

KIRK v. JONES.

Opinion delivered December 10, 1928.

1. INFANTS—JURISDICTION OF CHANCERY.—Minors are the wards of chancery courts, and it is the duty of such courts to make any orders that would properly safeguard the rights of minors.
2. PARENT AND CHILD—JURISDICTION OF CHANCERY.—The chancery court has jurisdiction, in habeas corpus proceedings, to award the custody of a child to its aunt upon the death of its mother, where the father, by his neglect, had forfeited his right thereto.
3. PARENT AND CHILD—RIGHT TO CUSTODY OF CHILD.—In determining which of the parties to litigation over the custody of a child should have its custody, the child's permanent well-being, rather than its present enjoyment, is considered of prime importance.
4. PARENT AND CHILD—CUSTODY OF CHILD—EVIDENCE.—Evidence in habeas corpus proceedings to recover the custody of a child from its father, *held* to warrant the award of its custody to an aunt as best for its permanent welfare.

Appeal from Pulaski Chancery Court; *Frank H. Dodge*, Chancellor; reversed.

STATEMENT OF FACTS.

This proceeding was brought by Mrs. Laura Kirk against Andrew J. Jones in the chancery court for a writ of habeas corpus to recover the custody of a four-year-old child. The parties are sister and brother, and the latter is the father of the child.

In the early part of 1924 Andrew J. Jones, who lived in Little Rock, Arkansas, carried his wife to the home of her mother, Mrs. Z. A. Norris, at Beebe, Arkansas, and left her there to be kept by her mother until after the period of confinement, which occurred some three months later. The child, which is the subject of this lawsuit, was born and kept by its mother at the home of Mrs. Z. A. Norris. After the birth of the child, Andrew J. Jones and his wife separated, and she continued to reside with her mother, and kept the custody of the child until her death, which occurred eighteen months later. Upon her deathbed she requested her mother, Mrs. Laura Kirk, or both of them, to have the care and custody of the child. She died as a result of

an operation, and Mrs. Kirk kept the child during her last illness. Mrs. Norris gave the child to Mrs. Kirk, who kept it for about two years. During this period of time Jones visited his son at the home of his sister, and went there in the early part of February, 1928, and asked to carry the child to the home of his mother for the purpose of dressing it up. He carried the child away, and refused to return it to his sister. She immediately instituted proceedings by habeas corpus to obtain the custody of the child. Thus far the facts are undisputed.

Some time after the death of his first wife, Jones married again, and now lives in Little Rock. Both parties introduced evidence tending to show that they were fit parties to have the care and custody of the child. According to the testimony of Mrs. Kirk and of Mrs. Norris, Jones had separated from his wife before the birth of the child, and only came to see his wife the next day after the baby was born. He only stayed a short time, and never afterwards lived with his wife. He separated from her before the child was born. He never contributed anything towards the support of the child, except \$10 to Mrs. Norris while the child was in her custody and about \$12 to Mrs. Kirk after she had the custody of the child. In addition to this he gave a few suits of cheap clothing to the child, which did not amount to a dollar a suit. Jones was an ex-service man in the World War, and received disability compensation in the sum of \$100 a month from the 21st day of July, 1922, to the 31st day of March, 1924. He received \$75 per month from the 1st day of April, 1924, to the 17th day of September, 1925. From September 18, 1925, on he received \$100 a month. For the period from July 28, 1924, to June 8, 1925, the compensation was apportioned so that the amount of \$30 per month was made payable to Mrs. Essie Jones for the benefit of herself and child, who was in her custody. The mother died on June 8, 1925, and, immediately following her death, the twenty per cent. compensation allowed for the child was paid

to the father, on the theory that he had regained custody of the child. The regulations provided for the apportionment of the compensation where the parent is living separate and apart from his child or in the event that he does not have the care and custody of his minor child.

Mrs. Kirk is a married woman, and lives on a farm of eighty acres of land, with her husband and six children. Her husband is out of debt, and provides well for their children as his circumstances in life permit. After the death of Mrs. Jones, her little son was taken into the home of Mrs. Kirk, and treated just as if he was one of her own children during the two years in which he remained in her custody. It became necessary to carry him to a hospital at Searcy, Arkansas, for the purpose of having his tonsils and adenoids removed. The operation was successful, and Mrs. Kirk paid the costs thereof, which amounted to \$37.

