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## Survey of Developments in the Law of West Virginia: 2001 Part One

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## SURVEY OF DEVELOPMENTS IN THE LAW OF WEST VIRGINIA: 2001 PART ONE

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I. CIVIL PROCEDURE

A. *Introduction*

The previous term of the West Virginia Supreme Court of Appeals was utilized to determine a myriad of issues surrounding the West Virginia Rules of Civil Procedure. Among the issues the court was faced with include default judgment, motion for relief from judgment, res judicata, review of magistrate court trials by a circuit court, dismissal orders under Rule 44(b) for failure to prosecute, and several issues surrounding the service of process.

B. *Default Judgment*

In *Conner v. Pound, Conner, Lucas, Andreozzi, Inc.*,<sup>1</sup> the court considered the propriety of an entry of default judgment when the parties were in dis-

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<sup>1</sup> 554 S.E.2d 120 (W. Va. 2001).

agreement as to whether the defendant had received notice of the suit. *Conner* arose out of a wrongful termination suit where the defendant, Mr. Conner's former employer, neglected to answer the summons and complaint.<sup>2</sup> The defendant's counsel entered a special appearance to argue that the defendant had never received a copy of the complaint.<sup>3</sup>

The record revealed that service of the summons and complaint was attempted through the Secretary of State because the defendant was an out-of-state business, and the return receipt in the record showed "unknown or insufficient address."<sup>4</sup> Nonetheless, the trial court granted plaintiff's motion for default judgment.<sup>5</sup> In reversing its decision and vacating the order of default judgment, the West Virginia Supreme Court of Appeals held that "[w]hen a return receipt for service of process is noted 'unknown' or 'insufficient address,' and no other action has been taken pursuant to the statutory provisions for service, then service of process has not complied with the statutory requirements and will not support a default judgment."<sup>6</sup>

In *Cook v. Channel One, Inc*<sup>7</sup> the court analyzed the considerations required of a trial court faced with a 60(b) motion to vacate a default judgment.<sup>8</sup> *Cook* arose out of a traffic accident where the plaintiff filed a John Doe suit alleging that defendant Carole Leasing Corporation (hereinafter "CLC") owned the vehicle that struck the plaintiff.<sup>9</sup> The driver of the car fled the scene.<sup>10</sup> Although service was properly effected through the Secretary of State, CLC did not file an answer to the complaint and judgment by default was rendered against it.<sup>11</sup> CLC entered the case to contest the entry of default judgment in the form of a motion to set aside the judgment under West Virginia Rule of Civil Procedure 60(b), which the circuit court denied.<sup>12</sup>

The court began its analysis by noting that determining whether a 60(b) motion should be granted in the face of a default judgment requires a trial court to consider: "(1) [t]he degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious de-

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<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> *Conner v. Pound, Conner, Lucas, Andreozzi, Inc.*, 554 S.E.2d 120 (W. Va. 2001).

<sup>7</sup> 549 S.E.2d 306 (W. Va. 2001).

<sup>8</sup> See *id.* at 307.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 307-08.

<sup>12</sup> See *id.* at 308.

fenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party.”<sup>13</sup>

The court found with respect to the first consideration that the plaintiff would suffer very little prejudice from the vacation of the default judgment order.<sup>14</sup> The court ruled that under the second consideration regarding presence of material issues of fact or meritorious defenses was satisfied because CLC was disputing a material allegation in the plaintiff’s complaint.<sup>15</sup> Under the third consideration, examining the significance of interest at stake, the court observed that CLC’s interests at stake were high because plaintiff was demanding \$65,000 in economic damages alone.<sup>16</sup> Finally, with regard to the fourth consideration, the court found that CLC’s degree of intransigence was high because it waited until eleven months after the suit was filed to enter the case.<sup>17</sup>

In an attempt to demonstrate excusable neglect on its part, CLC planned to assert that it forwarded all the pleadings to its insurer and the insurer did not respond to the complaint in a timely manner.<sup>18</sup> The court noted that it had already observed that a majority of jurisdictions hold that “where an insurance company has misfiled papers, this amounts to excusable neglect.”<sup>19</sup> Thus, the court found that CLC had met the stringent excusable neglect standard.<sup>20</sup>

Finally, in balancing the interests of both CLC and the plaintiff in light of the above four factor test, the court found that the trial court had abused its discretion in failing to grant CLC’s 60(b) motion to vacate the default judgment.<sup>21</sup> As a result, the order denying CLC’s motion to set aside the default judgment was reversed.<sup>22</sup>

### C. *Motion for Relief From Judgment*

The court was forced to determine the liberality of West Virginia Rule of Civil Procedure 60(b) in *Coffman v. West Virginia Division of Motor Vehi-*

<sup>13</sup> *Cook v. Channel One, Inc.*, 549 S.E.2d 306, 309 (W. Va. 2001) (citing *State ex rel. United Mine Workers of America, Local Union 1938 v. Waters*, 489 S.E.2d 266, syl. Pt. 2 (W. Va. 1977) (further citations omitted)).

<sup>14</sup> *See id.* at 309.

<sup>15</sup> *See id.* at 309-10 (citing *Hinerman v. Levin*, 310 S.E.2d 850 (W. Va. 1970)).

<sup>16</sup> *See id.* at 310.

<sup>17</sup> *See id.*

<sup>18</sup> *See id.*

<sup>19</sup> *Cook v. Channel One, Inc.*, 549 S.E.2d 306, 310-11 (W. Va. 2001) (quoting *Parsons v. Consolidated Gas Supply Corp.*, 472 S.E.2d 758, 762 (1979)).

<sup>20</sup> *See id.* at 311.

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

cles.<sup>23</sup> In *Coffman*, the defendant, Douglas M. Coffman, was convicted of second offense driving under the influence of alcohol and had his driving privileges revoked by the West Virginia Division of Motor Vehicles Commissioner, (hereinafter “the Commissioner”).<sup>24</sup> After having his privileges suspended by the Commissioner, the defendant appealed to the circuit court, arguing that he had not been promptly presented to a magistrate for a preliminary hearing.<sup>25</sup> The circuit court held a hearing on the issue and affirmed the decision.<sup>26</sup> Subsequently, the defendant filed a motion requesting the circuit court to vacate this decision.<sup>27</sup> By final order on July 18, 2000, the circuit court vacated this order, finding that the original order was inconsistent with prior rulings on the same legal issues in the same court.<sup>28</sup> The Commissioner then appealed this order.<sup>29</sup>

After restating Rule 60(b), the court observed that the record indicated that the trial court granted defendant’s motion because it found that a mistake had been committed.<sup>30</sup> In its analysis, the court ruled that one of the purposes of Rule 60(b) is to provide the means for a collateral attack on a final judgment when certain extraordinary circumstances were present.<sup>31</sup> Further, the court held that “when such extraordinary circumstances are absent, a collateral attack is an inappropriate means for attempting to defeat a final judgment in a civil action.”<sup>32</sup> The court went onto rule that because this rule is not to be liberally construed,<sup>33</sup> and the prior cases cited as the mistake in the prior holding were argued at the first hearing,<sup>34</sup> granting a 60(b) motion under these circumstances was erroneous.<sup>35</sup> As a result, the amended order of the circuit court was reversed and vacate, and the decision by the Commissioner was reinstated.<sup>36</sup>

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<sup>23</sup> 551 S.E.2d 658 (W. Va. 2001).

<sup>24</sup> *See id.* at 660.

<sup>25</sup> *See id.* at 661.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.* at 662.

<sup>28</sup> *Coffman v. West Virginia Division of Motor Vehicles*, 551 S.E.2d 658, 665 (W. Va. 2001).

<sup>29</sup> *See id.* at 661.

<sup>30</sup> *See id.* at 662.

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See id.*

<sup>34</sup> *Coffman v. West Virginia Division of Motor Vehicles*, 551 S.E.2d 658, 672 (W. Va. 2001).

<sup>35</sup> *See id.* at 662-63.

<sup>36</sup> *See id.* at 663.



In *Taylor v. Elkins Home Show*,<sup>37</sup> purchasers of a mobile home from the defendant complained that the contractor installed the home incorrectly and that the mobile home was damaged.<sup>38</sup> The plaintiffs filed suit.<sup>39</sup> During the trial, the court denied the retailer's motion for judgment as a matter of law, but granted a new trial as to one issue on damages.<sup>40</sup> The retailer filed a West Virginia Rule of Civil Procedure 60(b)(6) motion for reconsideration and then filed a renewed motion for judgment as a matter of law.<sup>41</sup> The trial court granted the motion.<sup>42</sup> In reviewing the trial court's decision, the supreme court noted that:

In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.<sup>43</sup>

The court found that the trial court retained its authority to vacate its order granting a new trial and to grant judgment as a matter of law on behalf of the retailer.<sup>44</sup> Further, the trial court was not required to set forth findings of fact and conclusions of law in its order under West Virginia Rule of Civil Procedure 52(a).<sup>45</sup> The plaintiffs also failed to produce sufficient evidence on damages to the property to sustain a verdict on their behalf, or to show a basis for an award of aggravation and inconvenience damages.<sup>46</sup>

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<sup>37</sup> 558 S.E.2d 611 (W. Va. 2001).

