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Casenotes: Domestic Relations — Child Custody — a Parent's Adultery Raises No Presumption of Unfitness for Child Custody. Davis v. Davis, 280 Md. 119, 372 A.2d 231 (1977)

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DOMESTIC RELATIONS — CHILD CUSTODY — A PARENT'S ADULTERY RAISES NO PRESUMPTION OF UNFITNESS FOR CHILD CUSTODY. *DAVIS v. DAVIS,* 280 Md. 119, 372 A.2d 231 (1977).

In *Davis v. Davis*[1] the Court of Appeals of Maryland held that an adulterous[2] parent is not presumptively unfit for the custody of her child.[3] While adulterous conduct remains a "relevant consideration" in custody disputes, it need only be considered to the extent that it affects the child's welfare, and must be weighed along with other pertinent factors.[4] In his tripartite opinion for the court, Judge Digges noted the "rapid social and moral changes in our society" that, perhaps, fomented the court's departure from the view that adultery was a "highly persuasive indicium" of unfitness, or raised a "presumption of unfitness."[5] An adulterous parent need no longer rebut such a presumption by satisfying a threefold test of termination of the relationship, repentence, and little likelihood of future indiscretions.[6] The opinion did indicate, however, that evidence of

1. 280 Md. 119, 372 A.2d 231 (1977).
2. Adultery can be proved by circumstantial evidence which establishes both a disposition on the part of the defendant and the paramour to commit adultery and an opportunity to commit the offense. *See* Pontorno v. Pontorno, 257 Md. 576, 263 A.2d 820 (1970); Doughtery v. Doughtery, 187 Md. 21, 48 A.2d 451 (1946).
3. *Davis,* 280 Md. at 127, 372 A.2d at 235.
4. *Id.*
5. *Id. See, e.g.,* Shanbarker v. Dalton, 251 Md. 252, 247 A.2d 278 (1968); Ferster v. Ferster, 237 Md. 548, 207 A.2d 96 (1965); Wallis v. Wallis, 235 Md. 33, 200 A.2d 164 (1964); Insogna v. Insogna, 229 Md. 33, 181 A.2d 677 (1962); Bray v. Bray, 225 Md. 476, 171 A.2d 500 (1961); Parker v. Parker, 222 Md. 69, 158 A.2d 607 (1960); Hild v. Hild, 221 Md. 349, 157 A.2d 442 (1960); McCabe v. McCabe, 218 Md. 378, 146 A.2d 768 (1958); Widdoes v. Widdoes, 12 Md. App. 225, 278 A.2d 100 (1971). *See generally,* 2 W. NELSON, DIVORCE AND ANNULMENT § 15.06 (2d ed. 1961); 20 MD. L. REV. 378 (1960).
6. *See, e.g.,* Davis v. Davis, 33 Md. App. 295, 364 A.2d 130 (1976) (applied the threefold test); *cf.* Oliver v. Oliver, 217 Md. 222, 140 A.2d 908 (1958) (divorce granted on the basis of abandonment, not adultery, but the court said that had the basis been adultery, the result would have been the same; although the court did not explicitly apply the threefold test, the paramour had moved to Michigan, indicating that the relationship had terminated and was not likely to begin anew; the court did not discuss repentance); 19 MD. L. REV. 61 (1959). It is ironic that both the court of appeals and the court of special appeals in *Davis* cited Neuwiller v. Neuwiller, 257 Md. 285, 262 A.2d 736 (1970), as standing for what seemed to be different propositions, namely, that *Neuwiller* employed the threefold test of repentence, termination of the relationship, and little likelihood of recurrence of the past conduct and also implied that no presumption of unfitness arose from the fact of adultery. The latter proposition can be inferred from Judge Barnes' strong dissenting opinion. The former was referred to only in passing by the majority, although the basis of the dissent was founded upon Judge Barnes' insistence that the threefold test should have been applied. What *Neuwiller* may have turned upon, however, was not the presumption *vel non* that an adulterous parent was unfit, but rather the presumption that "a young child should not be taken from its mother." Neuwiller v. Neuwiller, 257 Md. 285, 286-87, 262 A.2d 736, 737 (1970). *See generally* Foster & Freed, *Children and the Law,* 2 FAMILY L.Q. 40, 41 (1968). The presumption that a "young child" or a "child of tender years" should not be taken from its mother may no longer be

these factors retains validity in judging which parent would best promote the child's welfare.[7] According to the court, *Davis* served to recognize explicitly what prior Maryland cases had implied in their treatment of adultery in child custody contests.[8]

