

The Effect of Custodial Parents' Sexual Conduct in Dependency Determinations: *In re Burrell*

In a dependency action brought under Ohio Revised Code section 2151.04(C),¹ the Common Pleas Court of Franklin County, Juvenile Division, found two minor children to be dependent because their mother had permitted a man not her husband to live in her home along with the two children. It was established at trial that both children were "normal, healthy, clean and well dressed with no evidence of abuse."² It was further established through the testimony of a caseworker from the Franklin County Children's Services Board that the children suffered no demonstrable ill effects as a result of their mother's relationship. In addition, the evidence showed that the children's school attendance was regular, their dress was appropriate, their grades average or above average, and that they exhibited no specific behavioral problems.³

At the time of disposition the mother was living alone and so was granted custody with the caveat that if she did again reside with her "male companion" the children would be removed from her custody.⁴ This decision was upheld by the Court of Appeals of Franklin County on June 27, 1978.⁵ On April 25, 1979, the Supreme Court of Ohio reversed the court of appeals and established that where the sexual conduct of a custodial parent is at issue, there must be presented clear and convincing evidence that the parent's conduct has an immediate and specifically demonstrable adverse impact upon the child in order to reach a determination of dependency.⁶

Until the Ohio Supreme Court's decision in *Burrell* no definite standard existed to determine when a custodial parent's sexual conduct was of such significance that it would result in a determination of dependency. This lack of an established standard caused extreme variations in the standards actually applied in such proceedings, generally permitting the court to base its decision upon its own view of morality.⁷

"Dependent child" was originally defined by the Ohio legislature in General Code section 1645:

1. *In re Burrell*, 58 Ohio St. 2d 37, 388 N.E.2d 738 (1979). OHIO REV. CODE ANN. § 2151.04(C) (Page 1976) states in part:

["D]ependent child" includes any child:

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship.

As a rule, dependency actions are brought under subpart (C) when they are based upon allegations of parental sexual misconduct.

2. 58 Ohio St. 2d at 37, 388 N.E.2d at 738.

3. *Id.*

4. *Id.* at 38, 388 N.E.2d at 738.

5. *In re Burrell*, No. 77 AP-889 (Ct. App. Franklin County June 27, 1978).

6. 58 Ohio St. 2d at 39, 388 N.E.2d at 739.

7. The various standards applied are discussed in the text accompanying notes 15-39 *infra*.

For the purpose of this chapter, the words "dependent child" shall mean any child under eighteen years of age who is dependent upon the public for support; or who is destitute, homeless or abandoned; or who has not proper parental care or guardianship, or who begs or receives alms; or who is given away or disposed of in any employment, service, exhibition, occupation or vocation contrary to any law of the state; or who is found living in a house of ill fame, or with any vicious or disreputable persons or whose home, by reason of neglect, cruelty or depravity on the part of its parent, step-parent, guardian or other person in whose care it may be, is an unfit place for such child; or who is prevented from receiving proper education or proper physical, mental, medical or surgical examination and treatment because of the conduct, inability or neglect of its parents, step-parent, guardian or other person in whose care it may be; or whose condition or environment is such as to warrant the state, in the interest of the child, in assuming its guardianship.⁸

While the statute included a lengthy enumeration of actions and/or conditions that would result in a determination of dependency, it was drafted so broadly and contained so many vague or undefined terms that it left the actual meaning of dependency a matter almost entirely within the court's discretion. In addition, the statute's final clause—"or whose condition or environment is such as to warrant the state, in the interest of the child, in assuming its guardianship"—clearly left the door open for the court to determine dependency in any manner, as long as it served the court's perception of the child's interests.⁹

In a later revision of Ohio's General Code,¹⁰ "dependent child" was defined in a more succinct manner. Still included were certain specific conditions that required a finding of dependency.¹¹ Although many of the earlier specifications were dropped, the all-inclusive final clause of General Code section 1645 was retained. Again the courts were left to their own

