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Child Custody: Paternal Authority v. Welfare of the Child

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courts to interpret that document as limiting their jurisdiction, the courts now appear to have new flexibility in determining the justiciability of issues before them.³¹ However, it should be noted that the new constitution contains language which could serve as a source of constitutional limitation on the power of the courts, despite the absence of express prohibitions. The requirement that courts confine their activities to performance of traditional judicial functions could be implicitly derived from sections one and two of article II of the 1974 constitution which generally set out the division of power among the three branches of government.³²

Under the new constitution, it would appear that Louisiana courts may no longer insist as a general requirement of jurisdiction that issues be presented in an adversary contest. Still, under the language of *In re Gulf*, the courts have retained the right to dismiss such questions as "may never arise" or "which may arise only at some future time."³³ Further, if the court is faced with a statute requiring it to rule on a matter which it considers inappropriate for judicial resolution, the court may rely on limitations implicit in the 1974 constitution to declare the act unconstitutional.

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CHILD CUSTODY: PATERNAL AUTHORITY V. WELFARE OF THE CHILD

During the existence of her marriage, Mrs. Wood filed a petition for habeas corpus in district court to recover the custody of her two-year-old daughter from the child's maternal grandparents. The court awarded custody to the grandparents based on the "best interest" of the child and its decision was affirmed by the Third Circuit Court of Appeal. On writs to the Louisiana supreme court, plaintiff argued that the district court was without jurisdiction to inquire into the

31. For instance, if a legislative body sought an advisory opinion, judges, following the criterion laid down in the instant case, could refuse to answer on the ground that the issue had not yet arisen, and was therefore not justiciable.

32. LA. CONST. art. II, §§ 1 & 2 provide: "The powers of government of the state are divided into three separate branches: legislative, executive, and judicial. Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." These provisions might well be authority for continued limitation of the court's power to the exercise of judicial functions, either as traditionally understood, or as re-defined in *In re Gulf*.

33. 297 So. 2d at 667.

issue of parental fitness under the holding of *Griffith v. Roy*.¹ Although reversing the district court's decision on the merits, the Louisiana supreme court held that in a habeas corpus action brought by a parent against a non-parent, the district court has jurisdiction to consider the fitness of the parent whenever the question is raised. *Wood v. Beard*, 290 So. 2d 675 (La. 1974).

In Louisiana, both the district courts and the juvenile courts may have jurisdiction to consider the issue of child custody.² In some instances, there has been difficulty in defining the exact limits of their respective jurisdictions. Traditionally, the jurisprudence has distinguished between district court and juvenile court jurisdiction in child custody matters by looking to the parties litigant. The civil district court has had exclusive jurisdiction over contests between private litigants³ (e.g., parent against parent or parent against third person); the juvenile court has been recognized as the "special and exclusive tribunal"⁴ to determine custody in suits where the state as a party seeks to have the child adjudicated "neglected."⁵ In the case of *In re Sherrill*,⁶ the Louisiana supreme court interpreted the term "neglected" as defined in the special legislation concerning the jurisdiction of juvenile courts⁷ to mean a present state of neglect in fact.⁸

1. 263 La. 712, 269 So. 2d 217 (1972).

2. Under La. Const. art. VII, § 35 (1921), the district courts had "original jurisdiction in all civil matters . . . except as may be otherwise provided in this Constitution." The juvenile courts were given jurisdiction "of cases of the State of Louisiana in the interest of children under seventeen years of age, as may be provided by the Legislature, brought before said [juvenile] Courts as delinquent or neglected children. . . . Said [juvenile] Court shall also have jurisdiction of all cases of desertion or non-support of children by either parent. . . ." La. Const. art. VII, § 52 (1921), as amended (emphasis added). Thus, it appeared that juvenile court authority, as defined by special legislation, was an exception to the plenary jurisdiction of the district court over all civil matters.

This structure is continued in the Constitution of 1974: "Except as otherwise authorized by this Constitution, a district court shall have original jurisdiction of all civil . . . matters. . . ." LA. CONST. art. V, § 16. "Notwithstanding any contrary provision of Section 16 of this Article, juvenile and family courts shall have jurisdiction as provided by law." LA. CONST. art. V, § 18.

