A legal note from Marshal Willick about the changed role of parental sexual activity as it relates to child custody determinations.

An attorney wrote in, asking if courts will apply case law that has never been overruled, indicating that a parent's adulterous behavior should determine questions of child custody.

I. BACKGROUND; THE QUESTION ASKED

In *Sisson v. Sisson*, 77 Nev. 478, 367 P.2d 103 (1961), the Nevada Supreme Court reversed a child custody award to an "adulterous mother" who had "subjected her children to a shameful, immoral, unwholesome environment of more than a year's duration," because "such conduct precluded any conclusion that she was a good mother and a fit and proper person to be awarded custody of the children."

Nine years later, in *Cooley v. Cooley*, 86 Nev. 220, 467 P.2d 103 (1970), the Court vaguely and partially repudiated *Sisson*, holding that while "adultery is a weighty concern in a custody case," in that particular instance, the trial court's award of custody to the adulterous mother would not be reversed. The asserted grounds for the distinction were that in *Cooley*, the mother had only "lived, absent benefit of clergy, for over a month with her paramour, whom she later married." *Cooley* has apparently never been overruled.

The lawyer writing to me wanted to use this line of authority as "good law" sufficient to swing a custodial decision to his client.

II. WHAT A DIFFERENCE THIRTY YEARS MAKES

Jones v. Jones, 110 Nev. 1253, 885 P.2d 563 (1994), was a relocation case usually cited for the proposition that "ties go to the runner." The Court found that the Mother's desire to move to Chico was a result of much thought and research regarding career opportunities and lifestyle choices, rather than a mere whim to pursue a "frivolous, short-term romance." A desire to move to provide a "more rural lifestyle, to pursue expanded career opportunities, and to pursue a serious relationship" was found to be enough to meet the threshold requirement of an "actual advantage" to the move.

Amid much other discussion, the Court stated that courts are "not free to ignore noneconomic factors likely to contribute to the well-being and general happiness of the custodial parent and the children" in applying the "actual advantage" test. The Court "recognized" that the best interest of the children "cannot be addressed without considering the best interest of the other members of the household in which they live. . . . The custodial parent's right to pursue another relationship is integrally connected to the health and well-being of the custodial parent. Certainly, the best interests of the children cannot be considered in a vacuum without looking at the well-being of the custodial parent."

In *Jones*, sharing living expenses with an opposite sex cohabitant was considered a legitimate improvement in the Mother's economic position. The Court brushed off the Father's claim that the

Mother was displaying immorality in view of the children, despite the Mother's statement that she and her intended cohabitant were not engaged and had no present intention to marry in the future.

The distinction from the impact of near-identical facts since the time of *Sisson* could hardly be more clear – by 1994, a stable relationship with a cohabitant was, if anything, perceived as a ***positive*** contribution to the sort of "more stable living environment" looked for in making a custodial order. *See Primm v. Lopes*, 109 Nev. 502, 853 P.2d 103 (1993).

III. FEDERAL CONSTITUTIONAL LAW AND ITS APPLICATION TO FAMILY LAW

And even if evolving State law had not reconsidered parental cohabitation as a positive rather than a negative, such "conduct" now has Constitutional protections. In *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed. 2d 508 (2003), the U.S. Supreme Court stated with fair clarity that there is a liberty interest under the Due Process Clause of the 14th Amendment for private, adult, consensual sexual conduct. (As an aside, that case recited in a string cite that Nevada is among the "States with same-sex prohibitions" that "have moved toward abolishing them," citing 1993 Nev. Stats. p. 518 (repealing Nev. Rev. Stat. § 201.193)).

Of course, *Lawrence* involved criminal law, while in family law cases, "the best interest of the child" is the paramount consideration. But the *Lawrence* Court noted that "The State cannot demean [the] existence or control [the] destiny [of potential defendants] by making their private sexual conduct a crime."

To which I would add, "Nor can the State change custody of their children because of it." It would beg the question – and be supremely arrogant – to say that anyone's view of morality was so definitionally superior that the best interest of a child would necessarily be served by following it. As Justice O'Conner, concurring, observed in *Lawrence*, "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause."

And private sexual conduct is noticeably absent from the list of appropriate criteria for making a child custody determination under NRS 125.480, which the Nevada Legislature last addressed in 2005.

In other words, as with property division (*Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997) – only economic fault is relevant) and alimony (*Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000) – non-economic misconduct or fault is irrelevant) that ship has sailed as to child custody determinations.

Obviously, the nature and character of a cohabitant – or anyone else placed in a child's environment – is relevant to the child's "best interest." A mother's choice to cohabit with Jack the Ripper would be relevant to a determination of which household would be safest.

However, it would appear that as a matter of a fundamental liberty interest, the paternalistic moralizing as to the private sexual conduct of consenting adults is just no longer relevant to the question of child custody.

The Supreme Court noted in *Lawrence* that its decision would not be popular in some quarters, because some private behavior is condemned by

> religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992).

For the same reasons, the personal morality of some – even the majority – is not a valid basis for determination of family law issues.

Still, the extent to which this more liberal thinking will guide child custody determinations is not clear; Nevada case law contains plenty of never-overruled decisions – even fairly recently – seemingly based on little more than personal moralistic judgments. *See*, *e.g.*, *Daly v. Daly*, 102 Nev. 66, 715 P.2d 56 (1986) (termination of parental rights of transsexual affirmed, labeling father a "vestigial parent," over the dissent's objection that the majority was "being unnecessarily and impermissibly punitive to the exercise of a medical option we personally find offensive").

IV. CONCLUSION

At this point, *Cooley* and *Sisson* are historical anachronisms no longer relevant to family law issues. The "adulterous" cohabitation of a parent with a partner is relevant to child custody only with respect to the fitness of the person involved to contribute to the children and their household, personally, financially, or otherwise. And despite any personal religious or moral objections of the other parent, or any jurist, that is probably a good thing.

V. QUOTES OF THE ISSUE

"Law must be stable, and yet it cannot stand still."
– Roscoe Pound (1870-1964).

"It was morality that burned the books of the ancient sages, and morality that halted the free inquiry of the Golden Age and substituted for it the credulous imbecility of the Age of Faith. It was a fixed

moral code and a fixed theology which robbed the human race of a thousand years by wasting them upon alchemy, heretic-burning, witchcraft and sacerdotalism."
– H.L. Mencken, *The Philosophy of Friedrich Nietzsche* (1913)

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