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delimited by a process of inclusion or exclusion as the cases arise. As was said in the case of *Boynton Cab Co. v. Neubeck*: "It is not safe to do more than deal with the subject on broad lines because misconduct is always a question of fact which depends upon an infinite variety of circumstances, including the past record and general character of the alleged delinquent."[23] Other circumstances to be considered are whether the act occurred during the hours of employment, whether it occurred on the employer's premises, whether it occurred while the employee was engaged in his work and whether the employee took advantage of the employment relation in order to commit the act.

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RIGHT OF SURVIVING DIVORCED PARENT TO CUSTODY OF CHILDREN

An interesting and controversial question in the field of domestic relations is whether, when the divorced parent with custody of the children dies, the custody automatically inures to the surviving parent, or whether the court which granted the divorce and awarded custody has continuing jurisdiction over the children.

The question is considered in the case of *State ex rel. Gregory v. Superior Court.*[1] On August 31, 1954, the wife was granted a divorce and custody of the children by the Superior Court of Marion County, Room No. 5. She died on February 27, 1960. The father's sisters filed a petition in the same court seeking custody of the children and to enjoin the father from taking custody. After suffering an adverse ruling, the father filed his petition for a writ of habeas corpus in the Superior Court of Marion County, Room No. 1, seeking to have custody of the children granted to him. The latter court ordered the father's petition to be transferred to Room No. 5 to be consolidated with the prior action in which the father had suffered an adverse ruling.

The father sought a writ of mandamus from the Supreme Court of Indiana, which by a three-to-two decision entered a decree directing Room No. 1 to take jurisdiction of the father's action. Justice Jackson, presenting the majority opinion, reasoned that upon the death of the parent who had custody under the divorce decree, the right to custody of the children automatically inured to the surviving parent, and that

[23]Id. at 640-41.

[1]176 N.E.2d 126 (Ind. 1961).

this right could be asserted in any available court of co-ordinate jurisdiction by a writ of habeas corpus.[2]

There were two dissenting opinions,[3] one of which was by Judge Achor who took the view that upon the death of the parent having legal custody of the children, the surviving parent does not automatically gain the right to custody, but that the original court retains jurisdiction over the custody of the children. He reasoned that the court granting a divorce has the continuing duty to see that the child of the divorced parties, who, in a sense is a ward of the court, is properly cared for.[4] Therefore, in light of this dissent, the surviving parent must seek a modification of the original divorce decree in order to obtain legal custody of the children.

The prevailing rule is that the divorce decree abates upon the death of one of the parties, and the custody of the children automatically passes to the surviving parent.[5] Therefore, if the surviving parent has possession of the child after the death of the parental custodian, and such custody is unopposed, no judicial determination is necessary.[6] But when custody of the surviving parent is opposed, and such parent has possession of the child, he will be required to appear and defend in the court where those opposing have initiated action.[7] However, if the party opposing the right of the surviving parent to custody has possession of the child, then the parent may bring an independent proceeding of habeas corpus in any available court of appropriate jurisdiction.[8]

The numerous jurisdictions which follow the prevailing rule usually emphasize the right of the surviving parent to custody of the

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[2]Id. at 129.

[3]The dissenting opinion by Chief Justice Landis concerned the procedural matter of the father filing a petition in Room No. 1 after suffering an adverse ruling in Room No. 5, and is not pertinent to the present discussion.

[4]176 N.E.2d at 132.