3. *In re Owens*, 170 La. 255, 127 So. 619 (1930). *Accord*, *State ex rel. Simpson v. Salter*, 211 La. 918, 31 So. 2d 163 (1947); *State ex rel. Herbert v. Renaud*, 157 La. 776, 103 So. 101 (1925).

4. *In re Owens*, 170 La. 255, 265, 127 So. 619, 622 (1930).

5. *In re Cruse*, 203 So. 2d 893 (La. App. 4th Cir. 1967).

6. 206 La. 457, 19 So. 2d 203 (1944).

7. LA. R.S. 13:1569(16) (Supp. 1950), as amended by La. Acts 1972, No. 139 § 1 defines a "neglected" child as one: "(a) who has been abandoned by his parents, tutor or other custodian; (b) who is without proper parental care and control, or subsistence, education, medical or other care or control necessary for his well being because of the

Thus, after *Sherrill*, there can be no action brought in juvenile court when the child is being properly cared for by a third person, even if the child's parents have neglected their responsibilities.

A habeas corpus action brought in a district court has long been recognized as a proper remedy to obtain the custody of a minor by a person who is legally entitled to such custody.⁹ When a parent is a party to such proceedings, however, the courts have not only considered the parent's legal right to custody but have focused on the best interests of the child as well.¹⁰ Since the habeas corpus proceeding is brought on behalf of the child¹¹ and is considered a writ of inquiry in aid of rights and liberty, the interest of the child is deemed relevant. To help resolve the issue of custody in habeas corpus proceedings, the district court adopted a number of jurisprudential rules that had been developed in custody proceedings in other contexts.¹² The most

faults or habits of his parents, tutor, or other custodian or their neglect or refusal, when able to do so, to provide them. . . ." (Emphasis added.) LA. R.S. 13:1570 (Supp. 1950), as amended by La. Acts 1973, No. 73 § 1 provides: "Except as otherwise provided herein, the [juvenile] court shall have *exclusive* original jurisdiction in proceedings: "(A) Concerning any child . . . : (1) Whose parent or other person legally responsible for the care and support of such child *neglects* or *refuses*, when able to do so, to provide proper or necessary support, education as required by law, or medical, surgical or other care necessary for his wellbeing; or who *is* abandoned by his parent or other custodian, or who *is* otherwise without proper care, custody, or support. . . ." (Emphasis added.)

8. The holding of *In re Sherrill* is supported by the language of R.S. 13:1570, *supra* note 7, which employs the present tense, indicating there must be present neglect. *Accord*, *State ex rel. Stokes v. Stokes*, 222 So. 2d 573 (La. App. 1st Cir. 1969).

9. *State ex rel. Jagneaux v. Jagneaux*, 206 La. 107, 18 So. 2d 913 (1944); *State ex rel. Billington v. Sacred Heart Orphan Asylum*, 154 La. 883, 98 So. 406 (1923); *Prieto v. St. Alphonsus Convent of Mercy*, 52 La. Ann. 631, 27 So. 153 (1900); *Benoit v. Blassingame*, 249 So. 2d 302 (La. App. 1st Cir.), *cert. denied*, 259 La. 760, 252 So. 2d 456 (1971).

10. *State ex rel. Jagneaux v. Jagneaux*, 206 La. 107, 18 So. 2d 913 (1944). Habeas corpus has been recognized as one method for a divorced parent to argue for a change of custody due to an alleged change in circumstances since the last custody award. Such a proceeding is an obvious situation when the courts must consider the child's interest in addition to the parents' legal rights. *State ex rel. Girtman v. Ricketson*, 221 La. 691, 60 So. 2d 88 (1952).

11. *State ex rel. Lasserre v. Michel*, 105 La. 741, 30 So. 123 (1901). *See also* LA. CODE CIV. P. art. 3821: "Habeas corpus is a writ commanding a person who has another in his custody to produce him before the court and to state the authority for the custody. . . . A petition for a writ of habeas corpus may be filed by the person in custody or by any other person in his behalf."