8. OHIO GEN. CODE § 1645 (Page 1926).

9. Generally, in a dependency action, the best interests of the child are not to be considered until after an adjudication of dependency. *In re Darst*, 117 Ohio App. 374, 378, 192 N.E.2d 287, 290 (1963). The language of this clause (which is still in effect), however, permits consideration of the child's interests in determining dependency. This final clause (now subsection (C) of § 2141.04) has been interpreted as a blanket permissiveness "intended to cover all those situations not otherwise specifically defined by the neglect or dependency statutes." *In re East*, 61 Ohio Op. 2d 38, 40, 288 N.E.2d 343, 345 (1972). *But see In re Konneker*, 30 Ohio App. 502, 509, 165 N.E. 850, 852 (1929), quoting *Orr v. State*, 70 Ind. App. 242, 123 N.E. 470 (1919):

["Environment"] is a word of broad significance. Just what the Legislature intended by this last clause we do not know. We assume, however, that it did not intend thereby to confer unlimited authority on the courts to determine arbitrarily and generally what sort of environment will justify the state in assuming control of infants

The court went on to call for a legislative determination of what environmental conditions determined dependency.

10. OHIO GEN. CODE § 1639-4 (Page 1951) states:

For the purpose of this chapter, the words "dependent child" includes any child:

1. Who is homeless or destitute or without proper care or support, through no fault of its parents, guardian or custodian.
2. Who lacks proper care or support by reason of the mental or physical condition of its parents, guardian or custodian.
3. Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming its guardianship.

11. All versions of the definition of dependent child have included as a basis for a determination of dependency the lack of proper care. The current law in OHIO REV. CODE ANN. § 2151.05 (Page 1976) states in part that a child is without proper parental care when he is permitted to become dependent.

devices and vices to determine what factors required a finding of dependency and what was in the interest of the child. Thus, a court's personal bias toward various sexual orientations and activities often became the standard by which dependency was determined.¹²

The Ohio Revised Code adopted the later General Code definition of "dependent child" in substantially the same form.¹³ With only a minor and short-lived variation¹⁴ the statute remains the same today.

In applying Ohio's dependency statute, Ohio courts in general have chosen one of three standards for determining the effect of sexual conduct on the dependency determination.¹⁵ Those three standards are conclusive disqualification, presumptive adverse impact, and speculative adverse impact.¹⁶

Conclusive disqualification is self-defining. Once the court has determined that sexual misconduct has occurred, the party who engaged in such conduct is conclusively disqualified as being unfit to retain custody and therefore the child is found dependent. In *In re Decker*,¹⁷ the Juvenile Court of Tuscarawas County found that a child was dependent because its parents associated with "questionable characters" in circumstances that "could not possibly continue without leading to estrangement," because the mother had a venereal disease, and because both parents stayed out late at places that were "obnoxious to the other" while leaving the child with a neighbor.¹⁸ No evidence was offered regarding the child's health,

12. See text accompanying notes 17-39 *infra*.

13. OHIO REV. CODE ANN. § 2151.04 (Page 1976) states:

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "dependent child" includes any child:

(A) Who is homeless or destitute or without proper care or support, through no fault of his parents, guardian, or custodian;

(B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship.

14. OHIO REV. CODE ANN. § 2151.04 included between 1961 and 1969 the following:

(D) Whose parent or parents or legal guardian or custodian have placed or attempted to place such child in violation of section 5103.16 and 5103.17 of the Revised Code.

H. 320, 133 OHIO LAWS 2040 (1969).

15. In many of the cases discussed herein the various courts have discussed factors in addition to the sexual conduct of the parent as contributing to the child's dependency. Unless otherwise noted, however, those other factors will generally not support a finding of dependency. Thus, in this Note, the author assumes that the sexual conduct served as the basis of the finding. This assumption is generally supported by the opinions. It is further supported by the fact that once the court in any of these cases determines that a parent's conduct is "immoral," a finding of dependency inevitably follows.

