RIVAL CLAIMS OF PARENTS IN CUSTODY SUITS

There are few branches of English law in which discretion has been so completely substituted for principle as in that relating to custody of infants. In some respects this has been an inevitable and desirable process. The hypothesis of "paternal prepotency", as one Irish judge recently put it,[1] on which mid-Victorian courts based their theory of domestic relations, was bound to disappear with changes in the social status of women. The mother was gradually admitted by statute to equal rights with the father in the custody of infants, and today competes with him on very favourable terms. *The Guardianship of Infants Act*, 1925,[2] which represents the culmination of this process, was intended to crystallize the practice of Chancery Courts in the matter of custody suits, but it can scarcely be described as the epitome of legislative wisdom. It provided that where the custody or upbringing of an infant is in question, the court shall have regard to the welfare of the infant as the first and paramount consideration. The court is specifically directed not to take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. Is the welfare of the infant constituted by this enactment the sole criterion of a grant of custody? Where the welfare of the infant will certainly be better served by a grant of custody to one rather than the other parent it is clear that discretion is circumscribed. But what is meant by welfare, and what considerations, based upon rival claims of parents, appertain to welfare? What if the welfare of the infant will be equally served by a grant of custody to either parent? Are their claims evenly balanced, so that the decision between them must be essentially arbitrary? Or are there still common law priorities which begin to operate when the question of welfare is neutralised? If there are priorities, in what do they consist, and to what extent do they bind the court? If there are no priorities, are the competing

1. *In the Matter of Tilson* [1951] I.R., 1. per Gavan Duffy J. at p. 10.
2. 15 and 16 Geo. 5, c. 45, s. 1. See generally, Eversley, *Domestic Relations* (6th ed., 1951), pp. 369 *et seq;* Bicknell, *Law and Practice in Relation to Infants* (1928), pp. 28 *et seq;* Hall and Morrison, *Children and Young Persons* (3rd ed., 1947), p. 71; Holland, *The Law Relating to the Child* (1915), pp. 60 *et seq;* Birks, *Parent and Child* (1952), pp. 84 *et seq;* Joske, *Laws of Marriage and Divorce in Australia and New Zealand* (3rd ed. 1952), p. 440.

claims of the parents in any sense relevant? It must be admitted that the courts have demonstrated on these questions some divergence of approach and considerable reluctance to commit themselves. The deserted husband who naturally expects to retain custody of his children is normally perplexed when informed by his solicitor that the whole question is one for the court's discretion, and that it is impossible to predict the outcome of a suit instituted by the runaway wife. Nor, when his wife does obtain custody, as not infrequently happens, is he to be persuaded that the court's decision was anything but arbitrary. The purpose of this discussion is to discover if there are any principles on which a court is compelled, by logic, if not by law, to act when there are rival claims of parents to be balanced, and the welfare of the children is relatively indifferent.

The Act of 1925 corresponds substantially to legislation in most parts of the British Commonwealth,[3] and the decisions arrived at in the several jurisdictions are complementary to one another. The Court of Appeal in England in 1926 in *Re Thain*[4] provided the point of departure for a consideration of the relevance of rival parental claims. It held that the legislation of 1925 had merely enacted the rule which had up to that time operated in the Chancery Division. Warrington L.J. referred to the welfare of the child as "no doubt the first and paramount consideration," but only "one amongst several other considerations."[5] To what extent however those other considerations are to influence the court in determining questions of custody between parents was not examined until more recently, when both the Australian and New Zealand courts pronounced upon the point.

In *Lovell v. Lovell*[6] the High Court of Australia considered an application for custody brought by a deserting wife against a husband who had *de facto* custody. The applicant was able to offer the daughter, an only child of three, comfortable circumstances, but not personal attention during the day. Custody

3. N.S.W.—*Infants' Custody and Settlements Act*, 1899, No. 39, ss. 10, 17 (added by Act No. 20 of 1934, s. 3 (a)); Victoria—*Marriage Act*, 1928, No. 3726, ss. 136, 135; Queensland—*Guardianship and Custody of Infants Act of* 1891 (55, Vict. No. 13), s. 3 (inserted by 19 Geo. 5, No. 4, s. 4); Western Australia—*Guardianship of Infants Act*, 1926, No. 23, s. 2; South Australia—*Guardianship of Infants Act*, 1940, No. 55, s. 11. In Tasmania the court may make what order it thinks fit regarding the welfare and wishes and conduct of both parents. The principles of equity courts prevail; *Supreme Court Civil Procedure Act*, 1932, s. 11; New Zealand—*Guardianship of Infants Act*, 1926, s. 2.
4. *Re Thain, Thain v. Taylor* [1926] Ch. 676.
5. At p. 690. See also Lord Hanworth M.R. at p. 689; Sargent L.J. at p. 691.
6. (1950) 81 C.L.R. 513.

was given by the Supreme Court of Victoria to the husband, and the Full Court reversed the order. On appeal Latham C.J. stated that the section in the Victorian *Marriage Act* of 1928-29 (136) corresponding to s. 1 of the Guardianship of Infants Act, does not deny the existence of parental rights in relation to the custody of children, but does prevent the application of any doctrine that the rights of the father are superior to those of the mother, or that the rights of the mother are superior to those of the father. Nevertheless, although any strict priority of right is excluded, the section in question does not permit the welfare of the infant to "elbow out" all other considerations. The very reference to "paramount consideration" implies that there are other considerations, and among those other considerations are the claims of father or mother, which may not be ignored when considering the welfare of the infant.

