

MEHMET SEYIT,
Appellant (Plaintiff),
v.
ASIYE MEHMET,
Respondent (Defendant).

MEHMET SEYIT
v.
ASIYE MEHMET

(Turkish Family Court Appeal No. 3/60).

Divorce—Adultery—Custody of children—The Turkish Family (Marriage and Divorce) Law, Cap. 339 (1959 Edn.)—The Turkish Family Courts Law, Cap. 338 (1959 Edn.)—Welfare of children the paramount factor—Discretion of the Court—Not to be lightly interfered with by an Appellate Court—However in this case the trial Judge went wrong—His decision should be reversed—Terms.

The appellant husband claimed in the Court below (a) decree of divorce on the ground of his wife's adultery, (b) the custody of the children of the marriage, two daughters aged nine and five respectively. The wife-respondent admitted adultery and also, co-habitation with her paramour who happens to be a married man. The learned Judge granted the divorce. As regards the custody of the children, he came to the conclusion that the balance was in favour of the adulteress, the mother, and accordingly ordered that they should remain in her custody.

Held: (1) The paramount consideration in deciding with which of the parties the children should be left is the welfare of the child or children affected. It is also true that the welfare involves two aspects, physical and moral (vide *Allen v. Allen*, (1948) 2 All E.R. 413.) The upbringing of the child should not be exclusively considered only from the physical side. The moral side equally deserves consideration. This is not a case where the mother after committing an isolated act of adultery had given up any relations with the co-respondent. Here the adulterous relations are continuous and uninterrupted and so is the co-habitation with the adulterer. The respondent in this case is not only responsible for wrecking a conjugal union but also by co-habiting with a married man breaks another union. It cannot be said that the children, though at present owing to their tender age they may not be in a position to appreciate the situation, could be entrusted to the care and protection of a mother who leads a life inconsistent altogether with a moral conduct.

Statements of the law in Rayden, On Divorce, 7th edition, p.p. 536-7 (quoted in the judgment, post) adopted;

Statement in the Turkish case, Court of Appeal, Civil Dept., Full Court, dated April, 12, 1950, Action No. 2336, Judgment 17 (see: post in the judgment), adopted.

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(2) While this Court is slow in interfering with the exercise of discretion of a trial judge yet it appears that the learned Judge did not attach due consideration to the moral side of the matter. The evidence does not disclose that the children cannot be entrusted to the care and protection of the father and there must be clear proof that the father, for some reason or other, is not in a position to look after the children. This is not a case where a mere balance of physical welfare of the children might tip the scales in favour of one side.

(3) The appeal, therefore, should be allowed and the custody of the children should be given to the father; but the welfare officer should periodically visit the home of the children and report on their welfare to the Court and in the event of an adverse report or for any serious cause the Court will be at liberty to amend the order of this Court.

Appeal allowed.

Cases referred to:

Allen v. Allen (1948) 2 All E.R. 413:

Judgment No. 17 of the Turkish Court of Appeal, Civil Dept., Full Court, dated April, 12, 1950, Action No. 2336

Appeal

By the plaintiff against the judgment of the Turkish Family Court of Limassol (Ilkay, Judge) dated December, 31, 1959 in Turkish Family Court Action No.66/59 whereby it was adjudged, *inter alia*, that the custody of the children of the marriage be given to the mother (defendant).

A. M. Berberoglou for the appellant

Yiannakis Agapiou for the respondent

Cur. adv. vult.

The judgment of the Court was read by:

ZEKIA, J. : The appellant in this case claimed in the Court below (a) a decree of divorce on the ground of adultery committed by his wife, the respondent, (b) the custody of the children, the offspring of the union, consisting of two daughters aged nine and five respectively.

The wife admitted the commission of adultery and also the co-habitation with her paramour who happens to be also a married man. The learned Judge considered the pros and cons of giving the custody to either of the parties and came to the conclusion that the balance was in favour of the adulteress, the mother, and accordingly ordered that the children should remain in her custody.

There is no doubt that the paramount consideration in deciding with which of the parties the children should be left is the welfare of the child or children affected. It is also

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true that the welfare involved two aspects, physical and moral (vide *Allen v. Allen*, (1948) 2 All E.R. 413). The upbringing of the child should not be exclusively considered only from the physical side. The moral side equally deserves consideration. This is not a case where the mother after committing an isolated act of adultery had given up any relations with the co-respondent. Here the adulterous relations are continuous and uninterrupted and so is the co-habitation with the adulterer. The respondent in this case is not only responsible for wrecking a conjugal union but also by co-habiting with a married man breaks another union. It cannot be said that the children, though at present owing to their tender age they may not be in a position to appreciate the situation, could be entrusted to the care and protection of a mother who leads a life inconsistent altogether with a moral conduct. The following are extracts from the English Authorities on the point—Rayden on Divorce, 7th Edition, pp. 536-7 :

“Custody of children is usually except for grave cause given to the innocent party, though the House of Lords has deprecated the idea of a fixed rule.....”.

“It is not correct to say that because a woman has once committed adultery she is not a fit person, *vis-a-vis* one who has not, to look after a child.....”.

“In principle, children should not be separated, and the fact and advantage of brotherhood and sisterhood must also be considered when there is more than one child of the marriage and it is proposed to give custody of one child to one person and of another to a different person. In dealing with the questions of custody or access the Court will have regard to the particular circumstances of each case, always bearing in mind that the benefit and interest of the child is the paramount consideration, and not the punishment of the guilty spouse, though among other considerations the wishes of an unimpeachable parent stand first. The Court has a wide discretion in such matters”.

The relevant Turkish Authorities on the point run on similar lines. We quote:

“In view of the probabilities that the conduct of the mother which is contrary to morals and manners will affect the child, it is required that, even if the child is in need of maternal affection, the custody should be given to the father”.

(Court of Appeal, Civil Dept., Full Court, 12.4.1950, Action No. 2336, Judgment 17).

While this Court is slow in interfering with the exercise of discretion of a trial judge yet it appears that the learned

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judge did not attach due consideration to the moral side of the matter. In an exceptional case no doubt such course might be taken but before doing so it should be shown to the satisfaction of the Court that by granting custody to the father the children's welfare would be materially affected. In this particular case, however, the welfare officer, Nourten Guler, who visited the father's quarters at Prastio stated in her report the following:

“ The mother is living with her co-habitant who is legally married to another woman ; he may never get divorced and marry her. She has no income and no property. She is being maintained by her co-habitant (co-respondent) who may one day leave her. Father is living at the village, Prastio. He has a certain amount of property and is also working. His sister-in-law, Ismetiye, a young girl aged 19, lives next to his house. She has only a child 11 months old and expressed every desire to look after the two girls concerned if their custody is given to their father. The paternal grand-mother who is also settled at the village can do their washing and help in looking after them ”.

The evidence does not disclose that the children cannot be entrusted to the care and protection of the father and there must be clear proof that the father, for some reason or other, is not in a position to look after the children. This is not a case where a mere balance of physical welfare of the children might tip the scales in favour of one side.

We think therefore that the appeal should be allowed and that the custody of the children be given to the father ; but the welfare officer should periodically visit the home of the children and report on their welfare to the Court and in the event of an adverse report or for any serious cause the Court will be at liberty to amend the order of this Court.

Appeal allowed with costs.