The *Davis* court devoted the first section of its opinion to a clarification of the formerly unsettled standard of appellate review in child custody cases.[9] The court enumerated three categories for the possible findings that a chancellor could make in a child custody case. To each category, a different standard of appellate review applied. The "harmless error" test applied to matters of law, while the "clearly erroneous" standard applied to matters of fact.[10] The chancellor's "ultimate conclusion" as to whom the child was awarded was a matter neither of law nor of fact.[11] Rather, the court of appeals held that the "clear abuse of discretion" test applied to such ultimate conclusions. The court noted that

> [o]nly [the chancellor] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child[;] he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.[12]

In the absence of the application of unsound legal principles, or the use of clearly erroneous factual findings, an appellate court could correctly reverse a chancellor's child custody determination only if the chancellor clearly abused his discretion.

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valid in light of MD. ANN. CODE art. 72A, § 1 (Supp. 1976), which provides, in part, that "in any custody proceeding, neither parent shall be given preference solely because of his or her sex." *Cf.* Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977) (the Maryland Equal Rights Amendment, MD. CONST., DECL. OF RIGHTS, art. 46, combined with MD. ANN. CODE art. 72A, § 1, imposing responsibility for child support on both parents, dictated that the sex of a parent was not a factor in the allocation of child support). *But cf.* Cooke v. Cooke, 21 Md. App. 376, 319 A.2d 841 (1974) (in dictum, said that the maternal preference in child custody cases did not violate the Equal Rights Amendment because the issue was not the rights of the parents, but rather the best interests of the child, and because the preference applied only in the rare case when all other factors were equal). *See generally* 2 U. BALT. L. REV. 355 (1973).

7. 280 Md. at 127, 372 A.2d at 235.
8. *Id.*
9. *Id.* at 122-36, 372 A.2d at 232-34. This casenote will not address in detail that portion of the *Davis* opinion which discussed the standard of appellate review in child custody proceedings. The *Davis* standards have been applied by Maryland courts in cases following *Davis*. *E.g.*, German v. German, 37 Md. App. 120, 376 A.2d 115 (1977); Ross v. Hoffman, 280 Md. 172, 185, 372 A.2d 582, 590 (1977); Howard v. Gish, 36 Md. App. 446, 373 A.2d 1280, Daily Record, August 23, 1977; Christman v. O'Connor, 36 Md. App. 263, 373 A.2d 326, Daily Record, August 9, 1977.
10. 280 Md. at 125-26, 372 A.2d at 234.
11. *Id.*
12. *Id.*

While the *Davis* opinion clarified the standards for appellate review in child custody cases,[13] the court suggested that its treatment of an adulterous parent in such circumstances was not novel.[14] Instead, the court of appeals' decision implied that the presumption of unfitness had eroded, and that *Davis* merely recognized this trend in Maryland law.[15] The gradual erosion of the presumption of unfitness may not have been fully appreciated by other Maryland courts, however. Prior to *Davis,* Maryland decisions concerning the relevance of adultery seemed far from uniform. This was best illustrated by the different treatments of adultery by the chancellor and the court of special appeals in *Davis.*[16] By directing that the Maryland courts discard the presumption that an adulterous parent was unfit, the *Davis* decision provided a vehicle for a more uniform application of the substantive guidelines in custody cases.

The facts involved were not atypical.[17] The Davis marriage produced three children during its fifteen years.[18] Some eight months after Mrs. Davis left home with the youngest child, Leigh, Mr. Davis filed a bill of complaint seeking a divorce *a vinculo matrimonii*[19] on the ground of his wife's adultery,[20] and sought temporary and permanent[21] custody of the children. Mrs. Davis filed a cross-bill of

