

BOOK REVIEW

GETTING CUSTODY. By Robert Henley Woody.* New York: Macmillan Publishing Co. 1978. Pp. 178. \$8.95.

*Reviewed by Richard E. Shugrue***

The dramatic increase in the number of divorces granted each year both in the United States¹ and specifically in Nebraska² of necessity multiplies the number of painful human scenarios revolving around the issue of which parent shall be awarded custody of the children. Those who have struggled through either formal or informal reconciliation efforts³ ought, at the least, to understand that divorce and the splitting up of families carry with them neither certain financial nor emotional security.⁴ The breaking up of a marriage where no children are involved is traumatic enough; but when the dissolution involves a couple who has brought children into the world, all the parties will continue to be confronted by challenges to their emotional stability, no matter which parent,

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1. "In the United States, the rate of divorces and annulments has soared from 3.5 divorces per thousand population in 1970 . . . to 5.1 per thousand in 1977, an increase of more than forty-five per cent." Frank, Berman & Mazur-Hart, *No Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 5-6 (1979).

2. In Nebraska, divorces have increased from 2531 in 1966 to 5,788 in 1976, an increase from 1.7 per thousand to 3.7 per thousand. NEBRASKA DEPARTMENT OF ECONOMIC DEVELOPMENT, NEBRASKA STATISTICAL HANDBOOK 1978-1979 31 (1979).

3. The process involved in formal conciliation in Nebraska is outlined in NEB. REV. STAT. § 42-801 (Reissue 1978).

4. The recent decision in *Kuhn v. Kuhn*, 204 Neb. 363, 282 N.W.2d 43 (1979) illustrates the point. In January, 1977 the parties to the divorce agreed to joint custody with physical custody in the mother. She then sought permission to move to California. While the 12-year old child was with the father, no one was home during the day to take care of him. The child testified that he felt better about being in California with his mother, since he said he was scared being at home alone with no supervision. The father attempted to introduce evidence of the mother's alleged misconduct not called to the trial court's attention and existing at the time of the decree, but was not allowed to do so under the doctrine of *Youngberg v. Youngberg*, 193 Neb. 394, 227 N.W.2d 396 (1975). 204 Neb. at 364-68, 282 N.W.2d at 44-45. On the financial crises arising out of dissolution, see *Boroff v. Boroff*, 204 Neb. 217, 218, 281 N.W.2d 760, 761 (1979), where the court noted pointedly that "[b]oth parties testified to having expenses that exceeded their net income." See generally ABA SECTION OF FAMILY LAW, ECONOMICS OF DIVORCE (1978).

if either, is given physical custody of the youngsters. The uncertainty, the financial drain, the interference with chosen life styles and, most of all, the impact upon the lives of the children, will be present for the rest of their natural lives.⁵

Many lawyers who handle domestic relations cases are unprepared to cope effectively with the attendant psychological warfare in a dissolution matter. An attorney's typical response to a client with a domestic relations problem may be, "I am just a plumber. I will walk you through the divorce and try my best to get custody and property for you. But I am not a psychiatrist and I can't hold your hand for the rest of your life."

Likewise, the mental health and religious professionals who routinely handle the emotional problems of those facing divorce or custody battles may be woefully inadequate at imparting their limited information about legal aspects of divorce and custody.

Thus, the publication last year of a highly practical volume entitled *Getting Custody* by Robert Henley Woody may well serve to bridge these gaps in the understanding not only of the highly complex problems associated with custody fights, but of the resources available to make one of life's deepest crises less exacerbating to all parties involved.

The custody provisions contained in the Nebraska statutes appear to be deceptively simple. Section 42-364 states that, "custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court after hearing on such notice as prescribed by the court."⁶ The statute outlines three factors which the court must consider in solving the custody riddle.⁷

5. See generally Davis, *Representing the Lesbian Mother*, 1 FAM. ADVOCATE 2 (1979); Fox, *Who Should Give This Child a Home?*, 1 FAM. ADVOCATE 11 (1979); Seal, *A Decade of No-Fault Divorce*, 1 FAM. ADVOCATE 10 (1979); Note, *Divided Custody of Children After Their Parents Divorce*, 8 J. FAM. L. 58 (1968).