<sup>38</sup> *See id.* at 613.

<sup>39</sup> *See id.*

<sup>40</sup> *See id.* at 614.

<sup>41</sup> *See id.* at 615.

<sup>42</sup> *See id.* at 616.

<sup>43</sup> *See id.* at 615.

<sup>44</sup> *See id.* at 616.

<sup>45</sup> *See id.*

<sup>46</sup> *See id.* at 619.

#### D. *Res Judicata*

In *Willard v. Whited*,<sup>47</sup> the court was forced to apply the doctrine of res judicata to the West Virginia Uniform Declaratory Judgment Act. This case involved former litigation where a widower took his intestate share pursuant to West Virginia Code section 42-3-1 in lieu of the amount he was bequeathed under the will.<sup>48</sup> Accordingly, the circuit court below appointed a special administrator to make the determination of the widower's intestate share, which was approved by the circuit court by order dated August 6, 1998.<sup>49</sup> The widower died sometime later, and the executor of the widower's estate filed a motion for relief from judgment for the court to "fix and determine certain matters pertaining to the special commissioner's report."<sup>50</sup> The circuit court found that because the judgment in that case had been in effect for over one year, it no longer had subject matter jurisdiction over the matter and denied the motion.<sup>51</sup>

The widower's executor then filed a second civil suit under the Uniform Declaratory Judgments Act<sup>52</sup> and alleged that his estate was entitled to certain credits or offsets of the elective share amount found in the special commissioner's report.<sup>53</sup> The executor for the widower's wife's estate filed a motion to dismiss, alleging that the case should be dismissed pursuant to the doctrine of res judicata, which was granted by the circuit court.<sup>54</sup> This appeal followed.

After restating the elements for res judicata,<sup>55</sup> the court found that there was a "final adjudication on the merits in the previous action," that the case involved the same parties as the previous action had, and that "the issue presented

<sup>47</sup> No. 29372, 2001 WL 1525000, at \*2 (W. Va. Nov. 30, 2001).

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See* W. VA. CODE § 55-13-1 (2001).

<sup>53</sup> *See* *Willard v. Whited*, No. 29372, 2001 WL 1525000, at \*2 (W. Va. Nov. 30, 2001).

<sup>54</sup> *See id.* at \*3.

<sup>55</sup> *See id.* The court restated the following elements that must be met before a lawsuit may be barred under the theory of res judicata:

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

*See id.* (quoting *Blake v. Charleston Area Medical Ctr.*, 498 S.E.2d 41, syl. pt. 4 (W. Va. 1997)).

in this case could have been resolved had it been presented in the prior action.”<sup>56</sup> The court noted that, pursuant to the doctrine of res judicata, a judgment in previous litigation by a court having subject matter jurisdiction and involving the same parties with similar issues is final and conclusive.<sup>57</sup> Further, the court held:

It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed on its merits. An erroneous ruling of the court will not prevent the previous matter from being res judicata.<sup>58</sup>

After holding that a collateral attack through the use of declaratory judgment action after the doctrine of res judicata has attached is not permissible, the judgment of the lower court was affirmed.<sup>59</sup>

*E. Appeal From Circuit Court Order Remanding Action Back to Magistrate Court*

In *Wolfe v. Welton*,<sup>60</sup> the court was faced with an appeal from a circuit court order granting a new trial in magistrate court.<sup>61</sup> This case was originally filed in magistrate court and involved a dispute over repair costs to a used car under the West Virginia Consumer Credit and Protection Act.<sup>62</sup> The magistrate court entered judgment to the defendant-car owner after a jury verdict in his favor.<sup>63</sup> As a result of this initial appeal to circuit court, the circuit court reversed the judgment of the magistrate court and remanded the case.<sup>64</sup> Before a new trial could be held, the defendant-car owner appealed to the West Virginia Supreme Court of Appeals.<sup>65</sup>

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<sup>56</sup> See *id.* at \*3.

<sup>57</sup> See *Willard v. Whited*, No. 29372, 2001 WL 1525000, at \*2 (W. Va. Nov. 30, 2001).

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> 558 S.E.2d 363 (W. Va. 2001).

<sup>61</sup> See *id.* at 366.

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* at 367.

<sup>65</sup> *Wolfe v. Welton*, 558 S.E.2d 363, 367 (W. Va. 2001).

While ultimately disposing the case on substantive grounds,<sup>66</sup> the court held that “this court is vested with jurisdiction to hear an appeal from a circuit court judgment reversing the judgment of the magistrate court in a matter heard there on the merits, notwithstanding the fact that the order also undertakes to remand the case to the magistrate court for a new trial or other proceedings.”<sup>67</sup> The court also observed that the circuit court’s standard of review of the magistrate court judgment is *de novo* only to a civil case heard by the magistrate court sitting without a jury.<sup>68</sup> Thus, because this case involved a magistrate jury trial and the circuit court still used a *de novo* standard of review, the circuit court committed error.<sup>69</sup>

#### F. Failure to Prosecute

In *Anderson v. King*,<sup>70</sup> the West Virginia Supreme Court of Appeals reversed the circuit court’s dismissal of the plaintiff’s case for the failure to prosecute.<sup>71</sup> The plaintiff filed suit against an attorney that he hired to perform a title search to property that the plaintiff purchased.<sup>72</sup> The plaintiff claimed that the attorney negligently performed the title search and consequently, the plaintiff lost his property.<sup>73</sup>

The court found that the circuit court abused its discretion because there was evidence that the plaintiff had taken substantial action to prosecute his case.<sup>74</sup> Previous delays were the result of the circuit court continuing the action

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<sup>66</sup> Justice Davis filed a rather vigorous concurring opinion, arguing that the case should have been reversed solely on procedural grounds given the multitude of errors committed by the circuit court. *See id.* (Davis, J., concurring).

<sup>67</sup> *See id.* at 374.

<sup>68</sup> *See id.* at 371. West Virginia Code section 50-5-12(d) provides that the standard of review by a circuit court hearing an appeal from magistrate court sitting without a jury is *de novo*. *See W. VA. CODE* § 50-5-12(d) (2001).

<sup>69</sup> *See id.* Although the court held that the circuit court erred by utilizing this standard of review, the court does not appear to provide any guidance on what the appropriate standard is when a circuit court is faced with an appeal of a magistrate action that involved a jury trial. *See id.*

<sup>70</sup> 556 S.E.2d. 815 (W. Va. 2001).

<sup>71</sup> *See id.* at 815-16.

<sup>72</sup> *See id.* at 815.

<sup>73</sup> *See id.* at 816.

<sup>74</sup> *See id.* at 817.

*sua sponte*.<sup>75</sup> Additionally, the plaintiff’s original attorney left his firm and never received the circuit court’s notice of intent to dismiss the action.<sup>76</sup>

The circuit court dismissed the action pursuant to West Virginia Code section 56-8-9, which permits a court, in its discretion, to dismiss any proceeding where there has been no order or proceeding but to continue it for more than one year.<sup>77</sup> Rule 41(b) of the West Virginia Rules of Civil Procedure supplements the statutory provision and permits the court, on motion, to reinstate on its trial docket any case within three terms after entry of the order of dismissal or nonsuit.<sup>78</sup> Dismissal for failure to prosecute is “a harsh sanction . . . and should be considered appropriate only in flagrant cases.”<sup>79</sup> “[I]f a party showed good cause for not prosecuting an action, the court should not reinstate the action if substantial prejudice would result to the other party.”<sup>80</sup> The court found that the plaintiff’s conduct was not flagrant and that he showed good cause reasons for not prosecuting the case.<sup>81</sup> Additionally, the court found that the defendant would not be substantially prejudiced by reinstating the plaintiff’s case.<sup>82</sup>

In *Howerton v. Tri-State Salvage*,<sup>83</sup> the West Virginia Supreme Court of Appeals reversed the circuit court’s order to dismiss the plaintiff’s case for the failure to prosecute under Rule 41(b) of the West Virginia Rules of Civil Procedure.<sup>84</sup> The plaintiff’s counsel claimed that neither the notice of intent to dismiss nor the dismissal order were received.<sup>85</sup> Accordingly, the plaintiff moved to reinstate the action.<sup>86</sup>

Before a case may be dismissed under Rule 41(b), the following guidelines should be followed: “First, when a circuit court is contemplating dismissing an action under Rule 41(b), the court must first send a notice of its intent to do so to all counsel of record and to any parties who have appeared and do not have counsel of record.”<sup>87</sup> Second, any party opposing such motion shall serve

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<sup>75</sup> See *id.*  
<sup>76</sup> See *id.* at 818.  
<sup>77</sup> See *id.* at 817.  
<sup>78</sup> See *id.*  
<sup>79</sup> *Id.* (quoting *Dimon v. Mansey*, 479 S.E.2d 339, 344 (W. Va. 1996)).  
<sup>80</sup> *Id.* (quoting *Dimon*, 479 S.E.2d at 344-45).  
<sup>81</sup> See *id.*  
<sup>82</sup> See *id.* at 818.  
<sup>83</sup> 557 S.E.2d 287 (W. Va. 2001).  
<sup>84</sup> See *id.* at 289-90.  
<sup>85</sup> See *id.* at 288.  
<sup>86</sup> See *id.*  
<sup>87</sup> *Howerton v. Tri-State Salvage, Inc.*, 557 S.E.2d 287, 289 (W. Va. 2001).

