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Evidence—Impeachment of Witnesses—Showing of General Reputation for Unchastity

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Recognition of the right of custody in a putative father poses problems of the legal relationship, and the correlative rights and duties, between the father and his child. As to whether our court will treat the father as a natural guardian, or as a statutory guardian or as neither is a subject which it has yet to consider. For instance, will the putative father have a right to the earnings and services of the bastard child? The Washington court has held, "It is the law of this state, as elsewhere, that during the minority of a child the parents are legally entitled to his earnings. . . ." *American Products Co. v. Villwock,* 7 Wn. 2d 246 at 267, 109 P. 2d 570 at 579 (1941). Yet the word "parent" generally does not contemplate the putative father. Ex parte *Newsome,* 212 Ala. 168, 102 So. 216 (1924); In re *Hardenbergh's Will,* 144 Misc. 248, 258 N.Y.S. 651 (1932). If the relationship be one closer to that of guardian and ward, the putative father would not be entitled to his ward's earnings and services. Madden, *Domestic Relations* § 158 (1931). Perhaps this problem could be solved by calling the putative father *in loco parentis* to the child, and ". . . generally a person who has definitely assumed to stand *in loco parentis* to a child is entitled to his services. . . ." Madden, *supra,* § 120.

If the putative father takes the child out of the State of Washington to live, will the domicile of the child change with that of the putative father, or will the domicile remain in Washington until the court authorizes such change? If the father of the bastard be the natural guardian of the child (as is the mother of a bastard) the domicile of the child will change automatically with that of the father. Madden, *supra,* §§ 145, 164. However, if the relationship be closer to that of guardian and ward, the domicile of the child would not change without the authorization of the court. *Mathieu v. U. S. Fidelity and Guaranty Company,* 158 Wash. 396, 290 Pac. 1003 (1930).

Should the child desire to marry under the legal age, from whom must consent be obtained? Where the child is under age, the license may issue ". . . if the consent in writing of the father, mother, or legal guardian is obtained. . . ." RCW 26.04.210. [RRS § 8451]. Clearly the putative father is not the legal guardian unless the court has appointed him as such. In re *Teeters,* 173 Wash. 138, 21 P. 2d 1032 (1933). And generally the word "father" in a statute does not contemplate putative father. In re *Derheimers Estate,* 197 Wis. 145, 221 N.W. 737 (1928); *Howard v. United States,* 2 F. 2d 170 (E.D. Ky. 1924). If the child were once under the custody of the juvenile court, the juvenile court might be regarded as the "legal guardian" to give the consent necessary for the child's marriage. See *State v. Speer,* 36 Wn. 2d 15, 216 P. 203 (1950).

It is submitted that the recognition in the principal case of the father's right of custody will make it necessary for our court to determine in the near future the exact relationship between the putative father and his child.

ROBERT H. PETERSON

Evidence-Impeachment of Witnesses—Showing of General Reputation for Unchastity. *D,* charged with carnal knowledge of a 17-year-old girl, attempted to impeach the credibility of the prosecutrix by offering testimony of two witnesses to the effect that her general reputation in the community for morality was bad. The trial court excluded this evidence, and *D* was convicted. On appeal, *Held:* Affirmed. Evidence of general reputation for immorality is totally inadmissible for the purpose of impeaching the credibility of a witness. *State v. Wolf,* 40 Wn. 2d 648, 245 P. 2d 1009 (1952).

Historically, the Washington Supreme Court has followed two different rules as to the admissibility of evidence of general reputation for unchastity as affecting the credibility of a witness: (1) admissibility as a matter of right; and (2) discretionary admissibility. Admissibilty as a matter of rght was predicated on the policy announced in *State v. Coella,* 3 Wash. 99, 28 Pac. 28 (1891), where the court, in holding that the

defendant in a murder prosecution had the right on *cross-examination* to ask a witness if she were a prostitute, said: "She could not have ruthlessly destroyed that quality upon which most other good qualities are dependent, and for which, above all others, a woman is reverenced and respected, and yet retain her credit for truthfulness unsmirched." The cross-examination rule of the *Coella* case was extended in *State v. Jackson,* 83 Wash. 514, 145 Pac. 470 (1915) where on facts identical to the instant case, the court held that the defendant had a right to impeach a witness by *extrinsic* evidence of her reputation for unchastity. See also *State v. Workman,* 66 Wash. 292, 119 Pac. 751 (1911), and *State v. Jones,* 80 Wash. 588, 142 Pac. 35 (1914).

The point where the court adopted the rule of admissibility of impeaching evidence at the *discretion* of the trial court is obscure. Nine years after the *Jackson* case, the Washington Court declared: "How far a litigant will be permitted to go in showing facts affecting the credibility of a party or a witness is largely within the discretion of the trial court, to be reviewed for an abuse of the right only." *State v. Elder,* 130 Wash. 612, 228 Pac. 1016 (1924). The court in the *Elder* case did not advance any reason for changing the rule of the *Jackson* case; indeed, the *Jackson* case was not mentioned in the opinion. However dicta in subsequent cases seemed to regard admissibility as still a matter of right. *State v. Gaffney,* 151 Wash. 599, 607, 276 Pac. 873, 876 (1929); *State v. Pierson,* 175 Wash. 650, 651, 27 P. 2d 1068, 1069 (1933). Ignoring these dicta, the rule of discretionary admissibility was repeated in the recent case of *State v. Hoggatt,* 38 Wn. 2d 932, 234 P. 2d 495 (1951).