6. NEB. REV. STAT. § 42-364 (Reissue 1978).

7. *Id.* § 42-364(1). These are: "a) The relationship of the children to each parent prior to the commencement of the action or any subsequent hearing; b) The desires and wishes of the children if of an age of comprehension regardless of their chronological age, when such desires and wishes are based on sound reasoning; and c) The general health, welfare, and social behavior of the children." *Id.* § 42-364(2). This doctrine had most recently been adhered to judicially in the cases of *Bolles v. Bolles*, 182 Neb. 798, 800, 157 N.W.2d 410, 412 (1968) and *Hossack v. Hossack*, 176 Neb. 368, 370, 126 N.W.2d 166, 168 (1964), prior to the adoption of the so-called "no fault" divorce statute, L.B. 820, § 18, 1972 Neb. Laws 250. The Nebraska Supreme Court has indicated that it will examine all relevant factors in determining custody, including the sexual behavior of the parties. *Ahlman v. Ahlman*, 201 Neb. 273, 278, 267 N.W. 2d 521, 524 (1978). The court has also indicated that it is required to adjudicate custody issues throughout

And yet both trial and appellate courts have anguished over the questions relating to custody, whether they be physical possession, visitation rights, child support payments or transfers of custody after an initial decree has been entered.⁸ As the years pass and American mobility increases while family stability declines, new issues are added to the already complex strand of problems centering on custody. One illustration of the point is the increase in numbers of so-called "child-grabbing" cases, which has precipitated the passage of versions of the Uniform Child Custody Jurisdiction Act in a number of states including Nebraska.⁹ Congress has before it a new addition to the federal criminal code which would penalize the abduction of one's own child from the legal custodian.¹⁰

Given this myriad of custody problems, the lawyer, not to mention his or her client, should understand the psychological manifestations of the struggle and have access to resources to be turned to for assistance in successfully winning it. Woody's book, it is clear, is written primarily for the parent about to confront the custody issue as it arises in the original divorce proceedings. Its value, however, is for a far wider yet professionally specialized audience. He shatters some revered icons on the altar of traditionalism, including the popular assumption (discredited in the law

the period of minority of the children involved which duty exists "even without objections or requests on the part of the parents." *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 744, 272 N.W. 2d 40, 42 (1978).

8. For some recent illustrations of those problems, see *Ratcliff v. Ratcliff*, 5 FAM. L. REP. (BNA) 2914 (Ky. Ct. App. 1979) (whether custody in the father is really custody in the paternal grandparents); *In re Kenyon*, 5 FAM. L. REP. (BNA) 2895 (Or. Ct. App. 1979) (since each parent has a duty to support his or her minor children, a noncustodial mother must pay child support for her two teenage sons); *McGuire v. Brown*, 5 FAM. L. REP. (BNA) 2877 (Tex. Ct. Civ. App. 1979) (the parental rights of a healthy, working father may be terminated for his refusal to pay ordered support and for his cursing at the mother in the presence of the children when she asked for more support); *M.P. v. S.P.*, 5 FAM. L. REP. (BNA) 2855 (N.J. Sup. Ct. App. Div. 1979) (two minor children are better off with their lesbian mother than with their "far out" father where it is shown the mother did not try to inculcate the children in her sexual attitudes, and her custody would not harm them).

9. Nebraska Child Custody Jurisdiction Act, NEB. REV. STAT. §§ 43-1201 to -1225 (Supp. 1979) The Act is aimed at avoiding jurisdictional competition and conflict in custody matters; promoting cooperation with courts of other states so that custody issues may be resolved in the jurisdiction which can best decide the case in the interests of the child; assuring that the issues are resolved in the state with the closest connection with the child and his family; discouraging continuing controversies in the interests of greater stability of the home environment and secure family relationships; deterring abductions and other unilateral removals; avoiding of relitigation over custody issues; facilitating enforcement of custody decrees; and promoting the exchange of information between states and the uniformity of state laws. NEB. REV. STAT. § 43-1201 (Supp. 1979).

10. S. 1437, 95th Cong., 2d Sess. § 1624 (1978).

since the advent of the no-fault adjudication) that a mother should have custody of her children because the father is unable to give them proper care, especially during their "tender years."¹¹

As a practicing psychologist, Woody warns that having only one parent "creates the possibility of some undesirable conditions for child development."¹² He also acquaints his readers with the equally important criteria used by judges in evaluating conflicting claims as to the best interests of a youngster and deciding which parent is more fit to have physical custody. Although his specific focus is on the Michigan Child Custody Act¹³ standards, this exposition should be valuable in Nebraska where, theoretically, the same elements may constitute part of the evidence before the court.