13. *Id.* at 122, 372 A.2d at 232.
14. *Id.* at 127, 372 A.2d at 235.
15. Pontorno v. Pontorno, 257 Md. 576, 263 A.2d 820 (1970); Neuwiller v. Neuwiller, 257 Md. 285, 262 A.2d 736 (1970). *Cf.* Widdoes v. Widdoes, 12 Md. App. 225, 278 A.2d 100 (1971) (court stated that while the "rigors" of presumption of unfitness may be relaxed in the future, it was "obliged to follow the established rule.")
16. The chancellor, after having noted the presumptions that arise from adulterous conduct, considered the "best interest of the child" to be the paramount consideration. Davis v. Davis, 33 Md. App. 295, 300, 364 A.2d 130, 132-33 (1976). The court of special appeals agreed that the welfare of the child was the "cardinal rule in custody cases," but exercised its own judgment in applying the rule, accepting the chancellor's factual findings, but not necessarily his conclusions. *See* Sartoph v. Sartoph, 31 Md. App. 58, 64, 354 A.2d 467, 472 (1976). The court of special appeals proceeded to consider a series of guidelines, including 1) the tendency not to disturb the custody of a child unless there was a strong reason affecting his welfare, 2) the inclination to frown upon split custody (referring to the award of, for example, one child to the father and another child to the mother, as opposed to custody where the child spends equal time with each parent), 3) the presumption that an adulterous parent was unfit, as well as 4) the application of the threefold test, *see* note 36 *infra,* to rebut the presumption. Davis v. Davis, 33 Md. App. 295, 301, 364 A.2d 130, 133 (1976).
17. Davis v. Davis, 280 Md. 119, 120, 372 A.2d 231 (1977).
18. *Id.*
19. Divorce *a vinculo matrimonii* is defined as "a divorce from the bond of marriage. A total divorce of husband and wife, dissolving the marriage tie, and releasing the parties wholly from their matrimonial obligations." BLACKS LAW DICTIONARY 566 (4th ed. 1968). See MD. ANN. CODE art. 16, § 24 (Supp. 1976).
20. Adultery is one of the six "causes" for a divorce *a vinculo* in Maryland. See MD. ANN. CODE art. 16, § 24 (Supp. 1976).
21. MD. CTS. & JUD. PROC. CODE ANN. § 3-602(a)(1). A decree or order concerning a child is never permanent, despite the language in § 3-602(a)(3). A court of equity has continuing jurisdiction over the custody of a child. *Id.* § 3-602(a)(5).

complaint for a divorce *a mensa et thoro*,[22] for custody of the children,[23] and for alimony[24] and child support.[25]

In a *pendente lite* order[26] issued by the Circuit Court for Montgomery County, custody of the two older children was awarded to Mr. Davis, while custody of Leigh, the youngest child, was awarded to Mrs. Davis.[27] Mr. Davis was also ordered to pay $175 per month to Mrs. Davis for Leigh's support. The court granted a divorce *a vinculo matrimonii* to Mr. Davis but reserved ruling on permanent[28] custody of the children until a court investigator's report and recommendation was submitted.[29] Upon receipt and consideration of the report, the court issued identical orders to those issued *pendente lite*. Mr. Davis noted an appeal[30] to the Court of Special Appeals of Maryland, seeking custody of the youngest child.[31]

After a review of the findings of fact, the court of special appeals, reciting the "best interest of the child" test,[32] concluded that it was not bound by the clearly erroneous rule, "but must exercise its own good judgment whether the conclusion of the chancellor is the best one."[33] The court noted that "[i]t is the rare case in Maryland that has awarded custody to an adulterous parent, absent a showing that the wayward conduct had terminated."[34] Basic to the opinion

