Washington and Lee Law Review

Volume 16 | Issue 2 Article 15

Fall 9-1-1959

Effect Of Adultery On Custody Awards

> cal interstate and international trade in white slaves, 'the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes.' "[23]

It may be that Judge Medina's decision in the *Ross* case will initiate a much needed trend toward a stricter construction of the Mann Act by the judiciary. By ignoring certain facts of the principal case and while *apparently* following prior decisions, the Second Circuit has in fact circumvented the precedent set up by the Supmere Court in *Caminetti* and has in effect held that a single incident of interstate transportation for immoral purposes is *not* within the scope of the Mann Act. This is certainly a desirable result to be reached in applying the Mann Act when viewed in the light of the original intent of Congress in passing the Act. It is hoped that the Supreme Court will take notice of this correct result, though reached by rather devious means, and will heed the words of Mr. Chief Justice Marshall—"It is the legislature, not the Court, which is to define a crime and ordain its punishment."[23]

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EFFECT OF ADULTERY ON CUSTODY AWARDS

At common law the father was considered the natural guardian of the issue of a marriage. It was said in an 1875 House of Lords decision that "the father's right to the guardianship of his child is high and sacred. Our law holds it in much reverence; and it should not be taken from him without gross misconduct on his own part and danger of injury to the health or morals of the children."[1] An 1878 Virginia case added that "the father is universally considered as having claims paramount to those of the mother. . . ."[2] Evolution of the law has brought about a drastic change in this view in a relatively short

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[22]329 U.S. at 27. Though the formal title of the Mann Act is the White Slave Traffiic Act, the wording "any woman or girl" in the body of the Act seems to indicate that there is no distinction to be drawn from the word "White" in the title of the Act. The term "white slave" usually connotes a female held for the purpose of commercial prostitution against her will. It is believed that this word was coined at a time in the history of the United States when the institution of Negro slavery was still in existence (or shortly thereafter) in order to distinguish slavery of women for the purpose of prostitution from that of the involuntary servitude of the Negro race prevalent in this country at that time.

[23]United States v. Wiltberger, 4 U.S. (5 Wheat.) 574, 576 (1820).

[1]Symington v. Symington, 1870-75 2 A.C. 415, 425 (H.L. 1875) (Scot.).

[2]Latham v. Latham, 73 Va. (30 Gratt.) 110, 119 (1878).

period of time, so that today a mother who commits adultry may be preferred over the father as the proper custodian for the issue of a marriage.

In *Oliver v. Oliver*[3] the Court of Appeals of Maryland affirmed the custody award of a three-year-old girl to her mother when there was strong evidence tending to prove that she had been guilty of adultry. Mrs. Oliver, taking her child with her, abandoned her husband to live in an apartment in another city where she engaged in a course of conduct "not consistent with a normal friendship between a virtuous woman and continent man."[4] Her paramour, who had a toothbrush and pillow at Mrs. Oliver's apartment, was called "Daddy Taylor" by the little girl.[5] The lower court awarded Mr. Oliver a divorce on the ground of desertion, notwithstanding substantial evidence which showed his wife to be an adulteress, and awarded Mrs. Oliver custody of the little girl. Mr. Oliver appealed to the Court of Appeals for reversal of the custody award. This court found that the lower court had erred in requiring adultery to be proven beyond a reasonable doubt[6] but did not reverse the custody award, stating that "even if we assume that the wife did commit adultery, as the evidence in this case appears to indicate, the result so far as present custody is concerned would be the same."[7] The court justified this position by distinguishing prior decisions in which adultery by the wife had been proven and the custody of the children had been given to the father.[8] The majority found that an important factor in these earlier cases was

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[3]217 Md. 222, 140 A.2d 908 (1958).

[4]140 A.2d at 909.