16. Labels for the various standards and their definitions were freely adopted from Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647, 654-70 (1977) [hereinafter cited as Lauerman]; see also, generally, Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691, 693-715 (1976); Bregman, *Custody Awards: Standards Used When the Mother Has Been Guilty of Adultery or Alcoholism*, 2 FAM. L.Q. 384, 387 (1968); Foster & Freed, *Child Custody (Part I)*, 39 N.Y.U.L. REV. 423, 429-31 (1964).

17. 28 Ohio N.P. (n.s.) 433 (1913). This is the only case discussed in the text of this Note in which temporary placement was ordered. All others resulted in permanent termination of parental rights.

18. *Id.* at 434-35. As with many early cases, the court's delicacy leaves much to assumption what actual conduct took place. The implication of sexual misconduct is clear, although no specific instances are cited.

cleanliness, emotional well-being, or his actual living conditions. Furthermore, there was no evidence that the neighbor with whom the child was left was in any way unfit to care for the child under such temporary arrangements. Once the conduct had been established, the court assumed that, by virtue of their engaging in such conduct, the parents were unfit. Further evidence that the court's determination of unfitness was based upon the parents' conduct and not upon the condition of the child is the court's remark that if the parents had agreed to give up their way of life and live together "as a father and mother should" raising the child "according to the Christian standard" the court would have placed the child back into their custody.¹⁹

In *State v. Griffin*,²⁰ a prosecution for contributing to the dependency or neglect of a child,²¹ the court held that the mere testimony by the child's mother that she had engaged in "illicit sexual relations" in the presence of the child²² was sufficient to establish that the child was neglected or dependent. The same evidence had served as the basis for a determination that the child was both dependent and neglected in an earlier proceeding.²³ No evidence was presented regarding the physical or emotional well-being of the child or of the quality of care the child was given by its mother. As in *Decker*, the conduct of the custodial parent established her as unfit.

The Common Pleas Court of Stark County in *In re Turner*²⁴ found a child who had never been in his mother's custody to be dependent. Although the court claimed to have based its decision on several factors besides the mother's sexual conduct, including a psychologist's report stating that the mother had a "poor prognosis for success in the role of wife and mother,"²⁵ it is clear throughout the opinion that the court's main concern was the mother's past sexual conduct. The court's finding was made in the absence of any "derogatory testimony" concerning the physical surroundings of the mother's home and with the knowledge that the child's mother had adequate food, clothing, and shelter.²⁶ It is apparent that the court's determination was based on the mother's past sexual conduct and on a psychologist's report indicating that such conduct might continue.²⁷ No other evidence was offered that would normally result in a determination of dependency. The child's mother was conclusively disqualified from obtaining custody because of her sexual conduct.

Presumptive adverse impact is similar to the conclusive presumption

19. *Id.* at 435.

20. 93 Ohio App. 299, 106 N.E.2d 668 (1952).

21. See OHIO GEN. CODE 1639-45 (Page 1951).

22. There is no explanation whether "in the presence of the child" means that child was asleep in the same room, or present in the same house, or actually observing the sexual activity with or without the mother's knowledge.

23. 93 Ohio App. at 303, 106 N.E.2d at 670.

24. 41 Ohio Op. 2d 264, 229 N.E.2d 764, 231 N.E.2d 502 (1967).

25. *Id.* at 267, 229 N.E.2d at 768, 231 N.E.2d at 505.

26. *Id.* at 266, 229 N.E.2d at 766, 231 N.E.2d at 504.