22. Divorce *a mensa et thoro* is a "limited divorce . . . from bed and board. It grants unto the injured spouse the right to live separate and apart from the one at fault. However, the parties remain man and wife and there is no severance of the marital bonds." Courson v. Courson, 213 Md. 183, 188, 129 A.2d 917, 920. *See* MD. ANN. CODE art. 16, § 25 (Supp. 1976). For a comparison of divorce *a vinculo matrimonii* and *a mensa et thoro, see generally,* Schwab v. Schwab, 93 Md. 382, 49 A. 331 (1901).
23. *See* note 21 *supra.*
24. MD. ANN. CODE art. 16, § 3 (Supp. 1976).
25. MD. CTS. & JUD. PROC. CODE ANN. § 3-603(a) (Supp. 1977).
26. *Id.* § 3-602(a)(3).
27. A *pendente lite* order is a preliminary order which establishes certain domestic arrangements during the pendency of litigation. BLACKS LAW DICTIONARY 1290 (4th ed. 1968).
28. *See* note 21 *supra.*
29. 280 Md. at 119, 372 A.2d at 232.
30. *Id.*
31. Mrs. Davis did not cross-appeal the custody award of the older children. *Id.* at 121 n.2, 372 A.2d at 232 n.2.
32. 33 Md. App. at 301, 364 A.2d at 133.
33. *Id.*
34. *Id.* at 302, 364 A.2d at 133. The court pointed to three such cases. Pratt v. Pratt, 245 Md. 716, 228 A.2d 611 (1967), involved the award of an adolescent daughter and an infant son to the adulterous parent, even though the court did not make an express finding of repentence. Orndoff v. Orndoff, 252 Md. 519, 250 A.2d 627 (1967), centered upon less than persuasive evidence of the wife's adultery, coupled with a finding that the father's petition for custody was merely a means of retribution. Lastly, the court alluded to Mullinix v. Mullinix, 12 Md. App. 402, 278 A.2d 674 (1971), in which the adulterous parent was deemed fit because the chancellor had conditioned the award of custody on a prohibition of contact with her paramour. In Oliver v. Oliver, 217 Md. 222, 140 A.2d 908 (1959), the chancellor granted the husband an absolute divorce for abandonment, although the husband joined in one action for absolute divorce two independent causes,

was the theory that once Mr. Davis had overwhelmingly showed his wife's adultery, there was a shift in the burden of proof.[35] The shift required Mrs. Davis to show a "change" in her course of conduct. Presumably, the court would have required the threefold test[36] or one or more of its elements to have been shown. The opinion explicitly mentioned only repentence and little likelihood of a recurrence, perhaps incorporating the requirement of termination of the meretricious relationship.[37] The elements specifically articulated, however, were characterized as "mandatory."[38] Terming the chancellor's determination "erroneous," the court of special appeals found that the chancellor "failed to consider the long-term effect of having a child taught her sexual morals by an unrepentent, flagrantly adulterous and promiscuous parent."[39]

The court of special appeals remarked that Mrs. Davis "failed to discuss in any manner her adulteries or any change in her way of life."[40] Mrs. Davis claimed, in her appeal to the court of appeals, that a requirement that she show a "mandatory" repentence and change of lifestyle violated her right to be free from compulsory self-incrimination.[41] The court of appeals adroitly side-stepped the issue, and agreed, for different reasons, that the wrong standard was applied.[42]

The basic premise of the court of appeals' decision in *Davis* was that custody disputes should determine who is the "better" parent to raise the child.[43] The opinion of the chancellor, as well as that of the court of special appeals and the court of appeals, paid homage to the so-called "best interests of the child" rule.[44] A recent Maryland

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abandonment and adultery. The chancellor declined to grant the divorce on the ground of adultery, apparently because he thought that adultery had to be proved beyond a reasonable doubt. In light of the fact that the Oliver child called the wife's frequent visitor "Daddy Taylor", referred to "Daddy Taylor's pillow" on her mother's bed, and to "Daddy Taylor's toothbrush", one might well question the majority opinion. The opinion did state, however, that despite a finding of adultery, the court would have reached the same result. Thus, *Oliver* could have been some value to the court of appeals' decision in *Davis*. *See generally* 19 MD. L. REV. 61 (1959).

35. 33 Md. App. at 302, 364 A.2d at 134.
36. *Id.* at 301, 364 A.2d at 133. The court of special appeals enunciated the terms of the test as follows: "This presumption of unfitness can be overcome by showing that the adulterous party has repented, has terminated the relationship, and has changed his or her ways so that there is little likelihood of a reoccurrence of the past conduct."
37. *Id.* at 302-03, 364 A.2d at 134.
38. *Id.*
39. *Id.* at 302, 364 A.2d at 134.
40. *Id.*
41. 280 Md. 119, 126, 372 A.2d 231, 235 (1977), U.S. CONST. amend. V; MD. CONST., DECL. OF RIGHTS, art. 22.
42. 280 Md. 119, 126, 372 A.2d 231, 235 (1977).
43. *Id.* at 127, 372 A.2d at 235.
44. *Id.* at 130, 372 A.2d at 236 (court of appeals); 33 Md. App. 295, 301, 364 A.2d 130, 133 (1976) (court of special appeals).