12. The rules were originally developed by the district court in non-habeas corpus proceedings involving the issue of child custody such as (1) provisional proceedings to determine custody pending separation or divorce (LA. CIV. CODE art. 146), (2) custody proceedings incident to a divorce action (LA. CIV. CODE art. 157) and (3) summary

important of these principles is that the welfare of the child is the paramount consideration.¹³ The application of this rule in contests between a parent and a non-parent has justified the courts in denying custody of the child to a parent found to be unfit, despite the general proposition that a parent has the superior right to custody.¹⁴ Thus, the district courts have consistently inquired into the fitness of a parent bringing a habeas corpus action to recover the custody of his child from a non-parent.

The recent case of *Griffith v. Roy*¹⁵ attempted to delineate the jurisdiction and proper scope of inquiry of district and juvenile courts in custody matters. In *Griffith*, a grandparent brought an action in district court to have his grandchildren declared "neglected" following the separation and subsequent divorce of the children's parents.¹⁶ Reviewing the history of the legislation relating to juvenile and district court jurisdiction, the Louisiana supreme court concluded that after 1956, the district court no longer had authority in cases involving "neglected" children.¹⁷ The court then held that the district court

proceedings subsequent to divorce for a change of custody (LA. CODE CIV. P. art. 2592(8)). Custody may also be raised in tutorship proceedings upon separation or death of one of the parents. LA. CIV. CODE art. 250. See *Griffith v. Roy*, 263 La. 712, 728, 269 So. 2d 217, 223 (1972) (Appendix by Barham, J.). But cf. *Pascal, Tutorship After Separation of the Parents*, 16 LA. B. J. 267 (1968).

13. In *State ex rel. Harris v. McCall*, 184 La. 1036, 1039, 168 So. 291, 292 (1936), the supreme court declared that: "the State has an interest in children which goes beyond the mere parental right. In all cases involving their custody, the welfare of the children must be considered, and should prevail over the mere parental right to their possession." See also *State ex rel. Theriot v. Pulling*, 209 La. 871, 25 So. 2d 620 (1946).

14. *State ex rel. Rothrock v. Webber*, 245 La. 901, 161 So. 2d 759 (1964); *State ex rel. Munson v. Jackson*, 210 La. 1, 26 So. 2d 152 (1946) (parent has superior right to custody even of illegitimate child).

15. 263 La. 712, 269 So. 2d 217 (1972).

16. The mother had been awarded provisional custody of the children in a separation suit. However, the default divorce judgment later obtained by the father made no award of custody of the children. *Griffith v. Roy*, 263 La. 712, 718, 269 So. 2d 217, 219 (1972).

17. Prior to 1956, the district court had the power to remove a child from the custody of a person who was endangering the child's welfare by neglect. LA. R.S. 9:551-53 (1950) (repealed 1956). Thus, the district and juvenile courts had concurrent jurisdiction over cases of neglect. In 1956, the statutory basis for the district court's power was repealed and the court in *Griffith* concluded that the repeal divested the district court of jurisdiction. 263 La. at 720, 269 So. 2d at 220. But cf. *In re Harville*, 233 La. 1, 96 So. 2d 20 (1957). The court conceded that the effect of the repeal of R.S. 9:551-53 was to vest the juvenile court with exclusive jurisdiction over "neglected" children. Nevertheless, the court held the repeal did not mean that the district court was prohibited from admitting evidence of the moral fitness of the parties in a habeas corpus action involving child custody, since this was merely a question of admissibility of evidence and not a matter of jurisdiction.

lacked jurisdiction in the suit filed by the grandparent because the action was an attempt by a third party to have the children declared "neglected,"¹⁸ a right which can be exercised only by the state in a juvenile court proceeding.¹⁹ In addition, the trial court was ordered to determine the custody of the children in a previously dismissed habeas corpus action brought by their mother, in accordance with the court's opinion.²⁰

The court in *Griffith* supported its decision by emphasizing the importance of the concept of paternal authority in child neglect cases. As a result of the obligations owed by parents to their children,²¹ the Civil Code grants to parents, during the existence of the marriage,²² paternal authority²³ over unemancipated minor children²⁴ born of the

18. The court stated it would look through the caption, style and form of any petition brought in district court to determine from its substance whether the nature of the proceeding was that of a "neglect" proceeding which would be within the exclusive jurisdiction of the juvenile court. *Griffith v. Roy*, 263 La. 712, 725-26, 269 So. 2d 217, 222 (1972). Recent courts of appeal decisions ignored this aspect of *Griffith* and allowed third persons to bring actions in district court to obtain legal custody of a child from his parents. *Sanders v. Pepper*, 305 So. 2d 746 (La. App. 2d Cir. 1974); *McRae v. McRae*, 305 So. 2d 157 (La. App. 1st Cir. 1974).