> "The words 'from any *other* point of view' allow, in the consideration of the subject of the welfare of the infant, a consideration of the relative claims of the father and the mother. What s. 136 does is to exclude in any approach to the decision of the question of the best custody for an infant any preliminary assumption that the claim of the father as such in the case of any infant is superior to that of the mother or, (and this is important in the present case) that the claim of the mother as such in the case of any infant is superior to that of the father."

The Full Court of Victoria had based its judgment not only on the proposition that the consideration of the welfare of the infant should elbow out other considerations, but also on the proposition that a mother has a superior right to the custody of an infant of tender years, more particularly in the case of a female infant, and that that right can only be displaced by the very strongest evidence that her custody would be detrimental to the child. Such an approach, Latham C.J. said, involved a failure to apply the last words of the section which exclude any suggestion of competitive superiority on the part of either mother or father. "The provision means that the parents are to be on an equal footing as to rights and claims."[7]

This judgment of Latham C.J. has been approved and applied in several New Zealand cases. In *Norton v. Norton*,[8] Adams J., in the Supreme Court, discussing the New Zealand legislation, expressed an inclination to the view that the rival claims of parents are relevant so far as they bear on the welfare

7. At pp. 520-2.

8. [1951] N.Z.L.R. 678.

of the infant, but he found it unnecessary to decide what priority should be accorded them when that welfare was indifferent. Cooke J. in *Low v. Low*[9] gave expression to the like opinion. In *Otter v. Otter*[10] the Court of Appeal said " our concern is with the 'welfare of the child as the first and paramount consideration' and not with the rights or desires of the parents, except as secondary or less important considerations." Adams J. in *Connett v. Connett*[11] again examined the question and came to the conclusion that the respective claims of parents are "relevant as a separate subject, but subordinated always to the paramount consideration of the welfare of the child". None of the previous decisions, Adams J. considered, answered the question whether "rival claims of parents" might be relevant if viewed other than from the sole standpoint of the welfare of the infant. He was prepared to decide on the authority of *Lovell v. Lovell* that the innocent party to a divorce suit had a "preferable claim", and that consideration of the welfare of the child did not require that her claim be rejected. This was tantamount to deciding that, when the welfare of the child would not suffer, the court should grant custody to the parent with the "preferable claim".

From these dicta the following formula may be extracted: a court may not commence with the assumption that one party has any prior right to custody; the claims of parents are merely relevant considerations bearing upon the question of the welfare of children, and always of secondary moment. When the interests of the children are neutral, neither parent can assert any prior right, but the appropriate considerations remain relevant and constitute a "preferable claim" with, perhaps, persuasive effect on the court's determination. It remains to be seen to what extent this formula has operated in practice, and discuss what considerations are relevant.

Where One Parent is Guilty of a Matrimonial Offence

I

The Scholastic tradition of the family, on which all Western European legal systems founded their rules of domestic relations, regarded the natural right of parents to the guardianship of their children as inviolable. Where one parent defaulted in his or her obligation of guardianship and upbringing by an act of desertion, or in his or her obligation to the family as a whole by an act of adultery, all natural right to guardianship was conceived to have vanished; the innocent party alone retained

9. [1951] N.Z.L.R. 206 at p. 208. 10. [1951] N.Z.L.R. 739 at p. 746.
11. [1952] N.Z.L.R. 304 at p. 309. *In re P. (An Infant)* [1954] N.Z.L.R. 93.

this natural right. In English law no very clear doctrine on the subject had emerged before the Guardianship of Infants Act made the welfare of the child the paramount consideration, and there are decisions since the passing of this and comparable legislation in other common law countries which conflict on the issue whether, when the interests of the children are neutral, any priority is enjoyed by the innocent parent.[12]

The cases in England have tended to consider the relationships between the default of the guilty parent and the moral welfare of the children, and there is none in which a direct question of priority has been raised. The courts seem, however, to have proceeded on the assumption that there is no such priority. In *Allen v. Allen*[13] the Court of Appeal reversed the decision of Wallington J. that a respondent wife in a divorce suit based on adultery was likely, having once offended, to do so again, and that therefore the moral welfare of the daughter of the marriage aged eight, being of paramount importance, required that custody be granted to the petitioner. It was held that this was not the proper test to apply. The welfare of the child, both moral and physical, was of paramount consideration, and it was impossible to assume that the mother was naturally promiscuous. In *Willoughby v. Willoughby*[14] Wallington J. again granted custody to the father of a girl aged two, on the ground that it would never be in the interests of the child to be entrusted to the care of a woman who had committed adultery and might do it again. The husband's claims were strong in view of the fact that the adultery took place only nine months after the birth of the child, and that the mother had taken no steps to see the child for eighteen months after the separation. The Court of Appeal nevertheless reversed the decision, holding that Wallington J. had gone wrong in principle in adhering to his view in *Allen v. Allen.* In both cases the Court of Appeal, while not expressing a final opinion, would seem to have concluded that the innocence or guilt of the respective claimants is an irrelevant consideration.