decision stated that the best interests of the child rule was "always determinative in child custody disputes."[45] While this rule provided the central question in such disputes, it failed to suggest an answer. Each party was faced with the task of showing that he was the parent who would more advance the "best interests of the child."[46] To facilitate this determination, many guidelines were formulated.[47] One such guideline developed into the "presumption of unfitness" or the "highly persuasive indicium" that an adulterous parent was unfit.[48] In *Palmer v. Palmer,*[49] for example, the Court of Appeals of Maryland stated the presumption of unfitness and continued by saying that, "to overcome this presumption, a strong showing must be made of the facts and circumstances which indicate that [the adulterous parent] is, in fact, nevertheless fit and proper."[50] The opinion in *Wallis v. Wallis*[51] termed the presumption of unfitness "one of fact, not law, and the rule is thus not absolute."[52] It was settled, prior to the *Davis* decision, that the rule was not designed to punish the adulterous parent, but was formulated to determine which parent was better fit to provide the most wholesome atmosphere, and thus, serve the best interests of the child.[53] While the rule never dictated that an adulterous parent was *ipso facto* unfit,[54] it operated as a strong weapon, weilded against the guilty parent.

Davis relegated the adulterous conduct of a parent to the status merely of a relevant consideration, one that may affect the child's welfare.[55] Because a finding of adultery was stripped of its "presumption of unfitness" the guilty parent was impliedly relieved of the "mandatory" proffer of the threefold test.[56] The elements of the threefold test remain important, however. The satisfaction of

45. Ross v. Hoffman, 280 Md. 172, 178, 372 A.2d 582, 587 (1977); Kauten v. Kauten, 257 Md. 10, 11, 261 A.2d 759, 760 (1970). *See* Fanning v. Warfield, 252 Md. 18, 248 A.2d 890 (1969); Heaver v. Bradley, 244 Md. 233, 223 A.2d 568 (1966); Glick v. Glick, 232 Md. 244, 192 A.2d 791 (1963); Young v. Weaver, 185 Md. 328, 44 A.2d 748 (1945).
46. Levin, *Guardian* Ad Litem *In A Family Court,* 34 MD. L. REV. 341, 341-43 (1974). In this article, Judge Levin aptly characterized the verbal exchanges that take place in courts as often to the detriment rather than in the "best interests" of the child.
47. *See, e.g.,* note 16 *supra. See generally,* W. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD (1973).
48. *See* Palmer v. Palmer, 238 Md. 327, 331, 207 A.2d 481, 483 (1965); Wallis v. Wallis, 235 Md. 33, 36-37, 200 A.2d 164, 165-66 (1964). *See generally* Annot., 23 A.L.R.3d 6, 38-42 (1969).
49. 238 Md. 327, 207 A.2d 481 (1965).
50. *Id.,* at 331, 207 A.2d at 483.
51. Wallis v. Wallis, 235 Md. 33, 200 A.2d 164 (1964).
52. *Id.* at 36-37, 200 A.2d at 165-66.
53. *Id. See* W. NELSON, DIVORCE AND ANNULMENT § 15.06 (2d ed. 1961).
54. Davis v. Davis, 280 Md. 119, 126, 372 A.2d 231, 235 (1977).
55. *Id.* at 127, 372 A.2d at 235.
56. *Id.*

these now-optional elements reduces the importance of the fact of adultery in child custody awards.[57]

The underpinnings of the *Davis* opinion were *Pontorno v. Pontorno*[58] and *Neuwiller v. Neuwiller*.[59] In *Neuwiller,* the chancellor granted the father a divorce *a vinculo matrimonii* and awarded custody to the adulterous mother, even though he "made it clear that he was not overwhelmed with the character of the wife."[60] On appeal, Judge Finan of the Court of Appeals of Maryland noted that the evidence was "not as clear as the Court should like to see it" with regard to termination of the adulterous relationship,[61] perhaps an allusion to the threefold test.[62] Despite the finding of adultery and less than clear evidence of its termination, the chancellor's award to the guilty parent was affirmed. The majority opinion in *Neuwiller,* however, may be read as weighing different "presumptions." More emphasis may have been placed on the "presumption" that a young child should stay with its mother[63] than on the "presumption" of the unfitness of an adulterous parent. The dissent in *Neuwiller,* written by Judge Barnes, concluded "that the adulterous mother had not made a clear showing rebutting the presumption that she is an unfit person to have custody."[64] Judge Barnes' adamant disagreement with the majority opinion may have been based on evidence that the mother had become pregnant by her paramour, and that she had performed an abortion on herself.[65]