[5]Evidence that the little girl called the paramour "Daddy Taylor" and referred to Daddy Taylor's toothbrush and pillow in Mrs. Oliver's apartment show that the relationship between the couple was carried on in front of the child. Evidence such as this has, in some cases, been considered important in establishing sufficient moral depravity on the part of the mother to render her an unfit custodian for the child. Revier v. Revier, 48 Wash. 2d 231, 292 P.2d 861 (1956); Vogel v. Vogel, 259 Wis. 373, 48 N.W.2d 501 (1951).

[6]Adultery in a criminal proceeding, must be proven beyond a reasonable doubt. Because of the difficulty in catching spouses in the actual act of adultery, a different test is used in divorce proceedings. It must be proved that the accused spouse has an adulterous disposition and also has had an opportunity to commit adultery. Then the judges in this equity proceeding decide whether or not a reasonable and just man would infer from the facts presented that an act of adultery took place. Revier v. Revier, 48 Wash. 2d 231, 292 P.2d 861, 862 (1956).

[7]140 A.2d at 910.

[8]The cases distinguished were: Townsend v. Townsend, 205 Md. 591, 109 A.2d 765 (1954); Trudeau v. Trudeau, 204 Md. 214, 103 A.2d 562 (1954); Pekar v. Pekar, 188 Md. 360, 52 A.2d 468 (1947); Stimis v. Stimis, 186 Md. 489, 47 A.2d 497 (1946); Pangle v. Pangle, 134 Md. 166, 106 Atl. 337 (1919).

that the wife had continued her misconduct during the time of the court proceedings, while in the present case Mrs. Oliver had been virtuous during this period. Basing its decision on this distinguishing factor, the court concluded that if the mother had led a virtuous life between the commencement of the action and the handing down of the final decree, she could be a proper custodian for the child.

It was argued in a strong dissent that the father should have been awarded the custody of the child. The dissenting judge thought that the person responsible for the marital misfortune should not benefit by the rift, and moreover that an innocent husband, reduced to a state of cuckoldry, should not be required to "pay for the child's support, and, at the same time, to permit his wife, an adjudicated adulteress, to rear his child."[9] The dissent further pointed out that the one consistent factor in the cases distinguished by the majority was that the father had been awarded custody of the children in every case in which the mother had committed adultery.[10]

On the basis of *Swoyer v. Swoyer*,[11] it would appear that the dissenting opinion, which would have awarded custody to the innocent father, is correct. In that case the Maryland Court of Appeals awarded custody to a father who gambled and drank heavily and who had no fixed place of abode, in preference to a mother who engaged in what the court called "open and notorious" illicit conduct. In fact, adultery was proven by circumstantial evidence and she might have been completely innocent.

Prior to the 1920's Massachusetts appears to be the only jurisdiction that had awarded the custody of a child to an adulteress.[12] When more recent decisions are considered, however, it appears that the majority in the *Oliver* case has much support for its position which awards custody to the mother, *even* if she did commit adultery.[13] Although

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[9]140 A.2d at 914.

[10]In light of the prior prevailing attitude expressed by the Maryland decisions (cited in note 8 supra) a subtle argument dealing with the conduct of the accused during the period between the commencement of the divorce suit and the time that the decree is handed down seems relatively unimportant. Such a distinction is misleading for it implies that if adultery is not committed during this period of time, this fact will be considered a mitigating circumstance by the court. In this light the argument stressed by the majority appears for what it really is—a convenient rationale to justify a departure from precedent.

[11]157 Md. 18, 145 Atl. 190 (1929).

[12]In Haskell v. Haskell, 152 Mass. 16, N.E. 859 (1890), the mother was a bigamist. She was given the custody of two boys aged four and five until they became older.

[13]By 1958 nine other jurisdictions in the following chronological order, rendered such a custody decree: Harmon v. Harmon, 111 Kan. 786, 208 Pac. 647 (1922); In re De Leon, 70 Cal. App. 1, 232 Pac. 738 (1924); Kruczek v. Kruczek, 29 N.Y.S.2d 385

the courts are generally stern when dealing with adultery, there has been a recent trend which shows much leniency in favor of adulterous mothers. For example, at one time an act of adultery by the mother[14] was treated as a conclusive presumption of her unfitness to care for her child. Today the presumption, although it still exists, has become rebuttable. Modern appellate courts look more carefully at the circumstances surrounding the act of adultery[15] and at the *comparative* character of the spouses in order to determine which is the better custodian for the children. In arriving at an award certain factors are considered which help to determine the degree of moral laxity in the adulteress' character. The wife's reasons for commiting adultery are considered, as well as the frequency of the acts, the number of paramours, the discretion involved, and the possible later marriage to the paramour.[16] Her character is then compared with that of her husband.