A contrary conclusion was arrived at in Scotland in the year following the enactment of the Guardianship of Infants Act, in two decisions of two divisions of the Inner House of the Court of Session, delivered within two months of each other.[15] Neither has been cited in an English case. According to the opinions of Lord President Clyde and Lord Sands,[16] concurred in by Lord

12. But cf. German Civil Code, Arts. 1635, 1636.
13. [1948] 2 All E.R. 413. 14. [1951] P. 184.
15. *M. v. M.* [1926] S.C. 778; *Hume v. Hume* [1926] S.C. 1008.
16. *Hume v. Hume* at p. 1013 *et seq.*

Blackburn, the dissenting judge, there is a legal presumption in favour of the innocent party, but effect will not be given to such claim if it be adverse to the welfare of the child. There is not, in the opinion of Lord Sands, to be a nice judicial balancing of the speculative advantages to the child, but a consideration of all the relevant circumstances, including the adultery, which may raise a question as to welfare. The courts of Australia, on the other hand, have generally acted on the principle that the guilt or innocence of the parents is relevant to the question of welfare only in so far as it establishes their respective suitability for guardianship, and that neither party has any presumptive right or *prima facie* claim.[17] In *Rogers v. Rogers*,[18] however, the Supreme Court of New South Wales held that the innocent party in adultery cases "has some claim to be considered as at least possessing the advantages of being a non-sinning parent". In New Zealand the issue was left open until recently. In *Bolton v. Bolton*[19] Ostler J. considered that "the true rule of law on this question seems now to be that an adultery by the wife ought not to be regarded for all time and under all circumstances as sufficient to disentitle her to access or even to the custody of the children." Regard must be had to the particular circumstances of each case. Neither in this case, however, nor in *Howell v. Howell*[20] was he prepared to pronounce on the point. In *Otter v. Otter*,[21] already cited, the Court of Appeal, dealing with the claim of an innocent father to custody based on the ground of the mother's continued adultery, asserted that the welfare of the children was the paramount consideration, but implied that all things being equal there might be competing rights between the parents, based on the default of one of them. Adams J. in *Connett v. Connett*,[22] stated that he had been unable to find any case in which a court had had to deal with rival claims of parents based on their conduct towards each other where such conduct was so completely unrelated to the future welfare of the child as in the case before him. In this case the ground of divorce was the failure of the mother to comply with a decree

17. *Alagich v. Alagich* (1947) 65 W.N. (N.S.W.) 92; *Evans v. Evans* (1938) 56 W.N. (N.S.W.) 168; *Rogers v. Rogers* (1947) 64 W.N. (N.S.W.) 207; *Donohue v. Donohue* (1901) 1. S.R. (N.S.W.) 1; *Chreighton v. Chreighton* [1918] V.L.R. 487; *Menzel v. Menzel* [1916] St.R.Qd. 113; *Jackson v. Jackson* (1917) 13 Tas. L.R. 11; *Johnson v. Johnson* [1921] S.A.S.R. 88; *Re Watson* (1907) 9 W.A.L.R. 62; *Glytsos v. Glytsos* (1951) 69 W.N. (N.S.W.) 166; *Besanko v. Besanko* [1949] S.A.S.R. 275.
18. (1947) 64 W.N. (N.S.W.) 207. See also *Horton v. Horton* [1945] Q.W.N. 50.
19. [1928] N.Z.L.R. 473.
20. [1942] N.Z.L.R. 311. See also *Cubitt v. Cubitt* [1930] N.Z.L.R. 227.
21. [1951] N.Z.L.R. 739.
22. [1952] N.Z.L.R. 304.

for restitution of conjugal rights. She subsequently applied for leave to remove the child out of the jurisdiction, and the husband applied for custody. The welfare of the child, the judge conceived, would be equally served by a grant of custody to either parent. He felt the case was novel, and should be decided on the ground that the innocent parent had the "preferable claim."

The relevance of innocence and guilt was again discussed by the New Zealand Court of Appeal in *Miller v. Low*.[23] The father had been granted a decree absolute in a suit grounded on adultery, but custody of two young girls had been given to the respondent. The latter later married the co-respondent, whereupon the father moved for a variation of the custody order in his favour. His living quarters were unsuitable, and he would have had to board the children with neighbours, whereas the mother was in reasonably comfortable circumstances. Gresson J. in the Supreme Court felt, in view of the ground on which the divorce suit had been brought, and in view of the marriage of respondent and co-respondent, that the moral interests of the children would be best served by a grant of custody to the husband. The Court of Appeal reversed the decision. The case must be determined, it held, solely by reference to the substantial interests of the children, the rival claims of the parents based upon considerations of their guilt and innocence being irrelevant except as bearing on the interests of the children. The facts of adultery and marriage with the co-respondent, while they might be taken into consideration, did not override the importance of the suitability of the respective living quarters and of the mother's affection and care, bearing in mind that the natural tie had always subsisted. Adams J., who sat in the Court of Appeal, did not, however, qualify the view he had taken in *Connett v. Connett*. He was careful to point out that this was not a case where the interests of the children were neutral. Where substantial neutrality did exist, he suggested, the Court was not prohibited from taking rival claims into consideration.

It may be concluded, therefore, that the guilt or innocence of the parents is a "relevant consideration", to be focused against the concept of the welfare of the children: where the latter's interests are neutral the innocent party has no strictly legal priority, but rather a "preferable claim" of persuasive effect.

23. [1952] N.Z.L.R. 575. See generally Birks, *Parent and Child* (1952), pp. 84-96, 129, 130.

II

The question immediately arises, can the interests of the children ever be neutral when they are very young, and the mother is not on general grounds disqualified from guardianship? Does not the "natural tie" between mother and young children, especially girls, establish in her favour a "preferable claim", if not a strictly legal priority, against which considerations of guilt can never prevail? The tendency is to grant custody in such cases to a mother unless there is the most compelling reason for not doing so,[24] and the Full Court of Victoria in *Lovell v. Lovell* came to the conclusion that the practice was in most cases mandatory.