In *Pontorno v. Pontorno,*[66] the evidence revealed, by inference, a disposition as well as numerous opportunities to commit adultery by the wife and her paramour.[67] The paramour was found to have been "continuously in the picture," before the separation, during the separation, and even after service of the complaint alleging adultery.[68] Custody of the young daughters, age three years and eighteen months respectively, was awarded to the father.[69] The *Pontorno* opinion made no mention of a presumption of unfitness of an adulterous parent, a point mentioned in the *Davis* opinion.[70] *Pontorno* did state, as quoted the court of appeals in *Davis,*[71] that a

57. *Id.*
58. 257 Md. 576, 263 A.2d 820 (1970).
59. 257 Md. 285, 262 A.2d 736 (1970).
60. *Id.* at 286, 262 A.2d at 737.
61. *Id.*
62. *See* note 36 *supra.*
63. 257 Md. 285, 286-87, 262 A.2d 736, 737 (1970).
64. *Id.* at 291, 262 A.2d at 740.
65. *Id.* at 286, 262 A.2d at 737.
66. 257 Md. 576, 263 A.2d 820 (1970).
67. *Id.* at 580, 263 A.2d at 822.
68. *Id.* at 578, 263 A.2d at 821.
69. *Id.* at 580, 263 A.2d at 822.
70. *Davis,* 280 Md. at 127, 372 A.2d at 235.
71. *Id.*

"finding of adultery is relevant to the extent that it may affect the welfare of the children."[72]

The *Pontorno* opinion, however, was complicated by a number of considerations, some of which tended to weaken its precedential value to the *Davis* decision. *Pontorno,* like *Neuwiller,* applied the "best interest of the child" test.[73] In *Pontorno,* the court of appeals, indicated that had the chancellor awarded custody to the father solely because of the wife's adultery, the court "might be disposed to remand or reverse."[74] This may lend support to *Davis'* reliance on Pontorno, but only when viewed in isolation, for the *Pontorno* court added that "[i]n cases where the chancellor has found that the party guilty of the adultery has ceased the relationship . . . the Court has upheld the Chancellor's decision to grant custody to the guilty party."[75] The natural implication of the court's statement involved the threefold test's first element, termination of the relationship. As customarily applied, evidence of termination of such a relationship was submitted to rebut the presumption of unfitness of an adulterous parent, yet the *Pontorno* court mentioned no such presumption. *Pontorno* did add, however, that the award of custody to a guilty party who had terminated the relationship was particularly likely where the mother was the adulterous parent and the children involved were young.[76] To compound the confusion, the *Pontorno* opinion termed the mother's fitness better to care for her young children a "presumption."[77] In sum, *Portorno* employed the "best interests of the child" test, the "presumption" that a mother was better fit for custody of young children, and the "relevance" of adultery as it affects the welfare of the child. In application, the result of the above is a confusion of labels, a rebuttal of the "presumption" that a mother was better fit for custody of a young child by a "factor," that of adultery. The *Pontorno* opinion implied, however, that adultery alone may not overcome the "presumption" of the mother's superior fitness, especially if the relationship between the mother and her paramour had ended. What may well have been conceived as a means to determine who is a better custodian became a conflict of presumptions and considerations, the nuances of each changing with the facts of each case. This confusion may have caused the court of appeals to state, in the first sentence of *Davis,* that "we refuse to be cast in the role of a super Solomon."[78]

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72. Pontorno v. Pontorno, 257 Md. 576, 580, 263 A.2d 820, 822 (1970).
73. *Id.*
74. *Id.*
75. *Id.* at 580–81, 263 A.2d at 822.
76. *Id.* at 581, 263 A.2d at 822.
77. *Id.*
78. 280 Md. at 120, 372 A.2d at 231. In a footnote the court alluded to King Solomon in 1 *Kings* 3:16. *Davis* cited Commonwealth ex rel. Myers v. Myers, 237 Pa. Super. Ct. 192, 352 A.2d 459 (1975), *rev'd,* 468 Pa. 134, 360 A.2d 587 (1976). *See*

