Case and Comment

BOLSTER v. BOLSTER (1953) 32 M.P.R. 143.

Infants – Custody of – Primary Right of Father to Custody

In this case the Court once more was given the very difficult task of awarding custody of children of a marriage that failed. It is settled law that the welfare of infants is paramount to all other considerations, and if the children's welfare is better served by giving them into custody of one parent, rather than the other, the order will be made accordingly. But in the case under discussion, the Court was concerned with the situation which arose when there was nothing in the evidence to show that the children would be better cared for by one parent than the other.

The Bolsters were married in 1944 and lived together until 1951, when a quarrel took place between them. Mrs. Bolster took the two children of the marriage and went to her parents' home, telling her husband there was no room for him. Shortly after this the father applied for custody of the two children, and as a result, a consent order, giving custody of the younger child to the father and the elder to the mother, was made by Hughes J. At the time, the children were aged seven and three years respectively. Later, on an action brought by the husband for divorce alleging adultery on the part of his wife, the Judge of the Divorce Court refused to grant the divorce. On June 5, 1952, the wife filed a petition for custody of both children, and Mr. Justice Hughes awarded custody of the two children to her. This appeal was then taken by the husband, seeking custody of the two children, and the order of the Trial Judge was reversed.[1]

Richards C. J., (dissenting) agreed with Hughes J. that on the evidence, the interest of the children would be better served if they were given into custody of their mother. Harrison J., with whom Michaud C.J.Q.B.D. concurred, based his judgment on the case of **Rev. v. Sharpe; Ex parte Sharpe.**[2] In that case the Court adopted the judgment of Barker J. in **Re Armstrong,**[3] where it was held that the Court on application for custody of children would take into consideration: (1) the paternal rights, (2) the marital duty of husband and wife so to live that the children will have the benefit of their joint care and affection, and (3) the interest of the children. **Barker J.** also made this statement:

> As to the primary right of the father to the custody of his infant children there can be no doubt.[4]

1. 32 M.P.R. 143 (N.B. C.A.).
2. (1920), 48 N.B.R. 483.
3. (1895), 1 N.B. Eq. 208.
4. **Ibid.**, at p. 210.

As to the nature of this primary right, Barker J. in **In Re Hatfield**[5] added:

> More than this I think the authorities are very plain and positive that the habits and character of the father must be open to the gravest objection to defeat this right.

In the **Bolster** case, Harrison J. reiterated these words and in deciding the issue said:

> Upon a careful reading of the affidavits and the evidence, I cannot find any sufficient evidence to deprive the father of his primary right to custody.[6]

By the common law of England the father had what was almost an absolute right to the custody of his children. It was practically impossible for the mother to make a sufficient showing of unfitness against the father in order to induce the Court to give a decision unfavourable to him. Cases which appear in the English reports show that, although the father's habits and character were of the most objectionable sort, he was still not deprived of the custody of his legitimate children. This right of the father was due to his superior position in the family household. The Chancellor, moreover, while undoubtedly having jurisdiction to determine the custody of the child, was restricted by the very practical consideration of the legal status of married women. The inferior position of married women at common law with regard to their property and income made it highly impracticable to remove the child from the father's custody to give it to the mother. For many years, however, the tendency of legislative action and of judicial decision, as well as of general opinion, has been to give to married women a higher status both as regards property and person. This trend is illustrated by the rights accorded women under such Acts as The Married Women's Property Act and the Representation of the People Acts of 1918 and 1928.

This movement, of course, directly affected the father's exalted position in the family. By conferring rights and privileges on the wife and mother, the power and authority accorded to the husband and father were diminished. In family matters the duty of the husband and welfare of the children were brought into greater prominence. In discussing the effect of the Guardianship of Infants Act[7] in **In re A and B. (Infants)**[8] Lopes L. J. said:

> Each step in legislation has been to confer privileges on the wife with regard to the custody of and access to her children . . . to mitigate the severity of the common law has been the object of the Legislature ever since 1839 when Lord Talfour's Act was passed. In 1886 came the Act in question, The Guardianship of Infants Act; and that again, more than any Act before increases the rights and privileges of the mother; in my judgment s. 5 was inserted expressly for the purpose of increasing and enlarging these rights.[9]

5. (1895), 1 N.B. Eq. 142, at p. 143.
6. 32 M.P.R. 143, at p. 150.
7. (1886), 49 & 50 Vic. c. 27.
8. [1897] 1 Ch. 786.
9. **Ibid.**, at p. 791.

In arguing the case for the mother in **Rex v. Sharpe; Ex parte Sharpe,**[2] counsel relied on **In re A. and B. (Infants).**[8] White J., on comparing s. 5 of the English Act of 1886 with Order 56, Rule 11, of the Judicature Act of New Brunswick, rejected counsel's argument, saying:

> We have in this province today no statutory enactment giving to the wife upon application by petition to the Court of Equity wider rights than she had at the time In *re Armstrong* was decided.[10]

The **Armstrong** case was decided in 1895, and represents the present state of our law, as is indicated by the decision in **Bolster v. Bolster.** In this province a mother does not even have the privileges conferred by the English Act of 1886, while in England the more recent Act of 1925 gives the mother a right equal to that of the father. This Act (1925) recites that Parliament, by the Sex Disqualification (Removal) Act [11] and various other enactments, has sought to establish equality in law between the sexes, and that it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby. The Act expressly states that the Court, in deciding any question in regard to custody or upbringing of an infant, shall regard the welfare of the infant as the paramount consideration, and shall not take into consideration from any other point of view whether the claim of the father, or any right of common law possessed by the father is superior to that of the mother.[12] In Canada, the provinces of Ontario, Manitoba and British Columbia all have enactments to the same effect; Saskatchewan even gives the mother a **prima facie** right to her children under fourteen years of age.

The "primary right of the father", which is still recognized in New Brunswick, is an anachronism in our law. Considering the legal status accorded the married woman today ,it is a concept which is completely incongruous in point of time. When custody problems arise between the parents, the Courts should, in the words of Beck J. A. in **Leboeuf v. Leboeuf,**[13] consider the following:

> The paramount consideration is the welfare of the children; subsidiary to this and *as a means of arriving at the best answer to that question* (italics mine) are the conduct of the respective parents, the wishes of the mother as well as of the father, the ages and sexes of the children, the proposals of each parent for the maintenance and education of the children; their stations and aptitudes and prospects in life; the pecuniary circumstances of the father and mother . . . not for the purpose of giving the custody to the parent in the better financial position to maintain and educate the children, but for fixing the amount to be paid by one or both parents for the maintenance of the children. The religion in which the children are to be brought up is always a matter for consideration . . . .

Lucille Calp, III Law U.N.B.

10. (1920), 48 N.B.R. 483, at p. 498.
11. (1919), 9 & 10 Geo. V, c. 71.
12. The Guardianship of Infants Act, 1925, 15 & 16 Geo. V, c. 45, s. 1.
13. [1928] 2 D.L.R. 23, at p. 24.