upon the court and the opposing counsel a response to such motion within fifteen days of the service of such motion, or appear and resist such motion if it be sooner set for hearing.<sup>88</sup> Third, if no motion is made opposing dismissal, or if a motion is made and is not set for hearing by either party, the court may decide the issue upon the existing record after expiration of the time for serving a motion and any reply.<sup>89</sup> Fourth, the plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action; if the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice to it in allowing the case to proceed; if the defendant does show substantial prejudice, then the burden of production shifts to the plaintiff to establish that the proffered good cause outweighs the prejudice to the defendant.<sup>90</sup> Fifth, the court, in weighing the evidence of good cause and substantial prejudice, should also consider “(1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and (3) other relevant factors bearing on good cause and substantial prejudice.”<sup>91</sup> Sixth, if a motion opposing dismissal has been served, the court shall make written findings, and issue a written order which, if adverse to the plaintiff, shall be appealable to this court as a final order; if the order is adverse to the defendant, an appeal on the matter may only be taken in conjunction with the final judgment order terminating the case from the docket.<sup>92</sup> Seventh, if the plaintiff does not prosecute an appeal of an adverse decision to this court within the period of time provided by our rules and statutes, the plaintiff may proceed under Rule 41(b)’s three-term rule to seek reinstatement of the case by the circuit court.<sup>93</sup> Eighth, should a plaintiff seek reinstatement under Rule 41(b), the burden of going forward with the evidence and the burden of persuasion shall be the same as if the plaintiff had responded to the court’s initial notice, and a ruling on reinstatement shall be appealable.<sup>94</sup>

The court found that although the injured party was less than diligent in prosecuting his case, dismissal was unwarranted.<sup>95</sup> The plaintiff’s interest in

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<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> *Howerton v. Tri-State Salvage, Inc.*, 557 S.E.2d 287, 289-90 (W. Va. 2001).

<sup>93</sup> *See id.* at 290.

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

moving forward with his claim outweighed concerns for judicial efficiency and any prejudice that the defendant may have suffered.<sup>96</sup>

### G. Service of Process

In *Kelley v. Toyota*,<sup>97</sup> the West Virginia Supreme Court of Appeals reversed the circuit court's order to dismiss the plaintiff's case under Rule 4(k) of the West Virginia Rules of Civil Procedure.<sup>98</sup> Rule 4(k) states in pertinent part:

*Time Limit for Service.*--If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effective within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.<sup>99</sup>

The plaintiff's attorney timely submitted a fee for service to the Circuit Clerk's Office with the understanding that it would be forwarded to the Secretary of State's Office.<sup>100</sup> Although the fee was inadequate, the Circuit Clerk failed to notify the attorney in a timely fashion.<sup>101</sup>

Relying on *State ex rel. Charleston Area Medical Center, Inc. v. Kaufman*,<sup>102</sup> the court stated that dismissal is not mandatory if a plaintiff shows good cause for not having effected service of the summons and complaint in a timely manner.<sup>103</sup> In this case, the attorney promptly moved to correct the problem when it came to his attention.<sup>104</sup> Consequently, the court held that under these circumstances, the plaintiff demonstrated good cause for failing to perfect service of process.<sup>105</sup>

J. Christopher Gardill

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<sup>96</sup> See *id.*

<sup>97</sup> 557 S.E.2d 315 (W. Va. 2001).

<sup>98</sup> See *id.* at 315.

<sup>99</sup> See *id.* at 318 (citing W. VA. R. CIV. P. 4(k)).

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> 475 S.E.2d 374 (W. Va. 1996).

<sup>103</sup> See *id.* at 374.

<sup>104</sup> See *Kelley*, 557 S.E.2d at 315.

<sup>105</sup> See *id.*

*Ashley Wilkinson*

## II. COMMERCIAL LAW

### A. *Introduction*

In 2001, the West Virginia Supreme Court of Appeals and the West Virginia Legislature made several modifications to West Virginia's commercial law. It is the intent of this survey to briefly summarize many of the significant modifications. These various alterations include court decisions regarding judicial interference with business management, interpretation of "liens" under the West Virginia Uniform Fraudulent Transfers Act, and modifications to the West Virginia tax code. The legislature also modified the tax code, including a bill favoring clean fuel technology, and enacted the Uniform Athlete Agents Act. Additionally, this survey will note the other significant changes in corporate law.

### B. *Corporate Law*

In *State ex rel. Smith v. Evans*,<sup>106</sup> the West Virginia Supreme Court of Appeals considered whether a circuit court has the authority, through an equitable remedy, to reinstate a corporate officer after his termination upon recommendation of the board of directors of the sole shareholder.<sup>107</sup> The court held that in the absence of fraud, conduct amounting to fraud, or oppressive conduct by the majority shareholder, the corporation had the uncontrollable right to manage the corporation. Furthermore, the court was without power to grant an equitable remedy that in essence exerted control over the management of the corporation or prevented its officers from performing their corporate duties.<sup>108</sup>

The court applied well-recognized principles of corporate law to resolve the issue presented in the case. However, to understand the application of the principles, a brief restatement of the pertinent facts is necessary. Larry D. Smith was the president of Petroleum, Inc.<sup>109</sup> Petroleum, Inc. was the wholly-owned subsidiary of Smith, Inc.<sup>110</sup> Larry D. Smith, Eddie B. Smith, and Donald P. Smith are the three equal shareholders of Smith, Inc. and comprised its board of directors.<sup>111</sup>

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<sup>106</sup> 547 S.E.2d 278 (W. Va. 2001).

<sup>107</sup> *See id.* at 278.

<sup>108</sup> *Id.* at 282.

<sup>109</sup> *Id.* at 281.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*



On April 2, 1999, Larry D. Smith filed a shareholder derivative suit in circuit court against the individual petitioners in the case and Smith, Inc., alleging that Eddie B. and Donald P. Smith converted assets, breached fiduciary duties, engaged in fraud and misrepresentation, and were unjustly enriched as a result of these activities.<sup>112</sup> Subsequently, on March 2, 2001, Smith, Inc., acting through its President Eddie B. Smith and through its board of directors, removed Larry D. Smith from his positions of president of Petroleum, Inc. and director of Smith, Inc.<sup>113</sup> On the same day, petitioners moved the circuit court to confirm the removal of Larry D. Smith as President of Petroleum, Inc. and as director of Smith, Inc.<sup>114</sup> In the circuit court's order, dated April 4, 2001, among other things, the court ordered the reinstatement of Larry D. Smith as president of Petroleum, Inc. and enjoined Eddie B. and Donald P. Smith from interfering with the operations of Petroleum, Inc. during the subsequent pendency of the litigation.<sup>115</sup> It is from this order that the petitioners sought a writ of prohibition challenging the circuit court's authority to issue that portion of its April 4, 2001, order.

The court began its analysis by examining existing corporate law as interpreted by the West Virginia courts. First, in syllabus point 1 of *Smiley v. New River*, the court stated:

The majority of the stockholders of a solvent going corporation, in the absence of fraud, or conduct amounting to fraud, and so long as they keep within their charter, have uncontrollable right to manage the corporate affairs, and a court of equity will not interfere at the instance of a minority or the stockholders, by receivers or otherwise, to control corporate acts or management.<sup>116</sup>

Furthermore, the court similarly recognized that in the absence of fraud, the corporation retains the power to remove its officers and directors<sup>117</sup> "whenever in its judgment the best interests of the corporation will be served thereby."<sup>118</sup> Similarly, absent statutory authority, a court lacks jurisdiction to

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 282.

<sup>116</sup> *Smiley v. New River*, 77 S.E. 976, syl. pt. 1 (W. Va. 1913).

<sup>117</sup> *Id.* at 282; see also 2 Fletcher Cyclopedia Corp. § 358 (1998).

<sup>118</sup> W. VA. CODE § 31-1-104(b) (1975).

grant injunctions restraining a corporation's officers from performing their duties, as this would have the same practical effect of removal.<sup>119</sup>

Larry D. Smith offered in support of his argument that the reinstatement and related orders were within the circuit court's authority, because when a finding of "oppressive conduct" is supported, the court has the power to grant equitable relief.<sup>120</sup> The West Virginia Supreme Court of Appeals stated that when a board of directors violates the fiduciary duty of good faith or fair dealing it owes the shareholders, a finding of "oppressive conduct" is warranted.<sup>121</sup> Furthermore, the court noted that an attempt "to freeze or squeeze out a minority shareholder from deriving any benefit from his investment in a private business corporation, without any legitimate business purpose, may constitute oppressive conduct."<sup>122</sup>

However, the court noted that there was no indication in the record of the circuit court of a finding of "oppressive conduct."<sup>123</sup> Thus, the court applied the traditional principles of corporate law as articulated in *Smiley and Harkey*. Accordingly, the court found that the factual record before it was void of any fraud or conduct amounting to fraud, and because no evidence of oppressive conduct was adduced at trial, the circuit court was without power to invade a properly effected business decision and reinstate Larry D. Smith to president of Petroleum, Inc. and director of Smith, Inc.<sup>124</sup>

In conclusion, the court stressed the principle that, even in the situation where one corporation is wholly-owned by a single shareholder, in the absence of fraud-like conduct or breach of fiduciary duty, a court is without power to invade the province of a corporation's board of directors' decision and alter a properly carried out business decision of the corporation.<sup>125</sup>

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<sup>119</sup> See *Harkey v. Mobley* 552 S.W.2d 70 (Mo. Ct. App. 1977) (holding that only a corporation has the power of a motion). The West Virginia Supreme Court of Appeals has held that a motion is "the removal of an officer in a corporation from his office." *Richards v. Town of Clarksburg*, 4 S.E. 774 (W. Va. 1887).