[5]Brown v. Brown, 218 Ark. 622, 238 S.W.2d 482 (1951); In re De Leon, 70 Cal. App. 1, 232 Pac. 738 (Dist. Ct. App. 1924); Wilson v. Mitchell, 48 Colo. 454, 111 Pac. 21 (1910); Girtman v. Girtman, 191 Ga. 173, 11 S.E.2d 782 (1940); May v. May, 162 Kan. 425, 176 P.2d 533 (1947); Barry v. Sparks, 306 Mass. 80, 27 N.E.2d 728 (1940); State ex rel. Gravelle v. Rensch, 230 Minn. 160, 40 N.W.2d 881 (1950); Kienlen v. Kienlen, 227 Minn. 137, 34 N.W.2d 351 (1948); Schumacher v. Schumacher, 223 S.W.2d 841 (Mo. Ct. App. 1949); Leclerc v. Leclerc, 85 N.H. 121, 155 Atl. 249 (1931); In re Thorne, 240 N.Y. 444, 148 N.E. 630 (1925); Hughes v. Bowen, 193 Okla. 269, 143 P.2d 139 (1943). See Annot., 74 A.L.R. 1352 (1931) for additional cases following the majority approach.

[6]In re Frank, 41 Wash. 2d 294, 248 P.2d 553 (1952).

[7]See, e.g., Kienlen v. Kienlen, 227 Minn. 137, 34 N.W.2d 351 (1948).

[8]See Annot., 39 A.L.R.2d 258 (1955).

children.[9] Other cases following this rule emphasize that the adjudication in a divorce action goes no further than to adjudicate rights between the husband and wife.[10]

Among the jurisdictions following the majority approach,[11] it has been held that upon the death of a parent who was awarded custody of a child in a divorce proceeding, the order of award immediately ceases to be effective, because there is no one upon whom it can operate, or anyone in existence who can assert any rights thereunder.[12] But the majority rule has been modified in three jurisdictions so as to permit an insertion of a provision for continuance of the decree as it relates to custody beyond the joint lives of the parents.[13] Hence, it would logically appear that under the majority approach, a surviving parent who has possession of the children is not required to obtain a modification of the divorce decree to retain custody. However, if he does not have possession of the children, he may institute habeas corpus proceedings in an appropriate court.

Where the parental custodian appoints a testamentary guardian other than the surviving parent, such appointment is not valid against the rights of the surviving parent.[14] It has been held that the parental custodian's right "does not descend nor can it be transmitted,"[15] but the surviving parent has an immediate right to custody.

The virtues of the prevailing rule are clear. It is apparent that ordinarily children should be under the care and protection of one of their natural guardians,[16] and the majority approach succeeds in this purpose. Then too, assuming both parents are fit, the divorce decree is an adjudication between the spouses, and the issue of custody is

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[9]Brown v. Brown, 218 Ark. 622, 238 S.W.2d 482 (1951); Girtman v. Girtman, 191 Ga. 173, 11 S.E.2d 782 (1940); May v. May, 162 Kan. 425, 176 P.2d 533 (1947); State ex rel. Gravelle v. Rensch, 230 Minn. 160, 40 N.W.2d 881 (1950).

[10]In re De Leon, 70 Cal. App. 1, 232 Pac. 738 (Dist. Ct. App. 1924); Kienlen v. Kienlen, 227 Minn. 137, 34 N.W.2d 351 (1948).

[11]Brown v. Brown, 218 Ark. 622, 238 S.W.2d 482 (1951); Girtman v. Girtman, 191 Ga. 173, 11 S.E.2d 782 (1940); May v. May, 162 Kan. 425, 176 P.2d 533 (1947); State ex rel. Gravelle v. Rensch, 230 Minn. 160, 40 N.W.2d 881 (1950). In Schumacher v. Schumacher, 223 S.W.2d 841, 845 (Mo. Ct. App. 1949) the court stated: "When we say... that the court which grants a divorce retains jurisdiction to determine the custody of a minor child until the child attains its majority, what we actually mean is that it retains jurisdiction until that eventuality is reached provided, both parents continue to live."

[12]In re De Leon, 70 Cal. App. 1, 232 Pac. 738 (Dist. Ct. App. 1924).

[13]In re Brown, 7 Alaska 411 (1926); In re Allen, 162 Cal. 625, 124 Pac. 237 (1912); Barry v. Sparks, 306 Mass. 80, 27 N.E.2d 728 (1940).

[14]Brown v. Brown, 218 Ark. 622, 238 S.W.2d 482 (1951).

[15]Id. at 484.