While statutes attempt to explain the norms under which custody is awarded, it is the judiciary which must struggle with how those standards will be applied in each case.¹⁴ This reality under-

11. See, e.g., *In re Carney*, 5 FAM. L. REP. (BNA) 2807, 2808 (Cal. 1979) (custody awarded to quadriplegic father since handicapped parents cannot lawfully be presumed to be less fit for parenting than nonhandicapped parent); *Flehart v. Flehart*, 202 Neb. 245, 247, 274 N.W.2d 871, 873 (1979) (no preference because of sex); *accord*, *Peterson v. Peterson*, 196 Neb. 328, 330, 243 N.W.2d 51, 52 (1976). The Nebraska Supreme Court has looked to the conduct of the parties in determining which parent is fit to have custody, *Morrissey v. Morrissey*, 182 Neb. 268, 270, 154 N.W.2d 66, 67 (1967) (where the mother was an adulteress and unfit, and the father was without fault); *accord*, *Wolpa v. Wolpa*, 182 Neb. 178, 180, 153 N.W.2d 746, 748-49 (1967). *Wolpa* has been discredited since the passage of the no-fault divorce law. In *Fisher v. Fisher*, 185 Neb. 469, 472, 176 N.W.2d 667, 670 (1970), the court held that custody should not be denied to an adulterer as a matter of law. *Id.* Of course, adultery is still an element which may be considered in determining fitness for custody. *Lockard v. Lockard*, 193 Neb. 400, 402, 227 N.W. 2d 581, 583 (1975) and *Bartley v. Bartley*, 197 Neb. 246, 249, 248 N.W.2d 39, 41 (1976).

12. R. WOODY, GETTING CUSTODY 11 (1978). He notes that, "[e]ven reconstructed families, presumably with an adoptive replacement parent, leave the child to cope with the experiences and feelings associated with the real father's or mother's absence and with the changes associated with a new family system." *Id.* at 12.

13. MICH. COMP. LAWS § 722.21-29; R. WOODY, *supra* note 12, at 25-26. For a discussion of the Michigan act and the criteria contained therein, see Huddleston, *Family Law*, 18 WAYNE L. REV. 355, 358 (1972).

14. One of the most widely criticized cases relating to a custody dispute between a natural father and the maternal grandparents was *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152 (1966). See also *In re Carlson*, 181 Neb. 877, 878-81, 152 N.W.2d 98, 99-101 (1967) (dispute between natural father and maternal grandmother where natural father prevailed); *Raymond v. Cotner*, 175 Neb. 158, 163-65, 120 N.W.2d 892, 895-96 (1963) (dispute between natural father and maternal grandparents, where former received custody). It has been stated:

Perhaps the major impediments to a sound solution of custody issues are the meaningless generality of such principles as 'the best interests of the child' and the persistence of the insensitive sentimentality that 'blood is thicker than water.' Unfortunately, these general propositions too often decide concrete cases. For a wise and just disposition of custody cases, such abstractions need particularization, and standards are needed to spell out

scores the necessity of all involved to recognize that old myths, while they may die hard, nevertheless expire. The attorney involved every day with custody disputes realizes certain facts of life about the development of the law which may be shocking to those not specializing in domestic relations and, particularly, to parents facing a custody dispute for the first time in their lives. An example of this is the rule that natural parents have no special inalienable claim to custody of their children.¹⁵

Woody's book examines the criteria used by a court in determining custody, including the issues of mental and physical health, the emotional ties between parent and child, and the ability to provide a home. He comments on the right of the child to be represented by counsel in so critical a decision-making process.¹⁶ That an understanding of each of these is important goes without saying. That all are not explored with the custody-battle client or that he or she has not had them explained in simple straightforward language, in an unfortunate reality.

Just as the criteria involved in custody fights are critically important to both counsel and client, so each, but especially the parent, must have an understanding of the impact of divorce on the child's mind. Woody notes quite simply that divorce "messes with the minds of all persons involved . . . because it attacks personal security, saps ego or psychic strength, creates uncertainty, and fosters self-doubts."¹⁷

amorphous concepts even though detailed rules are impracticable. Moreover, the assistance of social scientists and experts is essential if the decision is in fact to be in accord with the 'best interests of the child.'

Foster, *Family Law*, 36 N.Y.U.L. REV. 629, 635 (1961).