19. Although the state may be motivated to institute a neglect proceeding in juvenile court on the affidavit of a third person, a private person could not bring the action in his own name. LA. R.S. 13:1574 (Supp. 1950), *as amended by* La. Acts 1973, No. 193, § 1.

20. *Griffith v. Roy*, 263 La. 712, 728, 269 So. 2d 217, 223 (1972). The court did not set out any specific guidelines for the district court to follow in determining the custody issue in the mother's habeas corpus action. Presumably, the court's instructions pertained only to its holding that the district court lacked jurisdiction to inquire into the issue of neglect in any proceeding. *See Wood v. Beard*, 290 So. 2d 675, 681 (La. 1974) (Barham, J., concurring).

21. According to *Planiol*, paternal authority is accorded parents because of the "heavy duties" incumbent upon parents in rearing children. *See* 1 *PLANIOL, CIVIL LAW TREATISE*, pt. 2, no. 1636 at 14 (La. St. L. Inst. transl. 1959). The most important obligations of parents are found in LA. CIV. CODE art. 227: "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children."

22. Paternal authority would seem to exist during the marriage only if there has been no judicial separation from bed and board. *Cf.* LA. CIV. CODE art. 246.

23. *See generally* LA. CIV. CODE arts. 215-37. The term "paternal authority" is somewhat of a misnomer since under article 216, the authority belongs to both parents jointly with the stipulation that the father's opinion prevails in case of difference. *See also* 1 *PLANIOL, CIVIL LAW TREATISE*, pt. 2, no. 1636 ("Remark") at 15 (La. St. L. Inst. transl. 1959).

24. There are five methods of terminating paternal authority under the Civil Code: (1) emancipation (art. 216); (2) majority (art. 216); (3) death of one parent (art. 250); (4) judicial separation of the parents (art. 246); (5) divorce of the parents (art. 246). Under other legislation there are two additional methods: (1) surrender of parental authority (LA. R.S. 9:402 (1950)); (2) juvenile court proceedings which result in the

marriage.²⁵ The majority was of the opinion that no person, other than a parent, could institute a civil proceeding for custody of a child while the marriage (and paternal authority) was in existence. It stressed that "[u]ntil one of the parties attacks the marital contract," only the state, under the special juvenile court legislation, is authorized to interfere with paternal authority by bringing a neglect proceeding in juvenile court.²⁶

However, subsequent court of appeal cases considerably narrowed the broad language of the *Griffith* decision and consistently regarded the majority's comments concerning the inability of a third person to bring suit for child custody during the existence of the marriage as dicta, because the parents in *Griffith* were divorced.²⁷ In addition, the courts emphasized that the *Griffith* opinion did not address the question of a third party's right to institute a civil proceeding for custody of a minor, since the court confined its holding to the jurisdictional issue²⁸ of the propriety of bringing neglect proceedings in district court.²⁹ Finally, the lower courts held that *Griffith* did not change the prior jurisprudential rule that allowed the district court to inquire into the issue of parental fitness in a habeas corpus action brought by a parent against a non-parent.³⁰

In the instant case, a mother brought a habeas corpus action in

termination of all parental rights (LA. R.S. 13:1569(21) (Supp. 1972)).

25. LA. CIV. CODE art. 238 declares that illegitimate children are not submitted to paternal authority. The Civil Code articles dealing with paternal authority are found under the section "Of the Duties of Parents Toward Their Legitimate Children . . ." (Bk. I, Tit. VII, Ch. 5, § 1).

