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Child Custody Contests - Rights of the Father; McDanial v. McDanial

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RECENT CASES

DOMESTIC RELATIONS—CHILD CUSTODY CONTESTS—RIGHTS OF THE FATHER

McDanial v. McDanial, 16 Ohio Misc. 32, 240 N.E. 2d 916 (1967).

In an Ohio divorce action when there is a contest for the custody of a minor child, the proper standard to be employed by the court is: what arrangement will be in the best interest of the child?[1] In an action for modification of a custody award the same standard is applicable. A statute provides that one parent is not preferred over the other;[2] however, all other considerations being equal, custody will normally be given to the mother, provided that she is fit.[3]

In the principal case, which involved a petition for modification of custody, the court noted that Mrs. McDanial (the mother) had been awarded custody of the child at the time of the divorce but that she had subsequently given birth to an illegitimate child. The court decided that Mrs. McDanial's post-divorce misconduct did not represent a sufficient change of circumstances to justify granting custody of the first child to Mr. McDanial (the father).

This might appear to be an unusual decision, since by contemporary American middle class standards the mother of an illegitimate child is likely to be wanting in good moral character, and a mother with tendencies toward licentiousness would presumably make a less desirable guardian than would an affectionate and fit father. However, an examination of the reports reveals that the courts do not in common practice embrace this proposition,[4] and that in actuality it is very difficult for a father, whether fit or not, to prevail in a contested custody suit.[5]

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[1] Ohio Rev. Code § 3109.04. (1968 Supp.).

[2] Ohio Rev. Code § 3109.03. (1965).

[3] Schultz v. Schultz, 18 C.C. (NS) 402, 33 CD 120 (1910).

[4] See cases cited in H. Clark, *The Law of Domestic Relations* § 17.4 at note 16 (1968).

A contrary ruling is the case of *Hild v. Hild*, 221 Md. 349, 157 A.2d 442 (1960), where the Maryland court awarded custody of a seven-year-old boy to the father, who was granted a divorce on the ground of adultery. The court said that in adultery cases a presumption exists that the innocent spouse will make the fittest custodian and that the presumption had not been overcome in the case at hand. The court emphasized, however, that

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Although there is no statutory provision so declaring, the courts of Ohio have consistently held that the mother of a young child is better able to care for the child than is the father,[6] since "there is no substitute for a natural mother's love and care." [7] In *Vincent v. Vincent*[8] the court stated: "When children are under ten years of age, it is the duty of the court to award the custody of such children to the mother unless moral depravity, habitual drunkenness or incapacity can be proved." Generally speaking, the courts are guided by the same criteria in custody-modification cases as they are in original-custody-award cases. As the *McDanial* controversy illustrates, the courts do not feel that a mother's sexual impropriety necessarily impairs her ability to properly care for her children. Even though guilty of sexual indiscretions, she may be considered a suitable guardian if her acts of illicit intercourse have not been numerous and if she has ceased to associate with her paramour(s). *McDanial* cited cases (from other jurisdictions) indicating that modification of custody will be granted only when the mother appears impenitent or when her misbehavior has been "grossly immoral" or has involved a clear violation of a criminal ordinance concerning lewd or corrupt conduct.

If the *McDanial* decision (and the cases cited therein) suggests that the courts are not very solicitous of the custodial rights

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"the rule (favoring the innocent spouse) is definitely not absolute, for when the adulterous relationship has ceased and appears unlikely to be revived because the mother has changed her way of living, her past indiscretions may be overlooked."

In *Beamer v. Beamer*, 17 Ohio App. 2d 89 (1969), the Seneca County Court of Appeals affirmed a ruling granting a motion to change the custody of two small girls from that of the mother to that of the father. However, in this case the mother's post-divorce misbehavior consisted of establishing an illicit relationship with a *married* man, by whom she bore an illegitimate child. This decision can be reconciled with that in *McDanial* only if one takes the position that the formation of a sexual alliance with a married man is more culpable than the establishment of such an arrangement with an unmarried one.

[5] "It appears that the mother is given custody in about four-fifths of all the cases." H. Clark, *Cases and Problems on Domestic Relations* 722 (1965).

[6] *Vincent v. Vincent*, 8 O.D. 160, 6 N.P. 474 (1899).
Fitzpatrick v. Fitzpatrick, 14 Ohio App. 279, 207 N.E. 2d 794 (1965).
Grandon v. Grandon, 164 Ohio St. 234, 129 N.E. 2d 819 (1955).
Colcaster v. Colcaster, 2 Ohio App. 2d 142, 207 N.E. 2d 257 (1965).

[7] *Wise v. Wise*, No. 170, Highland County (1966 unpublished decision of Highland County Court of Appeals).

[8] 8 O.D. 160, 6 N.P. 474 (1899).

of the father, the holdings in *Painter v. Bannister*[9] and *Root v. Allen*[10] represent much stronger evidence in support of this conclusion. In the *Bannister* case the contest was between a seven-year-old boy's father and the maternal grandparents. The Supreme Court of Iowa awarded custody to the sixty-year-old grandparents, primarily because they could provide a more "stable, dependable, conventional, middle class background" than could the father, who, though not unfit, was "unconventional, arty, and Bohemian." The court considered it significant that the father "was either an agnostic or atheist," attended his wife's funeral in a sport shirt and sweater, supported the American Civil Liberties Union, and planned to move to Berkeley, California. The maternal grandfather, on the other hand, was a college graduate, served on the school board, and taught a Sunday School class. The court acknowledged that the father seemingly loved the child and obviously occupied a closer blood relationship with the boy than did the grandparents, but it decided that these factors were outweighed by the social considerations just discussed.

In the *Allen* controversy (1962) the Supreme Court of Colorado affirmed a decree awarding custody of a twelve-year-old girl to her stepfather in preference to that of her father. The court was influenced mainly by two considerations: First the girl had lived with the stepfather (and her mother until 1958, when the latter died) for the preceding nine years and was clearly attached to him; and secondly, following her parents' divorce the girl had seen her father only once (and for less than two hours) prior to the custody contest in question. However, the court admitted that the father had religiously made his child support payments and was undeniably fit to be his daughter's custodian. In addition, the court gave verbal recognition to a presumption that a child's welfare is best served by granting custody to a natural parent, but it stated that this presumption was rebuttable and had been overcome in the present case.

It would appear from the three decisions just discussed that the courts exhibit no great reluctance to deprive a father of the custody of his children. In all three cases the father was acknowledged to be fit, and in two of the three controversies the

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[9] 140 N.W. 2d 152 (Iowa 1966).

[10] 151 Col. 311, 377 P. 2d 117 (1962).

other contestant for custody was not a natural parent.[11] In the one case in which the opposing contestant was a natural parent she (the mother) was of questionable fitness. Yet in all three instances the ruling was adverse to the father. Generally speaking, our courts are very careful to prevent the impairment of a man's possession of his land. That they should display less solicitude for a man's right to possession of his children is remarkable.

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[11] In *Ludy v. Ludy*, 84 Ohio App. 195 (1948) the Franklin County Court of Appeals held that an Ohio court lacks the discretionary authority to award custody of a child to a non-parent unless the objecting parent is shown to be unfit.