[16]May v. May, 162 Kan. 425, 176 P.2d 533 (1947).

weighed only as between their respective rights as parents. The right of the parent who failed to obtain custody is a subordinate one; but when the parental custodian dies, the surviving parent's right becomes the primary one, and he is entitled to custody of the children.[17]

There is authority which holds that custody does not automatically vest in the surviving parent, but that the court which granted the divorce retains jurisdiction[18] notwithstanding the fact that the surviving parent may or may not have possession of the child after the death of the parental custodian. In *United States v. Green*,[19] where the father, as surviving parent, instituted a habeas corpus proceeding against the maternal grandparents to acquire custody of his child, the court said that it was a mistake to suppose that they were "bound to deliver over the infant to his father, or that [he had] ... an absolute vested right in the custody."[20] While it is recognized that the rights of neither parent should be disregarded, "yet the welfare of the child is superior to the claims of either parent."[21]

Under the minority view, the surviving parent is compelled to seek a modification of the divorce decree as a prerequisite to obtaining legal custody.[22] In this regard, the Florida court has said:

> "[T]hat portion of the [divorce] decree respecting custody of the children stands on a different footing from that portion dissolving the bonds of matrimony. The latter is final, once the time for taking an appeal has expired; the former is, in a sense, interlocutory, and may be modified from time to time as the welfare of the children requires."[23]

Thus, once the court acquires jurisdiction to determine the custody of

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[17]Kienlen v. Kienlen, 227 Minn. 137, 34 N.W.2d 351 (1948). There the court said, "The natural rights of the father are not completely annulled by a divorce decree awarding custody of the child to the mother, but are merely suspended for the time being and are revived in full force by the mother's death."

[18]Snead v. Davis, 265 Ala. 229, 90 So. 2d 825 (1956); Cone v. Cone, 62 So. 2d 907 (Fla. 1953); Jarrett v. Jarrett, 415 Ill. 126, 112 N.E.2d 694 (1953); Pinney v. Sulzen, 91 Kan. 407, 137 Pac. 987 (1914); Purdy v. Ernst, 93 Kan. 157, 143 Pac. 429 (1914); Edwards v. Engledorf, 182 S.W.2d 603 (Mo. Ct. App. 1944); In re Krauthoff, 191 Mo. App. 149, 177 S.W. 1112, 1118 (1915); Phipps v. Phipps, 168 Mo. App. 697, 154 S.W. 825 (1913); Neil v. Neil, 38 Ohio St. 558 (1883); In re Hampshire, 17 Ohio App. 139 (1922); In re Ellenburg, 131 Ore. 440, 283 Pac. 27 (1929).

[19]26 Fed. Cas. 30 (No. 15256) (C.C.D.R.I. 1824). There is no explanation for the style of the case or how the United States became a party to the suit, unless it is a shortened form of United States ex rel. ——.

[20]Id. at 32.

[21]In re Krauthoff, 191 Mo. App. 149, 177 S.W. 1112, 1119 (1915).

[22]In Tanner v. Tanner, 78 Ohio App. 178, 62 N.E.2d 654 (1945), the court reasoned that the surviing parent's right to the custody of the child is not "absolute," for the court must look after the best interests of the child.

[23]Cone v. Cone, 62 So. 2d 907, 909 (Fla. 1953).

the children it is not normally relinquished until the children reach majority.[24]

In line with the minority approach, it has been held that the death of the parental custodian does not affect the power of the court of equity that has assumed jurisdiction over the custody of the children. The children become wards of the court by virtue of the decree, and no one succeeds to the right of custody of the children because of the death of the parental custodian. His death merely serves to require the court to make other provisions for the custody of the children.[25]

The most important point to consider in this area of conflict is what should be the status of the child as regards custody immediately after the death of the parental custodian. There must be some provision for the care and custody of the child immediately upon the death of the parental custodian. Under the majority approach, the surviving parent is immediately vested with legal custody,[26] while under the minority approach, there may often be an interim period before the issue of custody is even brought to the attention of the court.[27] Even though there is a possibility of the surviving parent being an unfit custodian, that slight possibility, over the long run, would seem to be outweighed by the fact that, in most instances, the surviving parent is likely to be a better custodian than any other person that may assume custody on his own initiative. Therefore, as a practical matter, it would seem that the majority approach is more adapted to the immediate needs of the child upon the death of the parental custodian.