<sup>120</sup> See *Masinter v. WEBCO, Co.*, 262 S.E.2d 433 (W. Va. 1980) (holding that where "oppressive conduct" is proven, an exception to the general rule that courts will not interfere in the management of a corporation is warranted; therein, the court identified multiple equitable remedies that it may grant to a party that has suffered because of the oppressive conduct).

<sup>121</sup> *Id.* at syl. pt. 3.

<sup>122</sup> *Id.* at syl. pt. 4.

<sup>123</sup> *Smith*, 547 S.E.2d at 283.

<sup>124</sup> *Id.* at 285.

<sup>125</sup> See *id.*

C. *“Liens” Under the West Virginia Uniform Fraudulent Transfers Act*

In *Nicholas Loan & Mortgage, Inc. v. W.Va. Coal Co-Op, Inc.*,<sup>126</sup> the West Virginia Supreme Court of Appeals considered whether the voluntary creation of a lien could constitute a “fraudulent transfer” under the West Virginia Uniform Fraudulent Transfers Act, codified in the West Virginia Code sections 40-1A-1 *et seq.* (the “Act”).<sup>127</sup> The court held that where a debtor, after a suit is initiated against it by a creditor, allowed liens to be filed against substantially all of its assets giving a security interest in said assets to an insider, as defined in the Act, a “transfer” had occurred under the Act.<sup>128</sup> Furthermore, sufficient facts existed in the record to create a genuine issue of material fact precluding the circuit court’s granting of summary judgment holding that a “fraudulent transfer” had not occurred.<sup>129</sup>

The dispute involved a loan made on September 18, 1995, by Nicholas Loan & Mortgage, Inc. (“Nicholas Loan”) to William A. Ray, individually and on behalf of W. Va. Coal Co-Op, Inc. (“Coal Co-Op”), in his capacity as general manger, in the amount of \$63,956.83 (the “Loan”).<sup>130</sup> Nicholas Loan is a lending institution operating in Summersville, West Virginia.<sup>131</sup> Coal Co-Op, a West Virginia corporation owned by Gail Ray, wife of William A. Ray, buys, refurbishes, and sells mining equipment.<sup>132</sup> Shortly after the loan was made, Coal Co-Op and William A. Ray discontinued repayment of the Loan.<sup>133</sup>

On September 18, 1996, Nicholas Loan filed suit against Coal Co-Op and William A. Ray to collect the unpaid portion of the Loan.<sup>134</sup> On March 27, 1998, the Secretary of State accepted service of process on behalf of Coal Co-Op.<sup>135</sup> Thereafter, on April 2, 1998, Gail Ray executed three promissory notes (the “Promissory Notes”) payable to Dr. David Ray, her son, on behalf of several parties for various amounts of money totaling \$85,000.<sup>136</sup> Gail Ray executed notes obligating Coal Co-Op, Ray Sales (another family company con-

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<sup>126</sup> 547 S.E.2d 234 (W. Va. 2001).

<sup>127</sup> *See id.* at 239.

<sup>128</sup> *Id.* at 239.

<sup>129</sup> *Id.* at 241.

<sup>130</sup> *Id.* at 235.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 236.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (explaining that for an unknown administrative reasons, the West Virginia Secretary of State refused to accept service of process for Coal Co-Op when service was previously attempted).

<sup>136</sup> *Id.*

trolled by Gail Ray) and herself personally to Dr. Ray.<sup>137</sup> Following the execution of the promissory notes, on April 8, 1998, three liens were filed in the Nicholas County Courthouse granting Dr. Ray a security interest in virtually all of Coal Co-Op, Ray Sales, and Gail Ray's assets.<sup>138</sup> The lien at issue in the present case was the lien pledging the assets of Coal Co-Op for the repayment of the promissory notes.<sup>139</sup> Dr. Ray testified that these liens secured multiple loans he had made to his parents and their businesses throughout the 1990s, which had not been repaid.<sup>140</sup>

Nicholas Loan subsequently filed a new complaint alleging that the defendants entered into a scheme violating the Act and that the liens were filed with the intent to delay, hinder or defraud its rights.<sup>141</sup> The defendants responded that the liens only created a security interest in the property but fell short of a "transfer" prohibited by the Act.<sup>142</sup> Thus, the court was left to resolve whether a lien filed after a suit had been instituted against the debtor, granting an insider, as defined in the Act, a security interest in virtually all of the debtor's assets constituted a "fraudulent transfer" under the Act.

The court began its analysis by examining the definitions given "lien" and "transfer" in the Act.<sup>143</sup> "Lien" is defined as "a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement."<sup>144</sup> "Transfer" is later defined as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of *disposing of or parting with* an asset or an interest in an asset, and includes payment of money, release, lease and *creation of a lien or other encumbrance*."<sup>145</sup> The court found that the language of the statute was unambiguous and, thus, held that the plain meaning is to be accepted without resorting to principles of statutory interpretation.<sup>146</sup> Thereafter, the court reasoned that "lien"

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (stating that the lien pledged as security "all of the debtor's [Coal Co-Op] inventory, now owned or hereafter acquired, and wherever located, including without limitation, accounts receivable, cash, contract rights, and general intangibles").

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 237.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 238.

<sup>144</sup> W. VA. CODE § 40-1A-1(h) (1986) (defining the term as it was understood when the West Virginia Uniform Fraudulent Transfers Act was adopted by the West Virginia Legislature in 1986 and remains to be understood presently).

<sup>145</sup> W. Va. CODE § 40-1A-1(l) (1986) (emphasis added).

<sup>146</sup> *Nicholas Loan & Mortgage, Inc.*, 547 S.E.2d at 238; *see also State v. Jarvis*, 487 S.E.2d 293 (W. Va. 1997).

under the Act includes the consensual creation of a security interest in the property of a debtor to secure the repayment of a debt.<sup>147</sup> Furthermore, the creation of a lien or other such encumbrance on the debtor's assets constitutes a "transfer" under the Act.<sup>148</sup> Thus, the remaining question for the court was whether the transfer determined to have taken place between Gail Ray and Dr. Ray was "fraudulent" under the Act.

The Act provides that a creditor may prove a transfer fraudulent by showing that the debtor acted with intent to hinder, delay, or defraud a creditor.<sup>149</sup> The court reasoned that because the transfer was made to an insider,<sup>150</sup> after Gail Ray and Coal Co-Op had been sued by Nicholas Loan, and that the transfer represented substantially all of the debtor's assets, then there was sufficient evidence suggesting that the defendant's intended to hinder, delay, or defraud Nicholas Loan.<sup>151</sup> Therefore, because these facts are substantially the same as several factors listed in section 4(b) of the Act, a genuine issue of material fact existed as to whether the transfer was "fraudulent" under the Act, thus precluding the granting of summary judgment in favor of the defendant's by the circuit court.<sup>152</sup> The court then reversed the order of the circuit court.

The holding of this case clearly states that the creation of a lien is considered a transfer under the Act and depending upon the facts surrounding the creation of a lien, a fact-finder may conclude that such transfer was fraudulent and accordingly set the transfer aside to protect the interests of existing creditors, secured or unsecured.

#### D. Taxation

##### 1. Case Law

###### a. RGIS Inventory Specialists v. Palmer

In *RGIS Inventory Specialists v. Palmer*,<sup>153</sup> the issue was whether the actual electronic recording of inventory is exempt from West Virginia's sales

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<sup>147</sup> *Nicholas Loan & Mortgage, Inc.*, 547 S.E.2d at 238.

<sup>148</sup> *Id.*

<sup>149</sup> See W. VA. CODE § 40-1A-4(a) (1986); See also W. Va. CODE § 40-1A-4(b) (1986) (listing numerous factors to be considered by the court when determining whether a challenged transfer is fraudulent under the Act and susceptible of being set aside by the court).

<sup>150</sup> Defined by the Act as "a relative of the debtor" or when the debtor is a corporation, "a relative of a person in control of the debtor. W. VA. CODE § 40-1A-1(g)(1)(i) and -1(g)(2)(vi) (1986).

<sup>151</sup> *Nicholas Loan & Mortgage, Inc.*, 547 S.E.2d at 240.