> "It is a truism to say that in all these cases the first and paramount consideration is the welfare of the child. Indeed it is so much the paramount consideration that it has in practice elbowed out all other considerations, so that it is a mere academic question whether there are any other considerations, but there is another principle which though it can hardly be called a rule of law, has assumed almost the proportions of one, and that is that in case of an infant of tender years, and more particularly a female infant, the mother is entitled to custody except where there is the very strongest evidence that her custody would be detrimental to the child."

The High Court repudiated this proposition. It amounted, Latham C.J. said, to an assertion that, unless the mother was shown to be a bad mother, she could, on the authorities, add to the injury to her husband by taking the children with her; she could, in fact, claim them as of right irrespective of her matrimonial default. "Her action might be completely unjustified but if she were not proved to be a bad mother to the children, her conduct on other matters affecting domestic relations would be regarded as irrelevant." A principle so productive of disintegrating effects in family life required the closest examination. The legislation, Latham C.J. concluded, had placed both parents on an equal footing, so that neither had priority as of right. There was therefore no necessary priority on the part of the mother

24. *Austin v. Austin* (1865) 34 Beav. 257 at p. 623; *Re Webb* [1947] St.R.Qd. 143; *Menzel v. Menzel* [1916] St.R.Qd. 113; *Chreighton v. Chreighton* [1918] V.L.R. 487; *Morton v. Morton* (1911) 31 N.Z.L.R. 77 at p. 78; *Hedges v. Hedges* [1944] S.A.S.R. 266 at p. 269; *Bolton v. Bolton* [1928] N.Z.L.R. 473 at p. 475; *Bowles v. Bowles* [1940] G.L.R. 53 at p. 54 (N.Z.); *Howell v. Howell* [1942] N.Z.L.R. 311 at p. 312; *Low v. Low* [1951] N.Z.L.R. 206. See also Kentucky decision in *Saunders v. Saunders* (1942) 150 S.W. 2d. 903.

when the children were girls or very young. In effect the High Court balanced the "relevant consideration" of the age and sex of the child against the "relevant consideration" of the mother's guilt, and found the latter consideration the more persuasive.

Even in the case of young children, then, the guilt of one parent remains a relevant consideration, related, but always subject to, the over-riding consideration of the children's welfare.[25]

RIGHT TO DETERMINE EDUCATION: ANTE-NUPTIAL PROMISES.

I

"By marriage," said Blackstone,[26] "the husband and wife are one person in law, that is the legal existence of the woman is suspended during marriage, or at least is incorporated into that of the husband." Mid-Victorian judges elevated this concept of legal unity into a theory of paternal despotism, such as found expression in the celebrated and widely criticised *Agar Ellis Cases* (I and II), in which reference was made to the father's "undoubted right as master of his own house, as king and ruler of his own family";[27] and it was against this background that they constructed the common law priority of the father to determine the form of education and the religion of his children. The father having once made this determination no court might intervene, even after his death, and even when the consequences of failing to do so might be the erection of a barrier between the children and their widowed mother.[28] *The Guardianship of Infants Act* of 1886,[29] however, directed the court that upon the application of a mother for custody it might exercise its discretion having regard to "the wishes as well of the mother as of the father".[30] This rule, together with the tendency of the Chancery Courts to give effect to the father's right only when the welfare of the child would be satisfied in doing so, served to

25. *Cubitt v. Cubitt* [1930] N.Z.L.R. 227; *Fleming v. Fleming* [1948] G.L.R. 220. In *Otter v. Otter* [1951] N.Z.L.R. 739, the New Zealand Court of Appeal gave custody of a girl of four to the father on the ground that the child's moral welfare would not be advanced by her remaining with the mother who was living in adultery. It was only to be expected that the mother would seek to justify her conduct in the child's eyes. See also *Re Gray* (Ont.) [1925] 4 D.L.R. 381; *St. Thomas v. St. Thomas* 48 N.B.R. 132.
26. *Commentaries* (Gavit's Edn.), p. 189.
27. *Re Agar-Ellis, Agar-Ellis v. Lascelles (I)* (1878) 10 Ch. D. 49 at p. 75. For an American discussion see Friedman in 29 *Harvard Law Review* (1916) p. 485; Note in 54 *Columbia Law Review* (1954) p. 376.
28. *Hawksworth v. Hawksworth* (1871) 6 Ch. App. 539; *Re McGrath* [1893] 1 Ch. 143 per Lindley L.J. at p. 151; *Re Grey* [1902] 2 I.R. 683.
29. 49 and 50 Vict. c. 27, s. 5.
30. The common law right was accorded statutory recognition in the *Custody of Children Act*, 1891, 54 Vict. c. 3, s. 4.

mitigate the stringency of the common law principle.[31] In an appeal from Northern Ireland in the year previous to the enactment of *The Guardianship of Infants Act* of 1925, the House of Lords pronounced itself in favour of this practice. Viscount Cave in *Ward v. Laverty*[32] stated the rule as follows:

> "On the question of the religion in which a young child is to be brought up, the wishes of the father of the child are to be considered; and, if there is no other matter to be taken into account, then, according to the practice of our Courts the wishes of the father prevail. But that rule is subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare of the children themselves."