26. *Griffith v. Roy*, 263 La. 712, 726, 269 So. 2d 217, 222 (1972). See also LA. R.S. 13:1574(A) (Supp. 1950), as amended by La. Acts 1973, No. 193 § 1, which requires the proceedings in juvenile court to be entitled "The State of Louisiana in the interest of _____, a child under seventeen years of age."

27. See, e.g., *Wood v. Beard*, 280 So. 2d 567, 571 (La. App. 3d Cir. 1973).

28. In *Stuckey v. Stuckey*, 276 So. 2d 408, 410 (La. App. 2d Cir. 1973), the court referred to the following language of Griffith: "In this opinion we are determining only jurisdiction. The question of whether a third party has a right or cause of action to institute a suit which is in substance as well as style a civil proceeding for custody of minor children is not before the court. Neither do we reach the question of a third party's rights in civil custody proceedings pending between parents." *Griffith v. Roy*, 263 La. 712, 726 n.5, 269 So. 2d 217, 222 n.5 (1972).

29. *Borras v. Falgoust*, 285 So. 2d 583 (La. App. 4th Cir. 1973), cert. denied, 289 So. 2d 161 (La. 1974) (on grounds that judgment was correct); *Wood v. Beard*, 280 So. 2d 567 (La. App. 3d Cir. 1973); *Stuckey v. Stuckey*, 276 So. 2d 408 (La. App. 2d Cir. 1973).

30. *Borras v. Falgoust*, 285 So. 2d 583, 585-86 (La. App. 4th Cir. 1973), cert. denied, 289 So. 2d 161 (La. 1974). Justice Barham dissented from the denial of writs, claiming that *Griffith* should be construed to limit the district court's inquiry to the issue of legal authority for custody. 289 So. 2d at 161.

district court to recover the custody of her minor child from a non-parent. Although the district court did not find the plaintiff to be unfit or in any way incapable of caring for her child, considering the welfare of the child, it awarded custody to the grandparent, apparently after comparing the competency of the mother and grandparent. Before the Louisiana supreme court, plaintiff argued on the basis of *Griffith v. Roy* that the juvenile courts were the only tribunals with jurisdiction to interfere with paternal authority and hence the district court in the instant case had no jurisdiction.³¹ The court rejected plaintiff's argument on the ground that *In re Sherrill*³² limited the jurisdiction of the juvenile courts solely to custody contests involving children who are neglected *in fact*, as required by the special juvenile court legislation.³³ Plaintiff further argued that during the existence of the marriage the district court in a habeas corpus proceeding brought against a non-parent has no jurisdiction either to inquire into the fitness of the parents or to deprive a parent of the custody of his child. The court, however, concluded that the district court did have such jurisdiction, because it was the duty of the court in these actions to provide for the welfare of the child by placing him in the "custody of a proper person."³⁴ The court reaffirmed that "[t]he welfare of the child, and not simply the enforcement of a parental right to the possession of the child, is of primary concern to the court"³⁵ in habeas corpus actions. However, the court disagreed with the district court's finding as to the welfare of the child and reversed its award of custody by strictly applying the jurisprudential rule that a parent has a superior right over a non-parent to the custody of the child, unless the parent is unfit.³⁶

The *Wood* opinion makes it clear that, notwithstanding *Griffith*, the district court has jurisdiction to inquire into the issue of parental

31. *Wood v. Beard*, 290 So. 2d 675, 677 (La. 1974).

32. 206 La. 457, 19 So. 2d 203 (1944).

33. LA. R.S. 13:1561-92 (Supp. 1950), 1593-99 (Supp. 1958), 1600-05 (Supp. 1974).

34. *Wood v. Beard*, 290 So. 2d 675, 677 (La. 1974) (emphasis added), *citing* LA. CODE CIV. P. art. 3830: "The judgment may order the person released or placed in custody of a proper person." There is no legislative or jurisprudential definition of the term "proper person" other than the limited explanation contained in the comment to LA. CODE CIV. P. art. 3828 which states that the term includes welfare institutions as well as natural persons. However, since the purpose of a habeas corpus action is to determine the authority of the person with custody (LA. CODE CIV. P. art. 3821), presumably, a "proper person" is a person who has authority for the custody. Thus, the court's reliance upon this phrase as justification for examining the fitness of the parent having legal authority for custody seems questionable.