<sup>152</sup> *Id.*

<sup>153</sup> 544 S.E.2d 79 (W. Va. 2001).

tax.<sup>154</sup> According to the West Virginia Code, “[s]ales of electronic data processing services and related software” is exempt from the state sales tax.<sup>155</sup> “Electronic data processing services” is defined as :

(A) The processing of another’s data, *including all processes incident to processing of data* such as keypunching, keystroke verification, rearranging or sorting of previously documented data for the purpose of data entry or automatic processing and changing the medium on which data is sorted,. . . and (B) providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to the computer equipment.<sup>156</sup>

RGIS argued that under the plain meaning of this statute its services (i.e., taking inventory for businesses) are exempt from sales tax, because taking the inventory is incidental to the processing of the data.<sup>157</sup> The Tax Commissioner argued that RGIS was not processing data when it takes inventory, but rather creating data. Therefore, the court was required to determine what in fact the customer was buying and what was incidental to the purchase in this case.<sup>158</sup>

The court began its analysis with the principal that “where a person claims an exemption from a law imposing a . . . tax, such law is strictly construed against the person claiming the exemption.”<sup>159</sup> The court reasoned that in the statute “‘data’ is something that is initially ‘documented’ in one form.”<sup>160</sup> To bolster this argument, the court relied upon a Minnesota Court of Appeals decision to further explain that mental impressions or thoughts are not data until they have been recorded.<sup>161</sup> Thus, the court concluded that the individual items on the shelves being counted by RGIS’s staff are not data, nor did the legislature intend for individual items to be considered data. The court then held that RGIS had not proven that its activity was within the exemption because, its inventory activity (i.e., the actual act of taking the inventory) was not “the processing of another’s data,” but rather “the *creation* of another’s data.”<sup>162</sup>

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<sup>154</sup> *See id.*

<sup>155</sup> W. VA. CODE § 11-15-9(a)(22) (1997) (emphasis added).

<sup>156</sup> *Id.*

<sup>157</sup> *RGIS Inventory Specialists*, 544 S.E.2d at 83-84.

<sup>158</sup> *Id.* at 82 (citing W. VA. CODE ST. R. § 110-15-76.1.1).

<sup>159</sup> *Id.* (quoting *Shawnee Bank Inc. v. Paige*, 488 S.E.2d 20, syl. pt. 4 (W. Va. 1997)).

<sup>160</sup> *Id.* at 85.

<sup>161</sup> *Id.* at 86 (citing *Keezer v. Spickard* 493 N.W.2d 614 (Minn. Ct. App. 1993)).

<sup>162</sup> *Id.* at 87.

b. Syncor International Corp. v. Palmer

*Syncor International Corp. v. Palmer*<sup>163</sup> raised the issue of whether the sale of unit doses of nuclear medicine, or radiopharmaceuticals, is exempt from the state sales tax.<sup>164</sup> Under existing state law “[s]ales of drugs dispensed upon prescription and sales of insulin to consumers for medical purposes” are exempt from the state sales tax.<sup>165</sup> Syncor International Corp. (“Syncor”) sells radiopharmaceuticals, or nuclear medicines. Syncor’s “core” sales “involve[] unit doses of radiopharmaceuticals prepared for a particular, individual patient pursuant to the prescription of that patient’s physician.”<sup>166</sup>

The Tax Commissioner argued that these “core” sales are not exempt from the sales tax for two reasons. First, the statutory language exempts the sale “when the patient directly buys and self-administers a ‘drug.’”<sup>167</sup> Therefore, the sales should not be exempt because the hospital is the buyer and the drug is not self-administered by the patient. Second, state regulations, written by the state tax department, do not exempt drugs “sold to hospitals . . . which are to be consumed in the performance of a professional service.”<sup>168</sup> Thus, all sales of nuclear medicines are taxable, because the medicine is always consumed in the performance of a professional service. Syncor argued that the tax department had exceeded its authority by changing the statutory framework, as West Virginia Code section 11-15-9(a)(11) does not make a distinction between self administration or professional administration of the pharmaceutical.<sup>169</sup> Syncor argued that the state tax department did not have the power to alter the exemption under the statute with a regulation, because the regulations are not to change the statutory framework.

The court began its analysis by stating, “Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.”<sup>170</sup> The court reasoned that the statutory exemption was clear, and held that the statute does exempt the sale of nuclear medicines “purchased and dispensed pursuant to a physician’s prescription that was prepared for a particular, individual patient.”<sup>171</sup> The court explained that the Tax Com-

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<sup>163</sup> 542 S.E.2d 479 (W. Va. 2001).

<sup>164</sup> *See id.*

<sup>165</sup> W. VA. CODE § 11-15-9(a)(11) (1997).

<sup>166</sup> *Syncor Int’l Corp.*, 542 S.E.2d at 481.

<sup>167</sup> *Id.* at 482.

<sup>168</sup> *Id.* (quoting W. VA. CODE ST. R. § 110-15-92.2).

<sup>169</sup> *Id.* at 483.

<sup>170</sup> *Id.* (quoting *Crockett v. Andrews*, 172 S.E.2d 384, syl. pt. 2 (W. Va. 1970)).

<sup>171</sup> *Id.* at 484.

missioner's arguments were wrong, because the exemption did not depend on who purchased the drug nor on who administered it.

c. Citizens Bank of Weston, Inc. v. City of Weston

In the recent case of *Citizens Bank of Weston, Inc. v. City of Weston*,<sup>172</sup> the West Virginia Supreme Court of Appeals analyzed the city of Weston's municipal business and occupation tax ("B&O tax"), to determine whether its application to the Citizens Bank of Weston violated the state and federal equal protection provisions.<sup>173</sup> Citizens argued that the B&O tax "should not be upheld because the rate setting among the various business classes was performed arbitrarily and capriciously and because the rate setting lack[ed] a rational basis."<sup>174</sup> At the center of this contention was Citizens' allegation that the term "similar" in the statute, which conferred upon the municipality the power to enact the tax,<sup>175</sup> "requires any municipality that institutes a B&O tax to follow the exact same rate-setting and rate-to-class structure that was imposed by the state under its B&O tax system prior to its repeal on July 1, 1987."<sup>176</sup>

In refuting this argument, the court interpreted the statutory phrase "similar business and occupation tax,"<sup>177</sup> not to mean that any municipal tax enacted pursuant to the statute must be identical in rate and structure to the former state B&O tax, but instead to refer to "a similar kind of tax, i.e., a tax in the nature of a B&O tax."<sup>178</sup> Additionally, the court also upheld the constitutionality of the Legislature's right to delegate its taxing power to municipalities.<sup>179</sup>

Citizens next contended that the B&O tax had a disproportionate impact upon it and thus violated state and federal equal protection provisions. The court recognized that "equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner."<sup>180</sup>

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<sup>172</sup> 544 S.E.2d 72 (W. Va. 2001).

<sup>173</sup> *Id.* at 72.

<sup>174</sup> *Id.* at 76.

<sup>175</sup> W. VA. CODE § 8-13-5(a) (2000) ("Whenever any business activity or occupation, for which the state imposed its annual business and occupation or privilege tax under article thirteen . . . chapter eleven of this code, prior to July one, one thousand nine hundred eighty-seven, is engaged in or carried on within the corporate limits of any municipality, the governing body thereof shall have plenary power and authority, unless prohibited by general law, to impose a similar business and occupation tax thereon for the use of the municipality.").

<sup>176</sup> *Citizens Bank of Weston, Inc.*, 544 S.E.2d at 76.

<sup>177</sup> W. VA. CODE § 8-13-5(a).

<sup>178</sup> *Citizens Bank of Weston Inc.*, 544 S.E.2d at 77 n.12.

<sup>179</sup> *Id.* at 77.

<sup>180</sup> *Id.* (citing *Israel ex rel. Israel v. West Virginia Secondary Sch. Activities Comm'n*, 388 S.E.2d 480, syl. pt. 2 (W. Va. 1989)).



Citizens supported its disproportionate impact argument by asserting that it would be paying seventy percent of the tax while only participating in fifty percent of Weston's banking business.<sup>181</sup> In dismissing Citizens contentions, the West Virginia Supreme Court of Appeals relied on a United States Supreme Court decision in which the Court refused to allow a disparate-impact analysis with regard to the equal protection clause.<sup>182</sup> "[A]bsent proof of discriminatory purpose, a law or official act does not violate the Constitution 'solely because it has a . . . disproportionate impact.'"<sup>183</sup>

d. Coordinating Council For Independent Living, Inc. v. Palmer

In *Coordinating Council For Independent Living, Inc. v. Palmer*,<sup>184</sup> the West Virginia Supreme Court of Appeals upheld a circuit court's ruling on the inapplicability of a privilege tax to homemaker and case management services.<sup>185</sup> The statute at issue in this case imposes a tax of five percent of the gross value of health care services provided, on the provider of the service.<sup>186</sup> At the center of the dispute is whether the phrase "health care services" may properly be read to include either homemaker or case management services.<sup>187</sup>

Homemaker and case management services are funded through the West Virginia Medicaid program, and provide home health services as an alternative to residential care for elderly and disabled persons.<sup>188</sup> The court, using a *de novo* standard of review, admitted the statute was ambiguous, and that, therefore, it should be construed to ascertain the intent of the legislature before being applied.<sup>189</sup>

The court proceeded to analyze the statute by first recognizing that the word "certain" in the phrase "certain health care services," clearly shows that the legislature intended to tax only particular health care services, not all of them.<sup>190</sup> Additionally, "home health services" means, and is limited to, behav-

<sup>181</sup> *Id.* at 77 (noting that Citizens argued that the discrepancy is because its competitors report income at branches outside of Weston).

