

DIVORCE; Consent of mother having custody of minor under divorce
RECORDER: proceeding necessary for issuance of marriage license.
MARRIAGE: Father's consent insufficient.

August 30, 1950



Honorable Ted A. Bollinger
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Dear Sir:

This is in reply to your request for an opinion, which request is as follows:

"An opinion is requested of your office on the following question:

"Whether a recorder of deeds can properly refuse to issue a marriage license to a minor male when such minor exhibits a written consent executed by his father in proper form when the recorder is familiar with the fact that the father is divorced from the mother wherein custody of the minor was awarded to the mother. The mother of the minor had written to the recorder stating her objection to the marriage of the minor and on that ground the recorder refused to issue a license notwithstanding the written consent of the father?"

Section 3370, R.S.Mo. 1939, is as follows:

"No recorder shall in any event except as herein provided issue a license authorizing the marriage of any person under fifteen years of age: Provided, however, that said license may be issued on order of the circuit or probate court of the county in which said license is applied for, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable, and no recorder shall issue a license

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authorizing the marriage of any male under the age of twenty-one years or of any female under the age of eighteen years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths. The recorder shall state in every license whether the parties applying for same, one or either or both of them, are of age, or whether the male is under the age of twenty-one years, or the female under the age of eighteen years, and if the male is under the age of twenty-one years or the female is under the age of eighteen years, the name of the father, mother or guardian consenting to such marriage."

Section 3371, R.S.Mo. 1939, provides:

"Any person who shall solemnize any marriage wherein the parties have not obtained a license, as provided by this chapter, or shall fail to keep a record of the solemnization of any marriage, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars, and in addition shall be subject to a civil action by the parent, guardian or other person having care or custody of the person so married, to whom services are due wherein the recovery shall not exceed the sum of five hundred dollars; and any recorder who shall issue a license contrary to the provisions of this chapter shall be subject to a like punishment."

In an opinion under date of August 11, 1945 (Anderson), this office set out the above statutes and in comment thereon stated as follows:

"In view of the penalty attached to the issuance of a license contrary to these provisions, we believe that the recorder has the right to demand reasonable proof

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of the guardianship asserted by a person purporting to give his consent to the issuance of the license to a minor. Parenthetically, we might say that the same rule would apply to any person who claimed to be the parent of a minor seeking a license. Of course, if the recorder is satisfied that the person claiming to be the parent or guardian of the minor is actually such parent or guardian, he might well waive written proof of such parentage or guardianship, but, in the absence of such actual knowledge, we believe that it would be reasonable to require written proof of such parentage or guardianship."

In the case now before us, we have a situation where the status in regard to the custody of the child has been made known to the recorder. Under these circumstances, we believe that this question has been answered by an opinion of the Supreme Court in the case of Vaughn v. McQueen, 9 Mo. page 196, wherein the Court declared the law of consent to be as follows, l.c. 197:

"The only question to be determined is the sufficiency of this plea. In other words, can the mother of a minor consent to the marriage of such minor when there is a guardian? The 7th section of the act regulating Marriages prohibits the joining in marriage of minors, 'unless the parent or guardian or other person under whose care and government such minor may be, shall be present and give consent thereto, or unless the minor applying shall produce a certificate in writing under the hand of the parent or parents or guardian, or if such minor has no parent or guardian, then under the hand of the person under whose care and government he or she may be.' The 8th section affixes a penalty for transgressing this law.

"Our act concerning Guardians provides in certain cases for the appointment of guardians, whilst the father and mother are both living. There may also be a testamentary guardian, during the life of the mother. It may therefore happen that the father, the mother and a guardian are all in existence

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at the same time, in which event the question arises, as it did in this case, whether the consent of either is sufficient to authorize the marriage ceremony, or whether the law contemplates only one person as authorized to give the consent, either by his presence or certificate of approbation?

"The only construction which we think justified either by the grammatical construction of the sentence, or by the general scope of the statute, with reference to its object and the mischief designed to be remedied, is the one which limits the power of consent to one individual, and authorizes the consent of another only in the alternative. The last clause of the seventh section provides that the certificate shall be 'under the hand of the parent or parents or guardian, or if such minor has no such parent or guardian, then under the hand of the person under whose care and government he or she may be.' This phraseology it must be admitted is loose, inartificial and inaccurate, but the sense is sufficiently apparent. In the eighth section, the meaning of the lawgiver is more clearly expressed. It requires the officiating clergyman or justice, before proceeding to marry a minor to have 'the certificate or presence and consent of the parent or guardian, or other person having the care and government of such minor.' By this we understand that the consent of the person who has the legal custody of the minor, whether he be the guardian, or the father, or the mother, or the master, must be obtained. and there can be but one person authorized to give such consent. A strange absurdity would result from any other interpretation. The courts may, by the authority vested in them by our laws, deprive a dissolute, worthless or insane parent of that authority with which the laws of nature have invested him, and place the person and property of the infant under the control of a guardian, and yet the father be allowed under the construction contended for by the defendant and sanctioned by the Circuit Court, to thwart the

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legitimate control conferred upon the guardian, and that too in one of the most important steps which can be taken by the minor, and one likely to have a most serious influence upon his future happiness and prosperity."

As to the legal effect of the granting of custody of a minor child in a divorce proceeding, we refer you to the following statement in Lee v. People, 127 P. 1023, wherein the court said at l.c. 1024:

"The defendant appeared and contested the action in which the decree awarding the custody of the child to the mother was rendered. He was fully advised that his only right under the decree was to visit the child once a month for a stated time and within a limited distance from the mother's abode. By the express terms of the decree, the exclusive control and custody of the child were vested in the mother. The natural right of the father to have the custody and control of his child was taken away by law. It is well settled that, unless modified or set aside, a decree awarding the custody of a child is conclusive, and that such an award in favor of the mother against the father operates to divest the latter of all right over the child. 14 Cyc. 810."

Since the custody of the minor has been awarded to the mother and therefore the legal control of the father has been divested, we believe that it is necessary to obtain the consent of the mother who has legal custody of the minor.

CONCLUSION

Therefore, it is the opinion of this department that where the custody of a minor has been awarded to a mother in a divorce proceeding, the consent of the mother is necessary

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for the issuance of a marriage license to the said minor and the consent of the father is not sufficient, and if the recorder has knowledge of such facts regarding custody, he may properly refuse to issue a marriage license.

Respectfully submitted,

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APPROVED:

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