Referring to the Act of 1886, he pointed out that while less stress was placed on the father's wishes than formerly, "a sufficient case must be made out for going contrary to the father's wishes."[33]

Since the passing of the Act of 1925 there has been little authority on the question whether the common law right of the father was entirely abrogated, reduced to the status of a "relevant consideration", or merely suspended until the welfare of the children is neutral.[34] A recent American commentator questioned whether the English courts would construe the Act as requiring a revision of their former attitude towards the father's power to control the upbringing of his children.[35] The only English decision since the Act in which the common law priority was discussed is *Re Collins*[36] in 1950, which the commentator overlooked. In this case the Court of Appeal considered a claim for custody brought by paternal grandparents against the widowed mother of a boy aged six, who had been committed by her to the care of her parents. The father had been a Roman Catholic,

31. See e.g. *F. v. F.* [1902] 1 Ch. 688; *R. v. Gyngall* [1893] 2 Q.B. 232 at p. 248; *Re A. and B.* [1897] 1 Ch. 786; *Re Thompson* (1910) 30 N.Z.L.R. 168; *Goldsmith v. Sands* (1907) 4 C.L.R. 1648; *Moule v. Moule* (1911) 13 C.L.R. 267; *R. v. Boyd* [1919] V.L.R. 538; 27 C.L.R. 245; *In re Holmes* (1895) 21 V.L.R. 358.
32. [1925] A.C. 101 at p. 108.
33. The Supreme Court of Nova Scotia in *Re Boyd* ((1921) 61 D.L.R. 274) commented that the Nova Scotia *Custody of Infants Act* 1900, s. 2 of which corresponds with s. 5 of the Act of 1886 "overrides entirely the common law rights of the father." On its face this decision would seem to attribute more to the wording of the legislation than have the English courts.
34. In *Re Carroll* [1931] 1 K.B. 317 Slessor L.J. merely commented that since the Act the court must decide on the basis of the welfare of the infant what religious education it will be given. See Full Court of Queensland in *Re Uren* [1936] St.R.Qd. 168 at p. 186.
35. Allred in 12 *The Jurist* (1952) p. 9.
36. [1950] 1 All E.R. 1057.

the mother a Protestant. She had agreed before the marriage to have any children educated as Roman Catholics. For two years previous to the bringing of the claim the child had been educated as a Protestant by his maternal grandparents. The claim was refused on the ground that it would be contrary to the welfare of the child, considering his age and the circumstances, if he had to leave his present home. The decision was confirmed on appeal after a strenuous argument by counsel that the Act of 1925 had not abrogated the rule in *Hawksworth v. Hawksworth*[37] that the father's rights survived even after his death, but had limited its operation to cases of rival claims between living parents. No discussion was devoted to the question whether the father's prior claim asserts itself when the children's interests are relatively neutral.

The answer to that question is dependent upon whether the Chancery practice before 1925 was abrogated by the Act of that year. Reference has already been made to the statement in *Re Thain* in 1926[38] that the legislation merely enacted the Chancery rule. In addition, the Privy Council in 1951 in *McKee v. McKee,*[39] an appeal from the Canadian Supreme Court on the effect to be given in Ontario to a Californian custody order, commented that too much stress should not be laid on the provisions of the 1925 Act. Section 1 introduced, it was said, no new principle of law, but merely enacted the rule which had long been acted on in the Chancery Division.[40] It is also noted that the Supreme Court of Victoria,[41] where the same amendment operates, in 1946 granted custody to a mother but directed that the child be brought up according to the father's wishes, and in *Re Uren*[42] the Supreme Court of Queensland, where the amendment likewise operates, held that "it is not open to question that the father has the right to have his children brought up in any religious belief he may wish".

It is submitted, however, that the discussions in *Re Thain* and *McKee v. McKee* require close scrutiny in the light of the High Court decision in *Lovell v. Lovell,* already quoted. The Chancery practice was merely to suspend the father's right until the interests of the children were satisfied; thereafter that right operated *proprio vigore* even against the mother. It is the constant practice of the Ontario Courts, in which Province the father's common law right is specifically preserved by statute, to employ

37. (1871) 6 Ch. App. 539.
38. [1926] Ch. 676.
39. [1951] A.C. 352 at p. 366.
40. See also *Re B.'s Settlement* [1940] Ch. 54; *Re Uren* [1936] St.R.Qd. 168 at p. 186.
41. *X. v. X.* [1946] V.L.R. 1.
42. [1936] St.R.Qd. 168.

equity to make the child's welfare the overriding consideration, and accord priority to the father's wishes against the mother's only when that welfare is satisfied.[43] The Canadian Supreme Court has stated that the Ontario practice conforms to the principle in *Ward v. Laverty*.[44] Such a rule would seem to be inconsistent with the plain wording and intendment of the Act of 1925, which clearly directs the court not to take into consideration whether the father's common law right is superior to that of the mother, and which is much more emphatic than the Act of 1886 which merely permits the Court to "regard" a wife's wishes on her application. An argument could be advanced that this direction is to operate only when considering welfare, and has no relevance to a case where welfare is neutral. This, however, would seem to be excluded by Latham C.J.'s judgment in *Lovell v. Lovell* where it was stated that "the parents are to be on an equal footing as to rights and claims." A careful reading of *Re Thain* and *McKee v. McKee* will disclose that the question of competing priorities of parents was not in the mind of either court when it commented on the Act of 1925. The father's priority in the former case was merely that of a parent against more distant relatives when the interests of the child were neutral; and the court was clearly making reference to the fact that considerations other than those of welfare operated after the Act just as they had before it, but that they remained subordinate considerations. The court did not direct its mind to the second part of the section in question placing the parents vis-a-vis each other on an equal footing, and the conclusion should not be drawn that the Chancery practice of according priority to the father's wishes as against those of the mother survived the legislation. Those wishes must be regarded as a matter merely of "relevant consideration," which may or may not be persuasive, depending upon the circumstances of the case.