<sup>182</sup> *Id.* (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

<sup>183</sup> *Id.* (citing *Lewis v. Casey*, 518 U.S. 343, 375 (1996) (Thomas, J., concurring) (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976))).

<sup>184</sup> 546 S.E.2d 454 (W. Va. 2001).

<sup>185</sup> *Id.* at 464.

<sup>186</sup> W. Va. CODE § 11-13A-3 (1999).

<sup>187</sup> *Coordinating Council for Independent Living, Inc.*, 546 S.E.2d at 461.

<sup>188</sup> *Id.* at 457.

<sup>189</sup> *Id.* at 461.

<sup>190</sup> *Id.*

ioral health services and community care services.<sup>191</sup> The inquiry then turned to the definition of community care services, since behavioral health services were not at issue.<sup>192</sup> The court noted that it was troubled by the “lack of clarity as to the precise nature of ‘community care services,’”<sup>193</sup> but admitted that it did not contemplate services rendered by home health agencies.<sup>194</sup> With no definition for either homemaker or case management services, the court relied on the expression “*inclusio unius est exclusio alterius*,” or “the inclusion of one is the exclusion of the others.”<sup>195</sup> That doctrine “informs courts to exclude from operation those not included in the list of elements that are given effect expressly by statutory language.”<sup>196</sup>

Combining that tool of statutory construction with the policy of construing ambiguities in the tax laws in favor of the taxpayer,<sup>197</sup> the court held that the privilege tax levied upon health care service providers does not apply to case management services or homemaker services.<sup>198</sup>

Additionally, the court observed that it was troubled by “the draconian manner in which the Commissioner suddenly began enforcing the tax law which had been dormant since its adoption five years earlier.”<sup>199</sup> The court then proceeded to find that the procedure the Commissioner implemented to collect the tax was required to comply with the Administrative Procedures Act.<sup>200</sup> Because the Commissioner did not follow the “requisite mandates for formal proposal, approval, adoption, etc.,” of agency rulemaking, his “attempted enforcement of the health care services providers tax was void and ineffective.”<sup>201</sup>

*e.* Frantz v. Palmer

In the recent case of *Frantz v. Palmer*,<sup>202</sup> the West Virginia Supreme Court of Appeals considered the constitutionality of a statutory provision.<sup>203</sup>

<sup>191</sup> W. VA. CODE § 11-13A-3(c).

<sup>192</sup> *Coordinating Council for Independent Living, Inc.*, 546 S.E.2d at 462.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (citing *State ex rel. Roy Allen S. v. Stone*, 474 S.E.2d 554, 560 n.11 (W. Va. 1996)).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 463 (citing *State ex rel. Lambert v. Carman*, 116 S.E.2d 265 (W. Va. 1960)).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 464.

<sup>202</sup> *Frantz v. Palmer*, No. 29178, 2001 WL 1566731 (W. Va. Oct. 29, 2001).

The statute at issue reposes sole discretion in the Tax Commissioner with regard to issuance of a certification of adequate assets sufficient to secure performance in lieu of the appeal bond otherwise required by the statute.<sup>204</sup> The taxpayer challenged the legislative decision to grant the Tax Commissioner the sole authority to dispense with the bond requirement on the grounds that the legislature violated the state constitutional guarantee of open access to the courts by its enactment of the statute.<sup>205</sup> The taxpayer argued that the circuit court should have the ultimate authority to modify or waive the bond required for an appeal under the statute.

The court, analogizing to both criminal<sup>206</sup> and tax law,<sup>207</sup> held that the provision violated the constitutional guarantee of open access to the courts by omitting any provision for judicial review of the Tax Commissioner's decision. The court further reasoned that anyone "who otherwise complies with the statutory requirements for requesting a waiver of the appeal bond requirement, is entitled to apply to the circuit court for a review of any adverse determination concerning bond waiver."<sup>208</sup> However, a litigant who seeks a waiver of an appeal bond within the ninety-day statutory period after the filing of the appeal, must seek judicial review of the Tax Commissioner's decision within that same ninety day period.

## 2. Statutory Changes

### a. *Senate Bill 650*

Recently, the West Virginia Legislature, in an apparent effort to broaden the tax base, amended West Virginia Code section 11-15-2 to include construction management within the definition of contracting for sales and use tax purposes.<sup>209</sup> According to the amended section, a "construction manager" is "a

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<sup>203</sup> W. VA. CODE § 11-10-10(d) (1986) ("Notwithstanding the foregoing and in lieu of such bond, the tax commissioner, in his discretion upon such terms as he may prescribe, may upon a sufficient showing by the taxpayer, certify to the clerk of the circuit court that the assets of the taxpayer subject to the lien imposed by section twelve [§ 11-10-12] of this article, or other indemnification, are adequate to secure performance of the orders of the court.").

<sup>204</sup> *Id.*

<sup>205</sup> W. Va. CONST. art. III, § 17.

<sup>206</sup> *Champ v. McGee*, 270 S.E.2d 445, 447 (W. Va. 1980) ("[O]nce a person is convicted of a misdemeanor and sentenced to jail, he must post an appeal bond which, if cynically manipulated, can defeat his appeal.").

<sup>207</sup> Statutory tax provisions which deny a taxpayer's access to judicial review are unconstitutional. *See R. Commun., Inc. v. Sharp*, 875 S.W.2d 314 (Tex. 1994); *Jensen v. State Tax Comm'n*, 835 P.2d 965 (Utah 1992).

<sup>208</sup> *Frantz v. Palmer*, No. 29178, 2001 WL 1566731, \*1 (W. Va. Oct. 29, 2001).

<sup>209</sup> S.B. 650, 2001 Leg., 75th Sess. (W. Va. 2001).

person who enters into an agreement to employ, direct, coordinate or manage design professionals and contractors who are hired and paid directly by the owner or the construction manager.” Additionally, the business activities of such a construction manager are defined as “contracting, so long as the project for which the construction manager provides the services results in a capital improvement.”

*b. Senate Bill 447*

This recent amendment to the West Virginia Code added section 11-21-12(d), which has the effect of reducing federal adjusted gross income of certain retirees.<sup>210</sup> According to the section, any person who retires under an employer-provided defined benefit pension plan that terminates and is covered by a guarantor, may subtract annually the difference in the amount of the maximum annual pension benefit the person would have received had the plan not terminated, and the maximum benefit actually received from the guarantor under a benefit guarantee plan, if the guarantor’s maximum benefit guarantee is less than that enjoyed under the terminated plan. However, the tax commissioner has the power to adjust the percentage of the reduction to ensure that the revenues of the state are not reduced by two million dollars or more in any one year, due to this new subsection.

*c. House Bill 2968*

This bill amends West Virginia Code chapter 11, article 6a, entitled Pollution Control Facilities Tax Treatment, by creating section 5a of that chapter.<sup>211</sup> This new section states:

Each wind turbine installed at a wind power project and each tower upon which the turbine is affixed shall be considered to be personal property that is a pollution control facility for purposes of this article and all of the value associated with the wind turbine and tower shall be accorded *salvage valuation*. All personal property at a wind power project other than a wind turbine and tower shall be valued without regard to this article.

This appears to be an attempt by the legislature to favor clean fuel technology by granting preferential treatment under the tax laws to wind turbines. The legislature furthers this policy in favor of cleaner fuel by also modifying West Virginia Code section 11-13-2o(c)(2) in this bill to make the taxable generating capacity of a wind turbine unit five percent of the official capacity of the

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<sup>210</sup> S.B. 447, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>211</sup> H.B. 2968, 2001 Leg., 75th Sess. (W. Va. 2001).

unit, opposed to the forty percent of the generating capacity of all other new non-peaking plants.<sup>212</sup> One can only hope that this modification of the tax laws is an indication of future legislation favoring clean fuel technology.

*d. Senate Bill 405*

This bill amends West Virginia Code section 11-21-9 by adding two new definitions to the terms section of article twenty-one related to the West Virginia personal income tax.<sup>213</sup> First, the Legislature limited the definition of "medical savings accounts" so as not to include medical savings accounts established under West Virginia Code section 33-15-20 or -16-15 within the meaning of "taxable trust."<sup>214</sup> Furthermore, employer contributions to medical savings accounts created under said sections are not "wages" for purposes of withholding under § 11-21-71.<sup>215</sup>

Secondly, the Legislature clarified the meaning of the term "surtax" to mean:

the 20 percent additional tax imposed on taxable withdrawals from a medical savings account under . . . [§ 33-15-20] and the 20 percent additional tax imposed on taxable withdrawals from a medical savings account under . . . [§ 33-16-15] which are collected by the tax commissioner as tax collected under this article."<sup>216</sup>

Additionally, the Legislature expressly adopted, with respect to any term used in this article, the same meaning as that term has under the Internal Revenue Code of 1986 or any other provisions of the laws of the United States that relate to the determination of income for federal income tax purposes.<sup>217</sup> This statement applies to all amendments made to the federal laws referenced previously, provided they were made after December 31, 1999 but before January 1, 2001.<sup>218</sup> The amendments enacted under this bill are retroactive to the extent allowed under federal income tax law.<sup>219</sup> Furthermore, "[w]ith respect to taxable years that began prior to the first day of January, two thousand, the law

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<sup>212</sup> *Id.*

<sup>213</sup> S.B. 405, 2001 Leg., 75th Sess. (W. Va. 2001)

<sup>214</sup> *See* W. VA. CODE § 11-21-9(b) (2001).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* § 11-21-9(c).