Suppose, however, that custody by the surviving parent is never opposed. Under the majority approach the courts presume that the surviving parent is fit and proper to care for the child; therefore, a judicial determination of his fitness is unnecessary.[28] As stated by the court in *In re De Leon:*

> "[B]estowal of the custody of a minor in a divorce action is not, unless otherwise provided by statute, an adjudication of the fitness of the parent who is for the time denied the right to retain possession of the child. It is nothing more than the expression of the court's belief that, under the circumstances then existing, the welfare of the child would be best subserved by placing said child with one of the parents rather than the other."[29]

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[24]Edwards v. Engeldorf, 180 S.W.2d 603, 604 (Mo. Ct. App. 1944).

[25]Snead v. Davis, 265 Ala. 229, 90 So. 2d 285 (1956). But see Wilkinson v. Deming, 80 Ill. 342 (1875).

[26]Woodford v. Superior Ct., 82 Ariz. 181, 309 P.2d 973 (1957).

[27]See, e.g., Pinney v. Sulzen, 91 Kan. 407, 137 Pac. 987 (1914).

[28]Wilson v. Mitchell, 48 Colo. 454, 111 Pac. 21 (1910).

[29]70 Cal. App. 1, 232 Pac. 738, 742 (Dist. Ct. App. 1924).

The law presumes that it is for the child's best interest to be under the nurture and care of his natural protector,[30] and the feeling is that the surviving parent should be entitled to immediate custody of his child without any judicial determination. It may be said that the surviving parent has the right to custody subject to a condition subsequent, that if it be later shown that he is not a fit custodian the child may be taken from him.

Under the minority approach, on the other hand, the surviving parent is regarded as a preferred custodian,[31] but the courts require him to seek a modification of the divorce decree.[32] In obtaining such a modification, there would have to be some adjudication as to the fitness of the surviving parent.[33] Thus, there is some virtue in the fact that at least there is some adjudication of the fitness of the surviving parent prior to an alteration of legal custody of children.

If the custody of the surviving parent is contested, the final point to consider relates to which court should try the issue. Under the minority approach, only the original divorce court could determine such an issue,[34] while under the majority approach, the surviving parent may institute proceedings in any available court.[35] It seems that, as a matter of practice, the original court should be preferred. Such court having heard the evidence of the parties to the divorce relating to the welfare of the children, and having had the duty of looking after the care and welfare of the children following the divorce of the parents, is in a better position than any other court to again determine the issue of the custody of the children.

The substantive determination under both the minority and majority rules will likely be the same. Regardless of the jurisdiction, there is a presumption of the fitness of the surviving parent,[36] which will put the burden of proving otherwise on the contesting party. Similarly, it appears that all courts, whether following the minority or majority approach, apply an absolute rather than a relative standard in the determination of fitness of the surviving parent in a contested cus-

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[30]May v. May, 162 Kan. 425, 176 P.2d 533 (1947).

[31]United States v. Green, 26 Fed. Cas. 30 (No. 15256) (C.C.D.R.I. 1824).

[32]See note 23 supra.

[33]This information was acquired from Mr. J. H. Barney, a practicing attorney in Petersburg, Virginia, who is primarily engaged in the field of domestic relations.

[34]Baker v. Baker, 85 Ohio App. 470, 89 N.E.2d 123 (1949).

[35]State ex rel. Walker v. Crouse, 240 Mo. App. 389, 205 S.W.2d 749 (1947).

[36]Wilson v. Mitchell, 48 Colo. 454, 111 Pac. 21 (1910); Hutchinson v. Harrison, 130 Va. 302, 107 S.E. 742 (1921).