According to the testimony of Mrs. Kirk and her husband, Jones denied that the child was his son at the time of its birth. According to the testimony of Mrs. Norris, Jones came to see her after the death of his wife, and admitted that he was wrong in separating from his wife. He borrowed \$100 from her, and never paid it back. The doctor who attended Mrs. Jones at the time of the birth of the child testified that Jones had never paid his bill, although he had mailed it to him several times.

According to the testimony of Jones, he had contributed more towards the expense of keeping his child while in the custody of his sister than he received for it from the United States Government. He admitted, however, that he had not kept any account of the amounts expended by him, and was not able to furnish a statement thereof. He denied that he had separated from his first wife until after the birth of the child, and denied that he had ever expressed any doubt as to the paternity of the child. He paid his sister \$12.50 towards the expenses of the operation on his child, but this payment was not made until after the present suit was begun.

The chancellor found the issues in favor of Jones, and the petition of Mrs. Kirk for the custody of the child was dismissed for want of equity. The case is here on appeal.

Culbert L. Pearce, for appellant.

L. A. Hardin, for appellee.

HART, C. J., (after stating the facts). Minors are the wards of chancery courts, and it is the duty of such courts to make any orders that would properly safeguard their rights. This is a habeas corpus proceeding, and the court had the authority to grant the custody of the child to the aunt, provided it finds that the father had forfeited his rights thereto. Three parties are interested in the custody of minor children, the State, the parents, and the child itself. While the right of the father to the custody of his child is paramount, this is denied in many cases, and, regard being had for the welfare of the child, its custody has been placed elsewhere. *Verser v. Ford*, 37 Ark. 30; *Washaw v. Gimble*, 50 Ark. 351, 7 S. W. 389; *Coulter v. Sypert*, 78 Ark. 193, 95 S. W. 457; and *Clark v. White*, 102 Ark. 93, 143 S. W. 587; Ann. Cas. 1914A, 739. Other cases from this court and from many other courts of last resort to the same effect will be found cited in a case-note to Ann. Cas. 1914A, p. 748.

The permanent wellbeing of the child more than its present enjoyment is to be considered as of prime importance. No hard and fast rule can be laid down on the subject, and each case must be governed to a large extent by its own particular facts.

Tested by this rule, we think that the facts bring the case within an exception to the general rule, and that it would be best for the permanent welfare of the child that it should be in the custody of the sister of the father. In reaching this conclusion we are not unmindful that the father is married again and that his present home is a fit and suitable place for the child. Undoubtedly, however, this is true at the home of his sister.

She kept the child for two years after the death of its mother, without any hope or expectation of reward. She loved and cared for it just as she did for her own children, and never asked its father to make any contribution to its support. It is true that he testified that he contributed more to its support than he received from the United States Government for the support of the child, but his testimony is not corroborated by the other testimony. He admitted that he could not make any statement of the expenses which he had incurred. The record of the Veterans' Bureau shows that, from the date of the death of the mother of the child, he was allowed and received \$20 per month for the support of the child. His sister testified that he never contributed anything to the support of the child except about \$12 in money and a few cheap suits of clothes, worth a dollar each. He testified that he visited the child every two weeks, and, if he did so, he must have known that his sister paid the expenses of the operation upon the child. He never offered to pay her back any of this money until after the present suit was instituted. The amount of money he received from the government was based upon the theory that he had the care and custody of the child. During all the time he was collecting this money, the child was in the care and custody of the sister, and he never contributed any substantial sum towards its support. He never lived with his first wife after the birth of the child, and never gave any material contribution to her support and the support of the child. As far as the record discloses, the only sum contributed by him was the apportionment allowed by the United States Government when the wife is living separate and apart from her husband and has the custody of their minor child. Thus it will be seen that this apportionment, made for the benefit of the wife and child, was kept by the father after the death of the mother, on the theory that he had regained the care and custody of the child. The probabilities are that, if he ceased to receive any compensation from the United States, he would cease to

provide for the child, and that he might leave it to others to take care of his child just as he did when it came into the world.

On the other hand, the sister has shown her interest in the welfare of the child and has demonstrated that she would care for it just as she would for her own, regardless of whether or not she received the compensation apportioned for it by the government.

Therefore the decree will be reversed, and the cause remanded with directions to the chancery court to award the custody of the child to Mrs. Laura Kirk, with a right of the father to visit it at all proper times. It is so ordered.