II

What, then, was the effect of the Act of 1925 on a father's undertaking to the mother in consideration of marriage that the children shall be brought up in a certain religion? Does this

43. *Re Faults* (1906) 12 O.L.R. 245 at p. 255; *Re Laurin* (1927) 60 O.L.R. 409. The Ontario *Infants Act*, 1950 (c. 180, s. 24) provides that "nothing in this Act shall change the law as to the authority of the father in respect of the religious faith in which his child is to be educated."

44. See *De Laurier v. Jackson* [1934] 1 D.L.R. 790; *Re Smith* [1952] 2 D.L.R. 778 (Ont. C.A.); *Re Bennett Infants* [1952] 3 D.L.R. 699 (Ont. C.A.). On the general practice of Canadian courts see *Re Plewes* [1945] 4 D.L.R. 380; *Re Thompson* 10 M.P.R. 36; *Goldberg v. Goldberg* 41 Rev. de Jur. 427; *Re Johnson* 43 B.C.R. 328; *Re Mackay* (1923) 3 W.W.R. 369; *Re Gandy, Re Oland* [1938] 3 D.L.R. 767.

constitute a "relevant consideration" displacing in its persuasive effect the father's wishes when the welfare of the children is neutral? It is the practice in the Roman Catholic Church to require a non-Catholic party to a proposed "mixed marriage", before the marriage ceremony can be performed in the church, to sign a written undertaking that the children will be brought up Roman Catholics. Upon the subsequent separation of the parties it frequently happens that the father repudiates his undertaking and expresses the wish to educate the children in a religion other than the Roman Catholic. The courts have on a number of occasions entertained custody suits in which the wife has argued that effect should be given to the undertaking, but virtually all the reported decisions are concerned with children who had already been substantially educated in one religion and might suffer from a change. There is little authority on the question of priority in the case of young children who have not yet had time to form an opinion and whose welfare is therefore indifferent. It is usually urged by the respective parents that custody should as a matter of course, other things being equal, be given to the parent in whose religion the child is to be brought up, and it is therefore important that the court should decide which of them has the prior claim. Two "considerations" normally compete for supremacy, the father's wishes, which, as was said in *Re Uren* already quoted, in the absence of the undertaking might be persuasive, and the mother's reliance on the undertaking. It is true that in the case of very young children the courts will generally find that welfare will be better satisfied by a grant of custody to the mother, and it is therefore normally in the case of orphaned children, when paternal and maternal relations rely respectively on the rival parental claims, that the problem will arise.

The cases in England on the subject of undertakings of this character, and the force to be attributed to them, do not make impressive reading. The first decision on the point refused recognition to the undertaking on the ground that an oral agreement made in consideration of marriage is not enforceable under the Statute of Frauds,[45] and the suggestion was made that even if it was enforceable an attempt to do so might be "detrimental to the interests of the public." Thereafter the concept of public policy was resorted to in order to deny recognition to any attempt by a father at abdication of his right to determine his children's education.[46] While promises in consideration of marriage were

45. *Re Browne, a minor* (1852) 2 Ir. Ch. R. 151.
46. *Hill v. Hill* (1862) 31 L.J. Ch. 505; *Re Meades, Minors* [1870] I.R. Eq. 98.

in all other respects enforced by the courts as "most solemn engagements,"[47] undertakings about the children's education came to be regarded as less sacred than the paternal trust, and the fact that the mother had been induced to enter into marriage by those undertakings was regarded as immaterial.[48] The rule was somewhat mitigated in *Andrews v. Salt*[49] when the Court of Appeal held that a father who had actually carried out his promise by permitting the child to be brought up a Protestant had abdicated his rights, but until the passing of the Act in 1925 there was no tendency to treat the undertaking itself as relevant to the question of custody. In fact the liberalising tendency of *Andrews v. Salt* and *Re Clarke*[50] was virtually reversed in the unhappy decision in *Re Violet Nevin,*[51] in which the Court assumed the prerogative to decide what choice a father would have made had he foreseen events that would happen after his death, and decided in effect that he would have repudiated his ante-nuptial agreement. The courts generally contrived to avoid this sort of approach by employing the concept of welfare to confirm the upbringing of children in a religion in which they were already substantially educated.[52]

The effect of the Act of 1925 on the common law rule has not been adequately analysed. In *Re Collins*[53] counsel argued that the court ought to consider any arrangement between the spouses for the upbringing of children, and Evershed M.R. agreed that, in other circumstances, such consideration should be given. It was unnecessary, however, for the court to determine the weight to be attributed to the arrangement because the welfare of the child clearly demanded that it be left where it was. It would seem from Evershed M.R.'s comment that "changes in religious upbringing are matters not lightly to be regarded", that he intended to imply that consideration must be given to an agreement only when it is related to the children's welfare; his words are not instructive on the point whether consideration is to be given to the agreement itself, apart from its having been carried into effect, and where no question of welfare is directly involved. A similar ambiguity exists in the decision of the New

47. *Laver v. Fielder* 32 Beav. 1 at p. 12 per Sir John Romilly.
48. *Re Clarke* (1882) 21 Ch. D. 817; *Re Violet Nevin an infant* [1891] 2 Ch. 299; *Re Story* [1916] 2 I.R. 328; *Re Byrne* [1935] I.R. 782 at pp. 803-4.
49. (1873) 8 Ch. App. 622.
50. (1882) 21 Ch. D. 817.
51. [1891] 2 Ch. 299.
52. *Stourton v. Stourton* (1857) 26 L.J. Ch. 354. See, however, *Hackworth v. Hackworth* (1871) 40 L.J. Ch. 534, where the court refused to interview a child only a few months younger than that in *Stourton v. Stourton*.
53. [1950] 1 All E.R. 1057.