<sup>217</sup> *Id.* § 11-21-9(a).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* § 11-21-9(d).

in effect for each of those years shall be fully preserved as to that year, except as provided in this section.”<sup>220</sup>

### E. General Statutory Changes

#### 1. House Bill 2482

This bill modifies West Virginia Code section 44-5-12 in two ways.<sup>221</sup> Subsection (a) is amended to establish guidelines for disbursement of funds when 1) the funds are inadequate to fund the bequest or trust completely and 2) the funds have not been “irrevocably set aside within fifteen months.” If either of these two situations occurs, the fiduciary “shall allocate to the bequest or trust a prorata share of the income earned” on the sum available to the fiduciary.<sup>222</sup> Prior to this amendment, fiduciaries had no clear mandate from the legislature as to their responsibilities when the trust or bequest could not be executed because of insufficient funds.

Furthermore, subsection (d) is added to this section of the code. Subsection (d) grants the fiduciary of any trust discretion to “divide the trust . . . for purposes of the generation skipping transfer tax . . . or any other tax” without court approval.<sup>223</sup> This section appears to have been added to alleviate the court system of the many requests for approval to divide a trust for tax purposes.

#### 2. Senate Bill 732

This bill made a few changes to the West Virginia Code.<sup>224</sup> First, the report of the state’s debt is also to be given to the members of the joint committee on government and finance in addition to the governor, president of the Senate, and speaker of the House. Second, this bill modifies article 9, section 109 of the Uniform Commercial Code. As amended, West Virginia Code section 46-9-109(c) no longer applies to the extent that it is superceded by the federal government, or: “The rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under § 5-114.”<sup>225</sup> Article 9 was also modified to be inapplicable to transfers by a government or government unit.<sup>226</sup> The next notable modification to article 9 is in §§ 406(i) and

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<sup>220</sup> *Id.*

<sup>221</sup> H.B. 2482, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> S.B. 732, Leg., 75th Sess. (W. Va. 2001).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

408(f). These modifications prevent assignments of “viatical settlements,” “workers compensation settlements” and “special needs trust.”<sup>227</sup>

### 3. Senate Bill 418

A recent West Virginia Senate Bill<sup>228</sup> amended some of the statutes associated with regulation of residential mortgage lenders, brokers and servers. Sections one, two, four, five, six, seven, eight, nine, twelve and fourteen, of article seventeen, chapter thirty-one of the West Virginia Code are the affected statutes. These amendments took effect July 1, 2001.

Part one of section one was amended to require that a loan be a “consumer” loan, and that the property in question must be owner occupied to meet the definition of “primary mortgage loan.”<sup>229</sup> Part two’s definition of “subordinate mortgage loan” was amended to also refer to a “consumer” loan and require owner occupancy. Part 4 includes persons who service mortgage loans in the regular course of business to be a “lender.”<sup>230</sup> Part 5 was changed to include within the definition of “broker” someone who originates, processes or assigns a primary or subordinate mortgage loan between a lender and a borrower in the regular course of business for a fee, commission or other consideration.<sup>231</sup> The amendment also changed the number of loans in a year triggering the presumption that a person is acting in the regular course of business from five years to one. Part 13 and 14 were added to provide definitions for “affiliated and “servicing,” respectively.<sup>232</sup>

Section two part B was amended to remove from the application of the article loans made by any lender licensed by, and under the regular supervision and examination for consumer compliance, of any agency of the federal government.<sup>233</sup> The former law had no “regular” or “examination for consumer compliance” provisions. Part B was also changed to remove from the application of the article loans made by counties or municipal governments, and to exclude loans by non-profit community development organizations only if they are to promote home ownership or improvements for the disadvantaged. Finally, part B was changed to exclude loans made by Habitat for Humanity International, Inc. and its affiliates providing low-income housing within the state from the operation of the statute.

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<sup>227</sup> S.B. 732, Leg., 75th Sess. (W. Va. 2001) (purpose statement).

<sup>228</sup> S.B. 418, Leg., 75th Sess. (W. Va. 2001).

<sup>229</sup> W. VA. CODE 31-17-1 (2002).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* § 31-17-2.

Section four was amended to provide that licensee bonds are for the benefit of consumers, to require applicants to pay the cost of fingerprint processing and to change the net asset requirement of lender's license applicants to a net worth requirement.<sup>234</sup> Additionally, applicant brokers who wish to participate in a table-funded residential mortgage loan must file a bond with the commissioner in the amount of \$50,000 as opposed to the normal \$25,000. Lastly, applicant brokers must pay a license fee of \$350 dollars, up from the previous \$150.<sup>235</sup>

Section five was amended to change the net asset requirement to a net worth requirement, and to give the commissioner discretion to consider the experience and general fitness of an applicant. Each application for a lender's or broker's license must now be passed or refused within ninety days, up from the previous forty-five. Finally, the provision which, upon denial of an application, permitted the commissioner to retain the investigation fee but return the license fee has been changed. Now the commissioner may retain all fees which recover the administrative costs of processing the application, regardless of origin.<sup>236</sup>

Section six was amended to change the net asset requirement to a net worth requirement. Also, foreign corporations no longer must, at all times after licensing, remain qualified to hold property in the state. Finally, a foreign corporation no longer must remain qualified to transact business in the state if it is otherwise exempt.<sup>237</sup>

Section seven was amended to provide a requirement that renewal applications, beginning in the year 2002, be conditioned upon the attainment of seven hours of continuing education for each loan originator employed by a licensed broker.<sup>238</sup>

Section eight was amended to provide that in refinancing a loan, a licensee may not impose the same charges made under the original loan, unless the new loan has a reasonable, tangible net benefit to the borrower in light of all the circumstances. The provision which formerly allowed new charges for a refinanced loan if the charges for the old loan had been rebated or credited to the consumer has been deleted. The definition for "affiliated" is now found in section one. A new provision requires that a borrower must be given a copy of every signed document executed by the borrower at the time of the closing. Licensee's may not require the borrower to pay certain charges in excess of six percent of the amount financed, up from the previous five percent maximum.

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<sup>234</sup> *Id.* § 31-17-4.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* § 31-17-5.

<sup>237</sup> *Id.* § 31-17-6.

<sup>238</sup> *Id.* § 31-17-7.



Lastly, the amendment has a provision which states that if no yield spread premium is charged, then the aggregate charges may not exceed five percent.<sup>239</sup>

Section nine was amended to provide that a HUD 1 or HUD 1A settlement statement that provides the disclosures required by the subsection and all of the federal law disclosures is considered to meet the requirements of the subsection. Additionally, a new provision requires licensees to keep and maintain its records regarding residential mortgage loans for thirty-six months after the date of final entry.<sup>240</sup>

Section twelve was amended to provide the commissioner with the authority to impose a penalty not exceeding one thousand dollars upon any person who he determines has violated the provisions of the chapter.<sup>241</sup>

Section fourteen was amended to provide a requirement that if the commissioner appoints a hearing examiner then the commissioner must issue his final order within fifteen days of receiving the examiner's recommended decision.<sup>242</sup>

#### 4. Senate Bill 69

This bill represents the creation of a new statutory lien related to self-service storage rental transactions.<sup>243</sup> This new statute is codified as West Virginia Code § 38-14-1 *et seq.*, and may be referred to as the "Self-Service Storage Lien Act."<sup>244</sup> The provisions of the Self-Service Storage Lien Act (the "Act") are effective as of and apply to all rental agreements entered into, extended or renewed after July 1, 2001.<sup>245</sup> The lien created by the Act grants to the owner<sup>246</sup> a self-service storage lien ("Lien") on all personal property "stored within such leased space for agreed rent, labor, or other charges and for expenses reasonably incurred in its sale or destruction."<sup>247</sup> The Act provides that the Lien attaches on the date that the personal property is first stored in the

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<sup>239</sup> *Id.* § 31-17-9.

<sup>240</sup> *Id.* § 31-17-12.

<sup>241</sup> *Id.* § 31-17-14.

<sup>242</sup> 31-17-1 (2002).

<sup>243</sup> S.B. 69, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>244</sup> W.VA CODE § 38-14-1 (2001).

<sup>245</sup> *Id.* § 38-14-9.