The *Davis* opinion relieved the appellate courts of "super Solomon" demands by setting out clear standards of appellate review, standards which favored the affirmance of a chancellor's factual findings and ultimate conclusions.[79] *Davis* has not relieved the chancellor, however, from the task of making factual findings and drawing ultimate conclusions when an adulterous parent seeks custody of his child. Since *Davis* dispelled the "presumption" of unfitness, the chancellor must weigh an adulterous parent's conduct "with all other pertinent factors," but only as it affects the child's welfare.[80]

The large number of child custody disputes is one of the most difficult concomittant problems of the alarming divorce rate.[81] Rules of law, as well as presumptions of fact, that have been formulated have been often criticized.[82] One commentator stated that "historically, custody awards have been dictated or controlled by amorphous platitudes or generalizations on one hand and by rigid absolutes on the other."[83] At one point, Maryland was cited as having the "strictest" rule concerning the fitness of an adulterous parent, a rule demanding that "a mother who has committed adultery must make a strong showing to overcome the presumption that she is unfit to have custody."[84] During the 1950's, however, a general national trend became discernable. The trend treated adulterous mothers more leniently in child custody proceedings,[85] perhaps relying on the maternal preference. *Davis v. Davis* reflected this more lenient approach, although leniency was no longer limited by an underlying maternal preference.[86] Rather, the *Davis* decision recognized by implication that adulterous conduct described too large a realm of behavior to have justified a presumption of unfitness, even if it could be rebutted by a time-honored test.[87] *Davis* encouraged a greater consideration of other factors in a custody dispute. The opinion

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generally Shepherd, *Solomon's Sword: Adjudication of Child Custody Questions,* 8 U. RICH. L. REV. 151 (1974).

79. *See* note 10 *supra.*
80. *See* note 3 *supra.*
81. "According to the latest report on marriage issued by the National Center for Health Statistics in the Department of Health, Education, and Welfare, 455 out of every 1000 marriages made in this country last year are destined to wind up in the bitter and unhappy toils of the divorce court." *Saturday Review,* July 29, 1972, p. 33, N. SHERESKY AND M. MANNES, A RADICAL GUIDE TO WEDLOCK (quoted in H. KRAUSE, FAMILY LAW, CASES AND MATERIALS 100 (1976).
82. *E.g.,* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 LAW & CONTEMP. PROB. 226, 227 (1975); *Uniform Marriage and Divorce Act,* §401 *et. seq.,* 5 FAMILY L. Q. 209, 240–48 (1971).
83. Foster & Freed, *Child Custody,* 39 N.Y.U. L. REV. 423 (1964).
84. *Id.* at 429 and cases cited therein; Bregman, *Custody Awards: Standards Used When the Mother Has Been Guilty of Adultery or Alcoholism,* 2 FAMILY L. Q. 384, 394 (1968).
85. *See* 16 WASH. & LEE L. REV. 287, 290 (1959).
86. *See* MD. ANN. CODE art. 72A, §1 (Supp. 1976).
87. *See* note 36 *supra.*

relegated adultery to the category of a "factor," rather than elevating the importance of adultery at the cost of slighting factors that may be critical to the best interests of the child.

What the *Davis* decision will require of the practitioner is difficult to predict with any certainty. One may well argue that *Davis* made simply an academic distinction, characterizing adultery as a pertinent fact rather than as a presumption. It is clear that counsel for the parties in custody proceedings should squarely address the issue of adultery. In dealing with the issue, termination of the relationship, repentence, and little likelihood of recurrence remain salient, common-sense facts to be demonstrated, even if such a proffer is no longer mandatory.[88] Under the banner of "best interests of the child," each party should marshall the factual information that reflects his ability to promote the child's best interests. Acrimony and vengefulness on the part of the innocent parent, however, may damage an otherwise convincing argument.[89] *Davis* dictated that the future of the child, and not the past adulterous acts of a parent, must be the central concern. A "presumption" of unfitness loses sight of the primary goal of the court, insuring the best home and environment for the child involved. The adversary nature of custody proceedings in conjunction with "presumptions" of unfitness only exacerbate the parties' feeling that a child is a "spoil of victory." The *Davis* decision mandated a discriminating examination of the fitness of each parent, unencumbered by a "presumption" arising from the past. *Davis* served to realign the focus of custody disputes back to the child.

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88. Davis v. Davis, 280 Md. 119, 127, 372 A.2d 231, 234-35 (1977).
89. *See, e.g.*, Orndoff v. Orndoff, 252 Md. 519, 250 A.2d 627 (1967).