27. *Id.* at 267, 229 N.E.2d at 767-68, 231 N.E.2d at 505.

approach, except that the court presumes, once the conduct has been established, that the conduct results in an adverse impact. This presumption is generally unexplained although phrased in terms of the child's welfare.²⁸ In *In re East*,²⁹ the Court of Common Pleas, Juvenile Division, of Highland County, found the child dependent, but specifically rejected a determination of a mother's unfitness "predicted from her past history."³⁰ Rather, the court found that the child's prospective environment demanded a determination of dependency. The court, finding that the sixteen-year-old unwed mother had been an incorrigible and sexually promiscuous child with no visible means of support,³¹ stated that "[t]he law does not require the court to experiment with the child's welfare to see if he will suffer great detriment or harm."³² The court assumed an adverse impact would result based upon the mother's sexual conduct, even though the child had never been in her custody.

The third standard used by Ohio courts is speculative adverse impact. It is based on the court's opinion that an adverse impact may be occurring in the present or may occur in the future due to parental sexual conduct. This standard differs from presumptive adverse impact only in that, rather than assuming that sexual conduct equals adverse impact, the court generally acknowledges that the speculative impact is based on probability and will indicate specifically what harmful impact is expected.³³ The Juvenile Court of Huron County in *In re Douglas*,³⁴ after establishing that both parents were guilty of "serious marital misconduct,"³⁵ found two children dependent, stating that "[i]t is almost certain, it is unquestionably highly probable, that if these little children are left with their families, by the time they reach adolescence, the courts will have to deal with them as delinquents: as adults they will have no better habits or morals than their parents. . . ."³⁶ Later, that same court in *In re Dake*,³⁷ found dependent the children of a woman who, according to the court, was "so devoid of morals and intelligence as to bring forth a series of illegitimate children who must be supported by public funds. . . ."³⁸ The impact predicted by the court was that the children were left in such an atmosphere of moral

28. Lauerma, *supra* note 16, at 667-68.

29. 61 Ohio Op. 2d 38, 288 N.E.2d 343 (1972).

30. *Id.* at 41, 288 N.E.2d at 346. The court also found that a determination of unfitness is not necessary for a child to be dependent. *Id.* at 40, 288 N.E.2d at 345.

31. Normally the fact that a parent was an incorrigible child will not support a finding of dependency. Also the fact that there was no visible means of support is inconclusive since the child was removed from the mother's custody when it was two days old and there was no evidence presented that the mother was unwilling or unable to work. "Visibility" of means of support is irrelevant in any event. Section 2151.04 (A) and (B) calls for an actual lack of support, not a possibility in the future.

32. *Id.* at 41, 288 N.E.2d at 346.

33. Lauerma, *supra* note 16, at 663-66.

34. 82 Ohio L. Abs. 170, 164 N.E.2d 475 (1959).

35. *Id.* at 174, 164 N.E.2d at 478.

36. *Id.* at 176, 164 N.E.2d at 480.

37. 87 Ohio L. Abs. 483, 180 N.E.2d 646 (1961).

38. *Id.* at 485, 180 N.E.2d at 648.

indecent, stigmatized by their illegitimacy, that they would grow up to produce more illegitimate children who would become wards of the state.³⁹

Clearly, Ohio courts have played a game of pick-and-choose in finding standards to determine the effect a parent's sexual conduct on a dependency determination. The Ohio Supreme Court's decision in *Burrell*, however, has ended the arbitrary application of varying standards in such cases. That decision establishes a present adverse impact standard to measure the effect of a custodial parent's sexual conduct in a determination of dependency.⁴⁰ This new standard, which overrules the use of the three standards discussed above, requires a four step analysis. First, the sexual conduct must be established. Second, it must be established that the conduct forms a part of the child's environment. Third, it must be shown that the conduct has an impact upon the child. Finally, it must be "specifically demonstrated" by clear and convincing evidence⁴¹ that the impact upon the child is adverse to an extent that warrants state intervention.

