEN. STAT. § 7A-244 (Supp. 1967): Domestic Relations.—The district court division is the proper division, without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, alimony, child support, and child custody.

viso,[17] the unique character of custody proceedings,[18] and the lack of a strong foundation for the physician-patient privilege[19] all strongly favor this step. It is in fact necessary to return the "polar star" to its rightful position.[20]

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Evidence—Expert Testimony—Physician's Opinion Based on Patient's Statements

In *Todd v. Watts*,[1] plaintiff sought damages for persistent headaches and backaches allegedly resulting from injuries she had sustained in an automobile collision. Her evidence showed a collision, and that she had been thrown forward, striking her head on the windshield, her knees on the dashboard and wrenching her back. An orthopedic surgeon who had treated plaintiff testified in her behalf. He first related the history of the complaints, as told by the plaintiff on her first visit to him for treatment. This testimony included reference to the accident and a recitation that she told him "she was thrown forward when the collision occurred, striking her head and forehead against the front windshield glass, breaking the glass and abrading her forehead. She told me . . . she also wrenched and contused both knees and her low back."[2] There was no objection to this testimony, although on request of defense counsel its use was limited to corroborating the testimony previously given by the plaintiff.[3] The doctor then was asked to give certain opinions as

[17] The proviso was inserted by the legislature to prevent the privilege from serving as a bar to justice.

[18] As noted above, time may be a controlling factor in this type of litigation. Also, it may be extremely important to the welfare of the child that the initial determination be correct.

[19] *See* Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 Yale L.J. 607 (1943).

[20] The question of whether to remove a child from the custody of its natural mother is one over which judges have agonized from time immemorial. *See In re* Two Mothers, 1 Kings 3:11-28, decided by King Solomon, evidently the first 'reported' case. Klein v. Klein, 204 So. 2d 239 (Fla. Ct. App. 1967), *aff'd per curiam*, 18 L. Ed. 2d 1580 (1967).

[1] 269 N.C. 417, 152 S.E.2d 448 (1967). For a previous discussion of this case, see Brandis, *Evidence, Survey of North Carolina Case Law*, 45 N.C.L. REV. 934, 949-51 (1967) [hereinafter cited as Brandis].

[2] 269 N.C. at 421, 152 S.E.2d at 451-52 (dissenting opinion).

[3] *Id.* at 421, 152 S.E.2d at 451. This seems consistent with North Caro-