35. *Wood v. Beard*, 290 So. 2d 675, 677 (La. 1974).

36. *Id.*

fitness in habeas corpus matters involving child custody in order to enable the court to provide for the "welfare of the child." As a result, *Wood* seems to accord the district court a type of concurrent jurisdiction with the juvenile court over cases involving parental neglect of children. However, the jurisdiction of the juvenile court is limited under the jurisprudence to cases of present and actual neglect,³⁷ whereas the district court can consider the parents' past conduct toward and neglect of the child to determine parental fitness, even if the child is presently well-cared for. This conception of district court jurisdiction apparently permits the removal of a child from the custody of his parents when, in a civil proceeding properly brought,³⁸ it is shown that the parents have breached the obligations imposed on them by the Civil Code³⁹—a result never provided for by civil legislation.⁴⁰

The *Wood* decision appears to seriously erode the principle of paternal authority by admitting that in some instances a private party may challenge the parents' right to custody during the marriage. As noted by Justice Barham in his critical concurring opinion,⁴¹ *Griffith v. Roy* required that all challenges to parental rights to custody be brought in juvenile courts by the state, on the basis that during the existence of a marriage only the state is authorized to interfere with the paternal authority of the parents.⁴² This rule would

37. LA. R.S. 13:1570 (Supp. 1950), as amended; *In re Sherrill*, 206 La. 457, 19 So. 2d 203 (1944).

38. If the proceeding is instituted by a third person (*i.e.* a non-parent) against a parent, it is unclear whether the district court has jurisdiction to determine custody. See text at note 29 *supra*.

39. LA. CIV. CODE art. 227, quoted at note 21 *supra*.

40. There has never been any civil sanction for the breach of parental obligations under the Civil Code. Only under special public law may the gross violation of the parents' duty of support and maintenance be remedied by a neglect proceeding brought in juvenile court. See R. PASCAL, LOUISIANA FAMILY LAW COURSE 294-95 (1973).

41. *Wood v. Beard*, 290 So. 2d 675, 678 (La. 1974) (Barham, J., concurring).

42. "[N]o person is given permission to interfere with the paternal authority." *Id.* at 678. See LA. CIV. CODE art. 216 (child remains under authority of father and mother until majority or emancipation); art. 217 (child under paternal authority must obey his parents); art. 218 (minor child may not quit the paternal house without permission of his parents).

Justice Barham argued that under La. Const. art. VII, § 52 (1921), the juvenile courts had exclusive jurisdiction of cases involving "neglected" children as provided by the legislature. See LA. R.S. 13:1570 (Supp. 1950), as amended. Under the 1974 Constitution, Barham's argument would still be valid. LA. CONST. art. V, § 18 states: "Notwithstanding any contrary provision of Section 16 of this Article [district court's jurisdiction] juvenile and family courts shall have jurisdiction as provided by law." The new Constitution makes it clearer that the juvenile court's jurisdiction as outlined by the legislation (R.S. 13:1561-92) is exclusive of any contrary jurisdiction provided

have safeguarded the institution of paternal authority since the power of the state to interfere would be limited to situations which fall within the special legislation for juvenile court neglect proceedings.⁴³ Moreover, *Griffith* attempted to limit the district court's jurisdiction in habeas corpus proceedings involving child custody to the issue of who has "legal authority" for the custody.⁴⁴ During the existence of paternal authority, only the parents would have such "legal authority," unless deprived thereof through the proper juvenile court proceedings.⁴⁵

Further, consistent with the majority's use of the broad concept of "welfare of the child,"⁴⁶ the scope of the district court's jurisdiction could conceivably be expanded to encompass habeas corpus actions instituted by third persons. The court in *Wood* did not discuss whether a third person alleging the unfitness of the parents would be allowed to bring a habeas corpus action to gain the custody of a child still in the custody of his parents. However, this would seem to be a situation in which the juvenile court has exclusive jurisdiction, since there are allegations of present parental unfitness and the action resembles one to have a child declared actually "neglected."⁴⁷ Such a suit would be prohibited under the holding of *Griffith v. Roy* no matter how it was styled, because it is in fact a neglect proceeding

in LA. CONST. art. V, § 16 for the civil district court. Justice Barham also cited the qualifying phrase found in R.S. 13:1570 that "[n]othing contained in R.S. 13:1561 through 13:1592 shall deprive other courts of the right to determine the custody of children upon writs of habeas corpus, or to determine the custody of children when such custody is incidental to the determination of cases pending in such other courts." *Wood v. Beard*, 290 So. 2d 675, 679 (La. 1974) (Barham, J., concurring). However, he made no attempt to reconcile the statutory language with his contention that the district court in a habeas corpus action has no jurisdiction to inquire into parental fitness.

