

Parental Misconduct and Custody

Illinois law does not permit the judge, in making a custody award, to consider "conduct of a present or proposed custodian that does not affect his relationship to the child." In short, with the exception of violence, what the parents do on their own time is okay with the court... so long as it doesn't affect the children. Unfortunately, it's just not that simple.

Before 1977 (when Illinois' divorce and custody laws – known as "the IMDMA" – went into effect) the courts could consider just about any parental conduct or misconduct. In one famous, post-decretal case,¹ the former husband hired some detectives and entered the former wife's home where they found her "engaged in improper conduct with [a man] who was not then her husband... ." She probably would have lost custody of the children based on that fact -- and so she took her lover to the courthouse that very afternoon and married him! The hasty marriage sufficiently undermined the allegation of parental misconduct and custody of the children remained with the mother.

Since 1977, the courts have struggled with a conundrum: can a judge step in and say "the immorality is enough that it MIGHT affect the children" or must a judge wait until the children have already been affected before letting parental misconduct sway the outcome of a custody determination? Several cases by the Illinois Supreme Court explain the arguments on both sides.²

Eventually, the Illinois Supreme Court ruled that parental sexual conduct that does not impact on the children may not be considered as a factor in making custody determinations. Parental sexual conduct, however, may have a bearing on the stability of the child's home environment and that, said the court, is a legitimate factor to consider in making a custody award.³

Today, a parent with an ongoing, amorous relationship stands on equal footing with the puritan parent -- so long as the affair doesn't impact the children⁴ (the resulting divorce is not considered as a factor). Cohabitation with a lover has been overlooked by the courts in making custody determinations where the parent's cohabitation doesn't negatively impact the children.⁵ Even drug use plays no part in the custody determination unless it "can be shown to affect [the parent's] mental or physical health and his relationship with the child."⁶ On the other hand, some courts take the position that the "intimate cohabitation relationship of a parent... is a proper factor to be considered by the trial court in making a custody determination."⁷ Indeed, where parental misconduct takes place in the presence of the child, or where a parent attempts to rationalize to the child and explain away his or her misconduct, courts are more likely to consider the misconduct and to rule accordingly in the custody determination.⁸ The misconduct doesn't have to be criminal in nature (like adultery) – courts are free to venture out onto the slippery slope of moral judgment – a finding that the misconduct merely interferes with the parent's ability to parent is all that is all that is needed.⁹

The present status of Illinois law on cohabitation and custody is nicely encapsulated in a case¹⁰ where custody of a 16 year old daughter was awarded to the mother who lived with a man in a continuing, conjugal basis, and custody of a 14 year old daughter was awarded to the father. The 16 year old had a good relationship with her mother and seemed to thrive in her household although she apparently had some misgivings about her mother's living arrangements. The 14 year old presented a different, more difficult set of facts. It seems from the opinion that the mother's living arrangements may have caused, and likely would compound, "problems of insecurity" experience by the 14 year old daughter.¹¹

Homosexuality: Homosexuality, in and of itself, is not enough to preclude a claim for custody. Any intimate relationship—be it heterosexual, homosexual, or lesbian in nature—"is a proper factor to be considered by the trial court in making a custody determination."¹²