South Wales Supreme Court in *Rochfort v. Rochfort*[54] where an application for custody was brought by a divorced father of two children aged fourteen and three. The father was a Roman Catholic, the mother a Presbyterian, and the application arose from the fact that the wife wanted to bring the younger child up in her religion against the father's wishes. The elder child had been educated a Roman Catholic, and there was no intention that his religion should be changed. It appeared from the evidence that before the marriage both parents had mutually promised in writing that all children of the marriage should be brought up Roman Catholics, and after their separation the wife gave a further written undertaking to the same effect. It was understood that neither parent was in any way incapacitated from looking after the younger child, and the father desired custody only that he might determine the child's religious education. He relied on the written undertakings. As to these Jordan C.J. commented: "I attach no importance to the two documents signed by the mother with respect to the children's religion. These documents have no legal operation and the fact that she has seceded from them does not, in my opinion, on the facts of the present case, throw any material light on her fitness to be her children's custodian." On its face the decision would seem to attribute no relevance to either the father's wishes or the mother's agreement. On the other hand the court does appear to have placed considerable emphasis on the fact that the father had demonstrated his indifference to the children in all respects save that of religion, and it might be concluded, therefore, that the welfare of the child was not neutral, and that the other considerations were irrelevant only in view of the particular circumstances.

In view of the fact that both these decisions can be based on grounds other than the relevance or irrelevance of the ante-nuptial agreement it is necessary to discuss the real principle underlying the rule that such agreements are irrelevant, in order to determine the effect on that rule of the Act of 1925. The Irish Supreme Court in 1950 in *The Matter of Tilson*[55] critically examined the basis of the rule. The father, who was a Protestant, had entered into a written undertaking in consideration of marriage, that the children should be educated Roman Catholics. The four

54. (1944) 44 S.R. (N.S.W.) 238. Cf. the celebrated decision of *Matter of Santos*, 105 N.Y.S. 2d. 716; discussed in 65 *Harvard Law Review* (1952), p. 694.
55. [1951] I.R. 1. The common law rule had been recognized in the Irish courts in *Re Connor* [1919] 1 I.R. 361; *The State (Kavanagh) v. O'Sullivan* [1937] I.R. 618; *Re Kindersley* [1944] I.R. 111; *Re Frost* [1947] I.R. 3.

children were actually baptised as such, and the father had evidenced no intention, until after the separation of the parties, that they should be brought up otherwise than as Catholics. The wife applied for custody on the ground that she, as a Roman Catholic, would be the more qualified parent to give effect to the ante-nuptial agreement. There is no legislation in Ireland equivalent to the English Act of 1925, and the principles acted upon by the court are therefore those which operated in the Chancery courts before that date. A close examination of the judgments in *Tilson's Case* discloses that the children's welfare was regarded as neutral in all other respects save that of religion. In the High Court Gavan Duffy J. was compelled, with some reluctance, to admit that the father's wishes outweighed the fact of his agreement, but he did suggest that "a man may vis-a-vis his wife estop himself in law by the agreement, followed by marriage and the birth of a child; and again by allowing the child to be baptised a Catholic." Whether the doctrine of estoppel would operate he found it unnecessary to determine, because the case could be decided on Article 42 of the Constitution of Ireland, which gives both parents a joint power in respect of the religious education of their children; from this principle the corollary might be drawn that any decision which they make in common is irrevocable. On this constitutional point the judgment was confirmed on appeal to the Supreme Court. All the bench seems to have accepted that at common law the undertaking was irrelevant, but that it was so irrelevant only because of the rule that a father's wishes must be given priority. Black J. in a judgment dissenting on the constitutional issue, referred to the rule making "these ante-nuptial agreements unenforceable as an archaic law, and a relic of barbarism . . . This law was derived from another law—that of the 'serfdom of women' which perished in England in the legislation of 1925."

Despite casual references to "public policy", the authorities on the question of ante-nuptial agreements can only be rationalised, as the Irish Supreme Court clearly stated, on the basis of the father's right to determine the religious education of his children. In *Andrews v. Salt* the court said: "We think that a father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, the rights which the law gives him for the benefit of his children, and not for his own."[56] In *Re Agar Ellis* it was said that "the father has retained his rights to direct the religious education of his children . . . We

56. At p. 636.

base our decisions on the main subject, namely the power and jurisdiction of the father."[57] In *Hackworth v. Hackworth* the decision turned on the duty of the court "to see that the child is brought up in the religious faith of the father." Since 1925 every judgment in which an ante-nuptial agreement has been considered has merely asserted that the agreement is of "no legal effect", and, so it is implied, is for that reason irrelevant. This approach may well be challenged. If, as is argued, the Act of 1925 destroyed the father's rights and reduced his wishes to the status of a "relevant consideration", the basis of the common law rule concerning ante-nuptial agreements is likewise destroyed, and the field is open for a new approach to the question. It might, indeed, be argued that the effect of the Act on the common law was similar to that of the Constitution of Ireland, when *Tilson's Case* would be an authority. This is not to contend that effect should be given to the agreement as a legal contract for which specific performance would lie,[58] but it is to contend that the agreement, far from being irrelevant as it was before 1925, is a "relevant consideration" of persuasive value. Support for this argument may be drawn from the decision of the Full Court of the Queensland Supreme Court in 1936 in *Re Uren*, in which it was held that "although a pre-nuptial contract is not a binding contract enforceable in a court, yet it is a circumstance to which weight, and perhaps great weight, should be given."[59] The decision of the court of first instance that the children be brought up by a relative of the father's religion was reversed, and custody was given jointly to a maternal relative and a religious establishment so that effect might be given to the ante-nuptial agreement.

