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STATE OF KANSAS

Office of the Attorney General

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Attorney General

January 16, 1974

Opinion No. 74- 14

Honorable LaVerne H. Spears
Representative, Fifty-first District
Statehouse
Topeka, Kansas 66612

Dear Representative Spears:

Our office has considered at your request a proposal to amend K.S.A. 1973 Supp. 60-1610 by inserting a provision which would allow the courts the discretion, in custody matters in divorce actions, to place children other than with a parent without a finding of "unfit." The Kansas Supreme Court has consistently opposed such a position. In fact, in Stout v. Stout, 166 Kan. 459, the Court unequivocally stated:

> ". . . It will suffice to say that if there is any language to be found in any of our decisions justifying the construction that the children of a natural parent may be given to third persons without a finding such parent is an unfit person to have their custody it should be and is hereby disapproved." 166 Kan. at 465.

The Court speaks often of "well-established rules." First among these is that paramount consideration is to be given to the welfare and best interests of the children. Following this, the welfare of the child must be considered in conjunction with the rights of the parents. After making these points, the Court in In re Armentrout, 207 Kan 366, stated:

> "A parent will not be permanently deprived of the parental rights to a child unless such parent is found to be an unfit person." 207 Kan. at 370.

The Court quoted with favor the rule and reasoning found in In re Kailer, 123 Kan. 229:

> ". . . [I]t is urged that the welfare and best interests of the children were the paramount issue. Under the law of the land the welfare and best interests of children are primarily the concern of their parents, and it is only when parents are unfit to have the custody, rearing and education of children, that the state as parens patriae, with its courts and judges, steps in to find fitting custodians in loco parentium." 123 Kan. at 230.

See also Jackson v. Jackson, 181 Kan. 1, and the cases cited therein.

It is well to note that in Finney v. Finney, 201 Kan. 263, the Court defined unfit as:

> " . . . in general unsuitable, incompetent or not adapted for a particular use or service. As applied to the relation of rational parents to their child, the word usually although not necessarily imports something of moral delinquency. Unsuitability for any reason, . . . , may render a parent unfit for custody." [Emphasis supplied.]

The bill is susceptible to two objections. In the first instance, it articulates no standards to guide the court in determining the best interest of a child whose custody is in dispute.

Secondly, and more fundamentally, the Kansas Supreme Court has consistently refused to countenance an assertion by the state of its power as parens patriae to remove children from the custody of the parents absent a finding of parental unfitness. This longstanding precedent has never been expressed as a doctrine of constitutional dimension. However, in order to justify the exercise of the power of the state to deprive a parent of custody of the child, there must be some valid interest asserted by the state as a reason therefor. Parental unfitness has been the traditional reason so asserted. This bill would authorize an award of custody to other than the parents for no reason presumably other than that the interest of the child would be better served in the custody of someone other than a parent. The Kansas Supreme Court has consistently recognized that the parents' right to custody is a substantial right which may not be impaired by the state without cause, and that absent abuse or parental failure of some kind, the state has no supervening power to intrude itself into the parent-child relationship. The custody changes which the provisions of section 1(c) propose to authorize would be subject to the more serious objections on this ground.

We cannot but conclude that the provision proposed to be added by § 1(c) is susceptible to fundamental objections for the reasons stated above, and that a custody order based squarely on the proposed provision would raise serious questions, constitutional and otherwise.

Yours very truly,

Vern Miller

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