43. See LA. R.S. 13:1561-92 (Supp. 1950), 1593-99 (Supp. 1958), 1600-05 (Supp. 1974), dealing with delinquency proceedings as well as neglect proceedings. In both types of proceedings, precaution against undue interference with the parents' right to custody of the child is provided by specific provisions. R.S. 13:1569(16) gives a narrow definition of "neglected" child; R.S. 13:1570 contains a narrow statement of exclusive jurisdiction; R.S. 13:1574 provides that a neglect proceeding may only be instituted by the state after investigation into the allegation of neglect made in a third person's affidavit; R.S. 13:1580(3) allows removal of a "neglected" child from the custody of his parents only if it promotes the child's welfare. Also, the expertise of many juvenile court judges in handling cases involving parental neglect of children should mitigate against unnecessary removal of the child.

44. *Wood v. Beard*, 290 So. 2d 675, 678 (La. 1974) (Barham, J., concurring), citing LA. CODE CIV. P. art. 3821.

45. *Id.*

46. *Id.* at 677.

47. *In re Sherrill*, 206 La. 457, 19 So. 2d 203 (1944).

instituted by a private person and not the state.

Although the language and rationale in *Wood* seems to violate the concept of paternal authority, the practical effect of the decision may be less serious than it appears initially. The supreme court's rejection of the propriety of a judicial comparison between the parents and a competing party in determining the child's "best interest"⁴⁸ limits the scope of the court's inquiry to a consideration of the parent's fitness. If the parent is found to be fit and able to care for the child, the parental right to custody is superior to that of a third person, even one better able to provide for the child's welfare.⁴⁹ As a practical matter, the courts require a serious case before they will declare a parent unfit⁵⁰ and thus the *Wood* decision will not significantly increase the likelihood of a parent being deprived of custody during the existence of the marriage.

However, by permitting the district court to inquire into parental fitness and to deprive an unfit parent of custody in habeas corpus proceedings to promote the "welfare of the child," the decision has in effect read into the law a remedy for a blatant violation of the parental obligations imposed by the Civil Code.⁵¹ It would seem that if such a sanction is desirable, the legislature and not the courts should provide it.

Douglas W. Truxillo

CONFLICT OF LAWS: SECURITY INTERESTS IN MOVABLES

Disputes over security interests in movable property that generate conflict of laws questions arise in two contexts: the litigants may be the immediate parties to a contract secured by a movable or the

48. "A judicial comparison of qualified competitors for custody of a child does violence to the rule of 'parental right.'" *Wood v. Beard*, 290 So. 2d 675, 677 (La. 1974).

49. The rationale of *Wood* may have implicitly overruled *State ex rel. Paul v. Peniston*, 235 La. 579, 105 So. 2d 228 (1958), in which the court awarded custody to the non-parent in the "best interest" of the child, even though the parents were fit and able to properly care for the child. *But see Sanders v. Pepper*, 305 So. 2d 746 (La. App. 2d Cir. 1974). Because of an unusual factual situation, the district court awarded custody to the grandparents, even though the parent was not found to be unfit.

50. *E.g.*, in *Wood*, the mother's prior assault conviction was considered insufficient to render her unfit. The court emphasized the heavy burden on the non-parent to prove parental unfitness. *Wood v. Beard*, 290 So. 2d 675, 678 (La. 1974).

51. Since the parental obligations of support, maintenance and education (LA. CIV. CODE art. 227) are fundamental, a complete lack of any one should be considered as equivalent to the type of parental unfitness that has warranted the court in removing the child from the parent.