Guidance may also be drawn from the United States practice which grew up without the unfavourable background of the *Agar Ellis Cases*. American courts have fairly consistently favoured the ante-nuptial agreement,[60] so much so that in some States at least it is now treated as an integral part of the consortium.[61] In *Re Luck*[62] an Ohio court said: "As between the parties to

57. At p. 75.
58. It is undesirable that the contract should be so enforceable since this would enable the courts to intervene in the internal affairs of the home before a separation. Courts have refused to do this: *Sisson v. Sisson* 271 N.Y. 285.
59. [1936] St.R.Qd. 168. It must be admitted that *Re Uren* is not an authority for the line of argument suggested here, inasmuch as it referred to the father's rights as surviving the legislation. The case would appear to be inherently inconsistent, and the argument advanced here is demanded by the decision in *Tilson's Case*.
60. *Williston on Contracts* (1937), *sect.* 1744 n.; Allred, *loc. cit.;* Friedmann in 29 *Harvard Law Review* (1916), pp. 485 *et seq.*
61. *Jayner v. Jayner,* 39 Hun. 40. 62. (1900) 10 Ohio Decisions 1.

this marital relation, when the wife was living the binding force and inviolability of this compact would be recognized by the courts." In *Commonwealth v. McClelland*[63] it was stated in Pennsylvania that the father's "stipulations entered into at the time of his marriage would have been a sufficient answer." In *Commonwealth ex rel. Stack v. Stack*[64] the Supreme Court of that State held in 1940 that "due consideration" should be given to the agreement. The most emphatic American decision is that of the Court of Domestic Relations of New York City in *Ramon v. Ramon*[65] in which the line of English decisions was specifically rejected and it was held that:

> "relying on this solemn promise by which the petitioner agreed to protect and preserve this right, respondent married the petitioner and irrevocably and for life changed his status from the single to the married state . . . An ante-nuptial agreement providing for the Catholic faith and education of the children of the parties, in reliance upon which a Catholic has thereby irrevocably changed the status of the Catholic party is an enforceable contract having a valid consideration."

The decision was followed in *Shearer v. Shearer,*[66] but was rejected in *Martin v. Martin*[67] where the child aged twelve had already been reared in another faith and did not want to change.

So far as English law is concerned the matter must still be regarded as very much at large, and it is therefore with considerable hesitation that the following conclusion is advanced:

> A father has no priority to custody except when the children are actually being educated in his religion and other things are equal. If the children are being brought up in the wife's religion, and again other things are equal, the wife will have a prior claim. In both instances the balance favours the partner in whose religion the children are being brought up only because the children are sufficiently old for a change to be undesirable. If the children are not suf-

63. (1918) 70 Penn. Sup. Ct. 273. 64. (1940) 15 Atl. 2d. 76.
65. (1942) 34 N.Y. Supp. 2d. 100.
66. (1947) 73 N.Y. Supp. 2d. 337. See also *Re Butcher's Estate* (1920) 109 Atl. 683. On the other hand specific performance of an ante-nuptial agreement was refused by the Missouri Court of Appeals in 1910 in *Brewer v. Cary* (127 S.W. 685) on the basis of the *Agar-Ellis Cases*, and by the Supreme Court of Kansas in *Denton v. James* in 1920, 193 Pac. 307, 12 A.L.R. 1146; *Estate of Walson* 114 Cal. App. 2d. 82 (1952). See the discussion by Johnstone in 1 *University of Kansas Law Review* (1952), p. 37, and the collection of cases in 12 A.L.R. 1153.
67. (App. Div. 2d. 1954), 131 *New York University Law Journal*, 9, col. 7; *New York Times*, Feb. 4, 1954, p. 27, col. 3. See generally, 95 *Solicitors' Journal* (1951), p. 325; Jackson in 12 *Law Quarterly Review* (1896), p. 379; 6 *Solicitors' Journal* (1862), p. 428; Pfeffer, *Church, State and Freedom* (1953).

ficiently old or sufficiently trained in one religion for a change to be harmful, and there is no particular advantage in their being committed to the mother's care, that partner has the "preferable claim" in whose favour the other partner has entered into an ante-nuptial agreement.[68]

D. P. O'CONNELL.*

68. The logic underlying the conventional attitude of English Courts towards ante-nuptial undertakings was disclosed in an aside of Denning L.J. during argument in the Court of Appeal in a case (unnamed) reported only in *The Times* (29 May, 1954, p. 5, c. 7) which resulted in the giving of custody of four children between the ages of five and ten to a father after the mother's adultery. No details of the case are given save the debate on the undertaking given by the father to bring up the children in a specific religion. Denning L.J. asked: "How can you expect a man to be sincere if he is forced into it? You cannot marry unless you give an undertaking." What the learned Lord Justice ignored was the fact that an undertaking of this character is no more the product of duress than the promise of fidelity unto death which the law still in general terms upholds. The contract of marriage itself must be free to be valid. The motives underlying the entering into of the contract or the acceptance of conditions ancillary to it may be exceedingly strong in terms of affection but by no stretch of the imagination can they be described as "force" sufficient to vitiate consent or destroy freedom of decision.

* B.A., LL.M. (N.Z.), Ph.D. (Cantab.); Reader-in-Law in the University of Adelaide.