Burrell does not preclude the consideration of sexual conduct in determining dependency. It does preclude such a determination unless each of the four elements of the new present adverse impact standard are met. Generally, isolated incidents of sexual conduct will not be sufficient to establish dependency because such incidents could not be considered a part of the child's environment. Clearly, the new standard precludes determination of dependency based upon sexual conduct that occurs outside the home,⁴² without the child's knowledge,⁴³ or prior to the child's birth, because such activity is beyond the child's environment.⁴⁴

The fact that a parent may be perceived by the court as immoral due to sexual conduct or activity will no longer be sufficient to find a child dependent. The "morality" of the parent is no longer a significant factor. Only actual conduct that has an adverse impact and is part of the child's environment is relevant in dependency proceedings. The new standard in *Burrell* relieves the Ohio courts of the onerous burden of labeling sexual conduct in terms of its moral character.

Although *Burrell* deals particularly with the situation of a woman living with a man not her husband, the court clearly extended this decision to include all other nonmarital relationships including those between members of the same sex. Discussing Ohio Revised Code section 2151.04

39. *Id.* at 486, 489, 180 N.E.2d at 649, 651.

40. See note 16 *supra*.

41. OHIO REV. CODE ANN. § 2151.35 (Page 1976): "If the court finds from clear and convincing evidence that the child is a . . . dependent child. . . ."

42. *In re Decker*, 28 Ohio N.P. (n.s.) 433 (1913).

43. Adverse impact could occur although the child had no knowledge of the sexual activity if the child were neglected due to the activity or submitted to social ridicule due to others' knowledge of the activity; in general, however, lack of knowledge would preclude a finding of dependency. Lauerman, *supra* note 16, at 675 n.174.

44. *In re Turner*, 41 Ohio Op. 2d 264, 229 N.E.2d 764, 231 N.E.2d 502 (1967).

(C),⁴⁵ the court held that “[t]he conduct of a parent is relevant under the terms of this specific section solely insofar as that parent’s conduct forms a part of the environment of this child.”⁴⁶

The standard established in *Burrell* alleviates many of the problems exhibited in earlier decisions. The present adverse impact standard changes dependency determinations in which parental sexual conduct is in issue from situations in which the subjective morality of individual judges determined the outcome, to proceedings in which determinations must be based on objective evidence.⁴⁷ The time has passed when a court could in good faith accept a determination that a child could be permanently separated from his parent simply because of a judicial or societal prejudice against particular lifestyles or sexual orientations.⁴⁸ The *Burrell* decision is a much needed advance in ending such arbitrary decisionmaking.⁴⁹

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45. See note 1 *supra*.

46. 58 Ohio St. 2d at 39, 388 N.E.2d at 739.

47. The court’s only criterion for the evidence is that it specifically demonstrates in a clear and convincing manner the adverse impact. 58 Ohio St. 2d at 39, 388 N.E.2d at 739. It is clear, however, that even if it is established that a child is exhibiting emotional or behavioral problems, it must still be shown that there is a nexus between the child’s problem and the parent’s sexual conduct. For a general discussion, see Lauerman, *supra* note 16, at 672-81.

48. *Burrell* may still, however, leave too much to judicial discretion since it fails to develop a standard for determining when an impact is adverse.

49. The decision in *Burrell* should also be a step toward alleviating similar problems in custody proceedings. Although the final analysis in dependency and custody proceedings is very different—dependency possibly resulting in the permanent termination of parental rights while custody usually changing only living arrangements—each type of action when initiated because of parental sexual conduct should be subject to the same analysis in determining the effect of such conduct. Each type of proceeding requires the court to act in the interests of the child. Therefore, in a custody proceeding, just as in a dependency proceeding, it must be established that the parent’s sexual conduct is having an adverse impact. Without a showing of harm it cannot be in the best interests of the child to remove him from what is otherwise an adequate custody situation, *i.e.*, if parental sexual conduct is irrelevant in a dependency proceeding, unless there is a showing of adverse impact, it is irrelevant in a custody proceeding without a similar finding.