In *Norman v. Norman*[17] the husband invited his brother, a man of distasteful habits, to live in his household. The husband neglected his wife socially and sexually and ignored her protests against having

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(Supp. Ct. 1941); Norman v. Norman, 27 Wash. 2d 25, 176 P.2d 349 (1947); Ziontz v. Ziontz, 324 Mich. 155, 36 N.W.2d 882 (1949); Lucas v. Lucas, 119 Ind. App. 360, 86 N.E.2d 300 (1949); Matflerd v. Matflerd, 10 N.J. Super. 132, 76 A.2d 722 (1950); Pachkofsky v. Pachkofsky, 192 Ore. 627, 236 P.2d 320 (1951); French v. French, 236 Minn. 439, 53 N.W.2d 215 (1952).

[14]This article deals exclusively with adultery by the mother, not only because this is the fact situation in Oliver v. Oliver, but also because there are relatively few cases on the subject dealing with adultery by the husband. It would appear from those cases which can be found that an adulterous husband has never been awarded custody of his child. E.g., Jeans v. Jeans, 2 Del. (2 Harr.) 142 (1836); Crabtree v. Crabtree, 27 Ky. L. Rep. 438, 85 S.W. 211 (Ct. App. 1905); Small v. Small, 28 Neb. 843, 45 N.W. 248 (1890); Straughan v. Straughan, 115 W.Va. 639, 177 S.E. 771 (1934).

[15]The writing styles of opinions in cases where distasteful fact situations are present roughly compares with the literary works of the era. Thus in Kremelberg v. Kremelberg, 52 Md. 553 (1879), the opinion is written with the taste and discretion of Henry James, while in Hulett v. Hulett, 152 Miss. 476, 119 So. 581 (1928), the sexual frankness of James Gould Cozzens prevails. This change in the literary form lends itself to a thorough discussion of facts in an adultery case.

[16]See notes 20-23 infra. Additional elements in the final determination are (1) the age and sex of the child and (2) the preference of a child deemed to be of age to make an intelligent choice. These elements are not considered here, because neither is decisive unless the equities between the spouses are evenly divided. In cases involving adultery the parents fitness to care for the child is considered more important to the child's welfare than age or sex. Currin v. Currin, 125 Cal. App. 2d 644, 271 P.2d 61 (1954); Pangle v. Pangle, 134 Md. 166, 106 Atl. 337 (1919); Taylor v. Taylor, 224 S.W.2d 412 (Mo. Ct. App. 1949); Martin v. Martin, 27 Wash. 2d 308, 178 P.2d 284 (1947). Even when the child becomes older and capable of making an intelligent choice, the court will not honor this choice when it thinks the child's best interests will be better served in a different manner. Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 844 (1949).

[17]27 Wash. 2d 25, 176 P.2d. 349 (1947).

to live with the degenerate brother. As a consequence of the resulting estrangement between husband and wife, Mrs. Norman became enamoured with another man and committed adultery with him. The court found that her actions did not disqualify her from being a fit person to have custody of the child. Here the abuse and neglect by the husband were seen as a cause for her seeking other companionship and did not disqualify her from having sufficient moral fiber to be a good mother and to be preferred over the child's father.