15. Under Nebraska law, termination of parental rights can only be decreed by a juvenile court in a proceeding brought for that purpose. *Sosso v. Sosso*, 196 Neb. 242, 243-44, 242 N.W.2d 621, 623 (1976). But the Nebraska Supreme Court has also indicated in *In re Boyles*, 204 Neb. 546, 283 N.W.2d 382 (1979), that the parents' natural and superior rights to have custody have always been protected and maintained by the courts. *Id.* at 554, 283 N.W.2d at 387. However, those rights are not absolute or inalienable: society also has a paramount interest in the protection of the right of the child to be loved and cared for properly, and to have proper moral training and education. Moreover, in a dispute between parents over custody, the dissolution court may place custody in the court itself to facilitate judicial supervision and summary power to act swiftly in the best interests of the children. *Bartlett v. Bartlett*, 193 Neb. 76, 78-79, 225 N.W.2d 413, 415-16 (1975).

16. R. WOODY, *supra* note 12, at 27. Addressing himself to the parents, the author identifies counsel for the children as a "major breakthrough in child-custody laws, and one that you . . . must both accept — even if it seems counter to your personal preferences and interests — and demand on behalf of your children." *Id.* Nebraska law provides, "Whenever termination of parental rights is placed in issue by the pleadings or evidence, the court shall forthwith appoint an attorney as guardian ad litem to protect the interests of any minor children." NEB. REV. STAT. § 42-364(4) (Supp. 1978).

17. R. WOODY, *supra* note 12, at 39.

The parent may very well be absorbed in his or her own anxiety and sadness over the dissolution of the marriage, but must never lose sight of the fact that children of divorce suffer essentially the same kind of emotional and behavioral problems as disturbed children due to decreased self-esteem. Woody pointedly reminds the reader that the legal system "does not provide for the child's mental health needs during the divorce period."¹⁸ It is clear that the mother and father share a fundamental responsibility to help the child, despite their own trauma.

Divorce, as Woody points out, is a process, not an event; it does not erase the past. The parties to the dissolution are given concrete, sensible advice as to how they ought to begin reordering their lives. The professional dealing with marital discord is reminded that the emotional picking up of pieces does not end on the day the decree is entered by the divorce court.

Just as the divorce itself may have the appearance of finality, so, too, the custody issue may be seen as final. However, it is a rule of almost universal application that, where minor children are involved, the interest of the state, and thus of the court, continues to the age of the majority and often beyond.¹⁹ Custody litigation may well be the most significant battle in dissolution warfare. Woody examines the participants' roles in the battle and makes pointed recommendations regarding them. His chapter on "the gladiators" is helpful not only to the principals but also to their legal allies, who must present evidence on behalf of the spouse attempting to obtain custody.²⁰

Lawyers are all too familiar with the phenomenon of custody by stipulation, by default or, when a hearing is involved, by virtue of the slimmest distinction between the evidence produced by the

18. *Id.* at 42.

19. In Nebraska, child support allowances may be changed where new facts and circumstances of the parties are alleged. *Bruckner v. Bruckner*, 201 Neb. 774, 775, 272 N.W.2d 270, 271 (1978); *Pfeiffer v. Pfeiffer*, 201 Neb. 56, 58, 266 N.W.2d 82,84 (1978); *Wheeler v. Wheeler*, 193 Neb. 615, 618, 228 N.W. 2d 594, 596 (1975). Changes of custody may occur even when the original action is pending on appeal before the supreme court. *Fleharty v. Fleharty*, 204 Neb. 419, 420, 283 N.W.2d 604, 604-05 (1979). A crisis may arise subsequent to a final order when one party has custody and contemplates removing the child from the jurisdiction, even though the other party has visitation rights. *McGee v. McGee*, 190 Neb. 415, 416-17, 209 N.W.2d 339, 340 (1973). There is a growing body of law requiring a noncustodial parent to pay for the college education of a post-majority natural child, *Ross v. Ross*, 5 FAM. L. REP. (BNA) 3111, 3113 (N.J. 1979), or where the adult offspring is physically or mentally infirm, *Feinberg v. Diamant*, 389 N.E.2d 998, 1001 (Mass. 1979).

20. R. WOODY, *supra* note 12, at 57-67. For example, in a later chapter the issue of the intelligence of the parents is identified as relating to how it can restrict or enhance proper care for the child; Woody notes that psychologists are best suited for evaluating one's intelligence. *Id.* at 101-02.

adversaries. How much better might the lawyer be prepared to present his or her case if the principal were assisted by competent advocates? In addition to educational psychologists, these might include clinical psychologists, psychiatrists, social workers, clergymen, and physicians who, after having examined the parties to the dispute and their respective environments, can testify with authority as to what are in the best interests of the child.²¹

The urban lawyer may have at his or her disposal batteries of specialists, but attorneys in more sparsely populated areas may not even know where they can turn for assistance and in what cases such assistance may be helpful or harmful. It is Woody's view that prudent strategy in a custody fight requires the enlistment of a whole phalanx of professional advocates.

