

MILLIGAN v. MILLIGAN.

4-9359

235 S. W. 2d 964

Opinion delivered January 29, 1951.

1. INFANTS—CUSTODY OF.—Where the parties were divorced, the chancellor under the evidence correctly awarded custody of their 20 months old girl child to the father.

2. INFANTS—PATERNITY OF.—Although appellant testified that appellee was not the father of the child, the evidence showed that they were living together during the period of gestation, and is sufficient to support the finding that appellee is the child's father.

Appeal from Washington Chancery Court; *Lee Seamster*, Chancellor; affirmed.

John W. Baxter, for appellant.

Charles D. Atkinson and *Chas. W. Atkinson*, for appellee.

ED. F. McFADDIN, Justice. This is a child custody contest. The parties were married in 1942; their baby was born on May 30, 1948; the separation occurred in 1949; and a divorce decree—on the ground of indignities—was granted to the husband on February 8, 1950. As to the correctness of the divorce decree, no issue is made; but Mrs. Milligan claims that the Chancery Court erred in awarding Mr. Milligan the custody of the child, a little girl only twenty months old at the time of the decree.

A careful study convinces us that the Chancellor was correct in his decision. The evidence clearly establishes that Mrs. Milligan did not properly care for the child when she had its custody; and Mrs. Milligan's own testimony indicates that she probably could not care for the child if the custody should now be awarded to her. On the other hand, Mr. Milligan's mother and sister both testified that they had assisted Mr. Milligan in caring for the child while he had her custody, and the evidence preponderates to the conclusion that they will continue to do so. The mother, of course, has the right of visitation under such conditions as may be prescribed by the Chancery Court.

In what was evidently a most desperate attempt to prevent Mr. Milligan from having the custody of the child, Mrs. Milligan testified that he was not the father of it. She even named one whom she claimed to be the father. Without discussing the legal competency of such testimony,¹ we point out: (1) that the Milligans were

¹ See *Morrison v. Nicks*, 211 Ark. 261, 200 S. W. 2d 100; and *Kennedy v. State*, 117 Ark. 113, 173 S. W. 842, L. R. A. 1916B, 1052, Ann. Cas. 1917A, 1029.

living together part, if not all, of the full period of gestation; and (2) that witnesses testified that the Milligans slept together in the one bed in the home. The Chancery Court found that Mr. Milligan was the father of the little girl, and the evidence supports that finding.

The decree is affirmed.