In *Gibson v. Gibson*[18] the wife did not have mitigating circumstances surrounding her adultery, but the husband, in accounting for his conduct in a prior custody proceeding, had impeached his own character before the court. The mother, now married to the man with whom she had committed adultery, was living on a farm in a healthy atmosphere, while the only provision the father could make for the child was an overcrowded house with his relatives, an atmosphere considered by the court not to be proper for the rearing of a young child. The marriage to her former paramour was a factor in the mother's favor, for it showed that her former indiscretions were based on true affection rather than caprice. In this case the court compared the character of the spouses and the atmosphere that each intended to provide for the child, and accordingly the mother was awarded custody.

In *Lucas v. Lucas*[19] the adulterous wife was granted custody of the five and one-half year old boy because the husband was shown to be of bad character. Evidence that he once struck her in the stomach in an attempt to produce an abortion was given much weight by the court in its decision. In deciding that an award to the mother would be in the best interests of the child, even though she had been indiscreet, the court indicated that a comparison of characters of the spouses and their relative ability to bring up a useful citizen must form the basis for the final decision.

The above cases are exceptions to the general rule that mothers who commit adultery are not fit to raise their children. Where the mother was indiscreet,[20] or had a number of paramours,[21] or was filthy

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[18]196 Ore. 198, 247 P.2d 757 (1952).

[19]119 Ind. App. 360, 86 N.E.2d 300 (1949).

[20]Wilson v. Wilson, 124 Cal. App. 655, 13 P.2d 376 (1932); Vallandingham v. Vallandingham, 232 Ky. 123, 22 S.W.2d 424 (1929); Winfield v. Winfield, 203 Miss. 391, 35 So.2d 443 (1948); Manville v. Manville, 81 S.W.2d 382 (Mo. Ct. App. 1935); Norcross v. Norcross, 176 Ore. 1, 155 P.2d 562 (1945); Revier v. Revier, 48 Wash. 2d 231, 292 P.2d 861 (1956); Vogel v. Vogel, 259 Wis. 373, 48 N.W.2d 501 (1951).

[21]Vallandingham v. Vallandingham, 232 Ky. 123, 22 S.W.2d 424 (1929); Evans v. Evans, 57 S.W. 367 (Tenn. Ct. Ch. App. 1900); Smith v. Frates, 107 Wash 13, 180 Pac. 880 (1919).

in her personal habits,[22] or was shown to have little moral fiber,[23] she was properly not awarded the custody of the child.

It is admitted that a wife who commits adultery cannot be a woman of the best moral character, but it must also be admitted that, as compared to her husband, an adulterous wife may be the better custodian for the issue of the marriage. The modern position which creates a presumption against the adulterous wife which can be rebutted by further evidence takes proper cognizance of this possibility.

The Maryland Court of Appeals, with its statement that "even if we assume that the wife did commit adultery... the result so far as the present custody proceeding is concerned would be the same,"[24] has aligned itself with the modern trend toward leniency in cases where adultery is involved. The case may be criticized, however, for if it were followed to its logical extreme, *i.e.,* if the case were remanded and if Mrs. Oliver were found guilty of adultery, an exception would be created for which there were no exceptional circumstances. In this new, hypothetical *Oliver* case the husband would be of good character, and the wife would be an adjudicated adulteress with no mitigating circumstances surrounding her act; yet the court would nevertheless award her the young child.

By its decision in the *Oliver* case, the Maryland Court of Appeals has authorized Maryland courts to award custody of a child to a mother who has been adjudged an adulteress, as long as her conduct during the proceeding has been virtuous and even though her husband has been proven to be of good moral character. By such a decision it would appear that this court has dispensed with precedent and, in effect, considers an act of adultery as carrying with it no presumption of unfitness to raise a moral child. It appears that Maryland, in *Oliver v. Oliver,* is leading rather than following a trend.

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[22]Taylor v. Taylor, 224 S.W.2d 412 (Mo. Ct. App. 1949).

[23]Vagiakos v. Vagiakos, 243 Mich. 1, 219 N.W. 615 (1928); Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949); Martin v. Martin, 27 Wash. 2d 308, 178 P.2d 284 (1947); Rohrbaugh v. Rohrbaugh, 136 W.Va. 708, 68 S.E.2d 361 (1951).

[24]Supra note 7.