Just as a complete understanding of the impact of divorce on the child is essential, which understanding can be achieved with the aid of allied professionals, Woody also believes that the psychological attitude and physical strength of the adversaries may color the outcome of a custody fight. He therefore spends a chapter on the cultivation of strength, both physical and emotional.²² He notes, "[a] healthy state is a dimension of the major 'test' that a child-custody legal proceedings administers when considering the evaluations of the mother and father for suitability for custody: the 'fitness' test."²³

Steeling oneself to the reality of the courtroom drama is emotionally and physically draining. That sapping of strength is just the beginning for each parent will haggle and bicker over specifics of visitation, how much support has been paid and what is owed, and how to pay for emergencies not contemplated in the settlement or decree. The remarriage of one of the parties, an attempt by a new spouse to adopt the child, and the movement from the jurisdiction are all situations which require physical and emotional adjustment. Woody outlines them in a calm and frank manner.

Finally, what does one do after the decree is signed and the

21. See Foster, *supra*, note 14, at 635.

22. R. WOODY, *supra* note 12, at 111-34.

23. *Id.* at 126. The mental and emotional aspects of fitness are examined in such cases as *Stecker v. Stecker*, 197 Neb. 164, 167, 247 N.W.2d 622, 625 (1976) (where the court observes that both parents are "immature"); *Broadstone v. Broadstone*, 190 Neb. 299, 300-02, 207 N.W.2d 682, 684-85 (1973) (where the court notes that emotional problems led to placing legal custody in the director of county welfare); *Schott v. Schott*, 190 Neb. 84, 84-85, 206 N.W.2d 39, 39-40 (1973) (where the court observed that the wife's emotional problems related to the care and responsibility the children required, concluded that her conduct was having an adverse effect on the children, and awarded custody of both, one ten and one seven years old, to the father).

divorce is over? The restructuring of one's life can be an exceptionally traumatic experience. In his role as psychologist Woody provides some helpful and candid advice relating to the necessity of coping successfully with anxious, hostile, depressed, or guilty feelings.

Woody's book is not a legal treatise to compete with Clark's hornbook on Domestic Relations,²⁴ but that is the whole point of the work. Lawyers are well-equipped to find the law and apply its principles to specific cases with which they are dealing; in too frequent the case they are ill-equipped to act with full professionalism in solving the emotional and other personal problems surrounding the trauma of family disintegration. This little volume, a departure from the five psychological textbooks and some 150 scholarly articles authored by Woody, is a gem of a resource to have available. It outlines the problems involved in custody battles from the standpoint of the parent and the child of the marriage about to become a medicine ball on a muddy field.

During the years of legal education, students are too busy digesting the rules of law to examine thoroughly the rules governing human behavior as understood by other professions. During the years of practice, the lawyer has his or her hands full managing the caseload, meeting community and bar responsibilities, and fostering his or her own advancement in continuing legal education to become much of an expert on human emotional problems.

This book can be a most useful tool as a consequence of the lawyer's inability to take a cram course in psychological dynamics. It can be even more useful if loaned or recommended to the client contemplating dissolution and a custody battle.

Naturally, it is not designed to probe the outer limits of custody problems from their legal point of view.²⁵ But inasmuch as it prepares the client emotionally for the grave consequences of dissolution where children are involved, it can help pave the way toward as rational a solution to the custody issue as is possible given the limits of the law.

24. H. CLARK, *THE LAW OF DOMESTIC RELATIONS* (1968).

25. It is apparent that the child who is taken unilaterally by a noncustodial parent into another jurisdiction, or one who is forced to elect between a natural parent and the new spouse of a custodial parent, or one who is deprived of parental visits because of a geographic removal to a remote location in the country, faces devastating psychological problems. Likewise, a custodial parent may find it impossible to collect support payments in arrears and suffer great anxiety over the child's future. Even the "routine" visitation of a child to the noncustodial parents presents problems when the parent attempts to poison the mind of the child toward the custodial parent. See *Albertus v. Albertus*, 178 Iowa 1124, 1125-26, 160 N.W. 830, 830-31 (1917); *Kaplun v. Kaplun*, 227 S.W. 894, 894-95 (Mo. Ct. App. 1920).