The principal case expresses a third rule: evidence of general reputation for unchastity is inadmissible to affect credibility. The court stated that ". . . the trait of chastity has no such definite correlation with that of veracity as to justify courts in using the former as a criterion of the latter. . . ." The court had a strong alternative argument for denying the trial court discretion to admit the evidence, for even assuming that immorality destroys veracity, the best approach is to investigate the witness's reputation for truthfulness directly, and thereby avoid the prejudicial effect of revealing the unchastity of a witness before the jury. This is the view expressed by the great majority of courts, for generally only reputation for truthfulness in the community can be shown to impeach credibility. See 3 WIGMORE, EVIDENCE 923 (3rd ed. 1940); 90 ALR 870. Additional reasons that can be advanced in support of the rule are that a confusion of issues is prevented, and the witness-box cannot be used as a "slaughter-house for reputations" as it might have been under the pressure of an over-zealous counsel. *State v. Belknap,* 44 Wash. 605, 87 Pac. 934 (1906).

The rule as adopted has the advantage of certainty but the disadvantage of inflexibility. The concurring opinion maintains that the flexibility of discretionary admissibility should be preserved where the veracity of the prosecutrix in a sex offense is questioned. It adopts the position of Wigmore that there are sexually perverted females who invent false charges of sexual offenses by men. See 3 WIGMORE, EVIDENCE §§ 924a, 934a. It is submitted that the problem raised by Wigmore could best be solved by requiring psychiatric testimony rather than lay testimony as to reputation for chastity. See 39 Journal of Criminal Law and Criminology 751 (1949).

The principal case may have considerable impact on Washington law. Cases inferentially overruled are *State v. Workman, supra; State v. Jones, supra; State v. Pierson, supra;* and *State v. Elder, supra.* In addition, the policy announced in the principal case, being diametrically opposed to that of the *Coella* case, may be used as a basis for rendering inadmissible evidence of *specific acts* of unchastity as affecting credibility, although the court refused to pass on the question. Historically, the position of the Washington Court as to specific instances of unchastity has paralleled its different rules regarding the showing of general reputation for unchastity. The court initially

held that cross-examination as to the unchastity of a witness exists as a matter of right in the *Coella* case, but later in *State v. Linton,* 36 Wn. 2d 67, 216 P. 2d 761 (1950), a decision that impliedly overruled the *Coella* case, held that there is no right to cross-examine or to admit extrinsic evidence of specific instances of unchastity, but that the trial court has *discretion* whether or not to admit the evidence. In view of the declaration in the principal case that there is no room for judicial discretion in allowing evidence of unchastity to affect credibility, it would seem logically necessary for the court in the future to hold that specific instances of unchastity are also inadmissible for the purpose of affecting credibility.

GEORGE K. FALER

Rules on Appeal—Time for Filing Statement of Facts Where Motion for New Trial Pending After Entry of Judgment. In a civil action tried to the court, judgment was entered immediately after the findings of fact were filed, and *D* moved for a new trial. Before the motion was ruled upon, he perfected an appeal. The motion was later denied, after which *D* gave a second notice of appeal. His statement of facts was served 125 days after the entry of judgment and forty-six days after the denial of the motion. *P* moved to strike the statement of facts, contending that the time for filing and serving the statement had expired ninety days after the date of entry of judgment. *Held:* Motion denied. A statement of facts must be served and filed within ninety days after the date of entry of judgment, or, if a motion for a new trial has been timely filed, within ninety days from the date of entry of the order denying the motion for a new trial. *Dunseath v. Hallauer,* 40 Wn. 2d 708, 246 P. 2d 496 (1952).

By this holding, the Supreme Court has, in effect, changed the wording of Rule on Appeal 34, 34A Wn. 2d 36, which requires a statement of facts to be served and filed within ninety days after the date of entry of final judgment or appealable order. The ruling was necessary to dispel an apparent inconsistency among the rules and statutes relating to procedure on appeal.

RCW 4.64.010 [RRS § 431] provides that judgment may be entered by the court "at any time after two days from the return" of the verdict. (Where a case is tried to the court, the signing of the findings of fact is comparable to the return of the verdict in a jury trial.) During the two-day period before the entry of judgment, a motion for a new trial may be served and filed. See RCW 4.76.060 [RRS § 402]. In spite of the statute, courts continue to enter judgments simultaneously with the return of the verdict or the signing of the findings of fact. Where the statute is followed, a motion for a new trial is not entertained after judgment is entered, and the question before the court in the *Dunseath* case does not arise. The motion is determined before entry of judgment, and the time for taking an appeal *and for filing the statement of facts* begins to run from the date of the judgment. It has not been suggested that the failure of the trial court to observe the statuory procedure should deprive a party of his privilege of moving for a new trial.

Although Rule 34 provides that the statement of facts must be filed within ninety days after the entry of judgment or appealable order, Rule 33(5) allows an *appeal to be taken* upon the denial of a motion for a new trial when the motion is made after entry of judgment. An order denying a motion for a new trial is not appealable. *Wilson v. Katzer,* 37 Wn. 2d 944, 226 P. 2d 910 (1951). See RCW 4.88.010 [RRS § 1716] and Rule on Appeal 14, 34A Wn. 2d 20. The appeal taken after denial of the motion for a new trial is nevertheless an appeal from the judgment; and under a literal reading of Rule 34, the time for filing the statement of facts begins to run from the date of the judgment, not from the date of the order. Thus a strict application of Rule