<sup>246</sup> *Id.* § 38-14-2(5) (defined as the "owner, operator, lessor or sublessor of a self-service storage facility or the person's agent or any other person authorized to manage the facility or to receive rent from any occupant under a rental agreement"). This section also distinguishes between an owner who can avail herself of the provisions of this article and a warehouseman, as used in W.VA CODE § 46-11-1 *et seq.*

<sup>247</sup> *Id.* § 38-14-3(a).

rented space and continues until the occupant satisfies all terms of the rental agreement.<sup>248</sup>

The Act provides for liens on personal property, including motor vehicles and watercraft.<sup>249</sup> In addition, certain mandatory requirements are set for the rental agreement itself, and presumably, if the rental agreement does not satisfy these requirements, the lien claimed by the owner can be challenged.<sup>250</sup> The Act provides for the charging of late fees which also would be secured by the Lien.<sup>251</sup>

Section five of the Act provides for enforcement of the Lien and is the heart of the Act. If the occupant is in default under the rental agreement, the owner must notify the occupant of the default, in a form that satisfies<sup>252</sup> the Act.<sup>253</sup> If the occupant does not cure<sup>254</sup> the default within sixty days, the owner may proceed to enforce the Lien by selling the contents of the occupant's unit at public auction. Alternatively, the owner may destroy the personal property therein if it can be established that the value of the personal property is insufficient to cover the reasonable costs of conducting a public auction plus the amount of the Lien.<sup>255</sup>

In the case of personal property having a fair market value greater than \$1,000 and against which a secured party has properly filed a financing statement in the name of the occupant, the owner must notify the lienholder of record by certified mail of the time and place of the public auction not less than thirty days prior to the auction.<sup>256</sup> At any time prior to the public auction, the lienholder may pay "the reasonable fees and costs due to the person possessing the self-service storage lien and take possession of the personal property which is subject to the lien."<sup>257</sup>

The Act requires the notice of default to include an itemized statement of the owner's claim, a demand for payment and a conspicuous statement that

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<sup>248</sup> *Id.* § 38-14-2(4) (defining occupant as "a person entitled to the use of a leased space at a self-service storage facility under a rental agreement, or the person's sublessee, successor or assign").

<sup>249</sup> *Id.* § 38-14-3.

<sup>250</sup> *Id.* § 38-14-3(c).

<sup>251</sup> *Id.* § 38-14-4.

<sup>252</sup> *Id.* § 38-14-5(c).

<sup>253</sup> *Id.* § 38-15-5(a).

<sup>254</sup> *Id.* § 38-14-5(d) (by paying the full amount necessary to satisfy the Lien ant any point prior to the public auction or destruction of the personal property).

<sup>255</sup> *Id.* § 38-14-5(a)(1).

<sup>256</sup> *Id.* § 38-14-5(a)(2) (or if the personal property is a motor vehicle or watercraft and a lien is listed on the certificate of title).

<sup>257</sup> *Id.*

unless the claim is paid prior to the enforcement of the Lien, the owner may either sell the occupant's personal property at public auction or destroy it.<sup>258</sup> All notices required under the Act are deemed delivered when deposited with the United States postal service, postage paid.<sup>259</sup> In addition, if the rental agreement so provides, an owner may, without judicial process, deny the occupant access to its personal property, presumably by changing the lock, so long as the owner displays a conspicuous sign on the premises stating the name, street address and telephone number of the owner or owner's agent who the occupant may contact to redeem her personal property.<sup>260</sup>

If the owner proceeds to enforce the Lien by holding a public auction, it must advertise the date, time and location of the public auction, the date, time and location where the property may be inspected and the form of payment acceptable.<sup>261</sup> If the owner proceeds in accordance with the provisions of the Act, the Act provides for limited liability of the owner.<sup>262</sup> Any remaining surplus obtained from the sale of personal property at public auction, after the owner satisfies the Lien therefrom, shall be held for delivery on demand of the occupant.<sup>263</sup>

Prior to a sale at public auction or destruction of the occupant's personal property, the owner must make a detailed inventory list of the personal property to be sold or destroyed and must maintain the inventory listing for a period of two years after the sale or destruction for review by the occupant.<sup>264</sup> A bone fide purchaser for value takes property purchased free from any claim of occupant or any other person against whom the Lien was valid.<sup>265</sup>

## 5. House Bill 2738

This bill makes two minor adjustments to the West Virginia Code in order to update the code to reflect the adoption of the limited liability company.<sup>266</sup> First, it adds section 31b-1-113. This new section requires a limited liability company that seeks or holds a class A liquor license to disclose in any required application the identities of all members or persons entitled to "a transfer of

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<sup>258</sup> *Id.* § 38-14-5(c).

<sup>259</sup> *Id.* § 38-14-5(h).

<sup>260</sup> *Id.* § 38-14-5(b).

<sup>261</sup> *Id.* § 38-14-5(f).

<sup>262</sup> *Id.* § 38-14-5(e).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* § 38-14-7.

<sup>265</sup> *Id.* § 38-14-5(g).

<sup>266</sup> H.B. 2378, 2001 Leg., 75th Sess. (W. Va. 2001).

money, property, or other benefit from [the] limited liability company.”<sup>267</sup> Second, this bill adds limited liability company and professional limited liability company to the definition of person in both section 47-9-1 and section 47b-1-1. It appears as though the legislature was updating the statutes to reflect the recent recognition of the limited liability company and professional limited liability company in the West Virginia Code.

## 6. Senate Bill 226

The Uniform Athlete Agents Act does three things in an effort to protect student athletes from the pressures of leaving college (or skipping college altogether) to enter professional sports arena.<sup>268</sup> First, it requires “athlete agents” to register with the secretary of state.<sup>269</sup> The Act defines “athlete agent” as “an individual who enters into an agency contract with a student-athlete or . . . recruits or solicits a student-athlete to enter into an agency contract.”<sup>270</sup> A “student-athlete” is “an individual who engages in, is eligible to engage in, or may be eligible to engage in, any intercollegiate sport.”<sup>271</sup> Consequently, a lawyer, registered with the state bar association, cannot act as an athlete agent in the state of West Virginia until he or she has also registered with the state as an “athlete agent.”

Second, the Act regulates the conduct of the athlete agent.<sup>272</sup> Violations of this Act carries the possibility of both criminal penalties and civil liability.<sup>273</sup> The criminal punishment varies from misdemeanor to a felony.<sup>274</sup> However, it is the civil penalties that should concern athlete agents and student athletes. The Act provides educational institutions that have incurred sanctions as a result of a violation of the Act “against an *athlete agent* or a *former student athlete* for damages caused by [the] violation .”<sup>275</sup> Possible damages to the school that result after a violation of this Act “include losses and expenses incurred because . . . the educational institution was . . . disqualified or suspended from participation in athletics by a national association for the promotion and regulation of athletics, by an athletic conference, or by reasonable self-imposed disciplinary

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<sup>267</sup> W. VA. CODE § 31b-1-101(2001).

<sup>268</sup> S.B. 226, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>269</sup> W. VA. CODE § 30-38-1 (2001).

<sup>270</sup> *Id.* § 30-38-2(2).

<sup>271</sup> *Id.* § 30-38-2(14).

<sup>272</sup> *See id.* § 30-38-14.

<sup>273</sup> *See id.* §§ 30-38-15 to -16.

<sup>274</sup> *See id.* § 30-38-15.

<sup>275</sup> *Id.* § 30-38-16(a) (emphasis added).

action taken to mitigate sanctions likely to be imposed by such.”<sup>276</sup> Thus, damages could be extremely high if West Virginia University were to lose its eligibility to compete in championship games because an athlete agent and/or student athlete violated the Act.

Finally, the Act regulates the content of the contract between the student athlete and the athlete agent.<sup>277</sup> Aside from description of the services to be provided and the rate of compensation, the contract is required to have a conspicuous statement that warns the student athlete of the potential problems of signing the contract as related to the student’s eligibility to compete as a student athlete.<sup>278</sup> The student is also granted a 14 day period after signing the contract in which he or she may cancel it without being required “to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.”<sup>279</sup>

#### F. *Conclusion*

In summary, the West Virginia Supreme Court of Appeals and the West Virginia Legislature made several minor modifications to the commercial law area. The Supreme Court’s decisions varied from corporate organization to the definition of “liens” under the West Virginia Uniform Fraudulent Transfers Act, to several cases interpreting the state’s tax code. The legislative acts in regards to taxation in 2001 included the usual attempt by the legislature to broaden the tax base, but also included a tax break for plants that employ wind power. The legislature also enacted the Self-Service Storage Lien Act and the Uniform Athlete Agents Act.

*G. Kurt Dettinger  
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### III. DOMESTIC RELATIONS

#### A. *Introduction*

In 2001, the West Virginia Supreme Court of Appeals and the West Virginia Legislature made numerous changes that impact families in West Virginia. These statutory enactments and opinions dealt with the rights and responsibilities of both custodial and non-custodial parents. The court also focused on

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<sup>276</sup> *Id.* § 30-38-16(b).

<sup>277</sup> *Id.* § 30-38-10.

<sup>278</sup> *See id.*

<sup>279</sup> *Id.*

visitation and custody rights of grandparents. The legislature enacted a statute establishing children's centers for the monitoring of custodial responsibilities. This digest article summarized recent family law cases and legislative enactments in the areas affecting family law in West Virginia.

## B. Divorce Generally

### 1. *Boarman v. Boarman*

*Boarman v. Boarman*<sup>280</sup> concerned an appeal of an order in a divorce proceeding. The order required Mr. Boarman to either pay a judgment held by his wife's attorney or face incarceration for contempt. Mrs. Boarman was awarded \$8,766.60 in attorney fees in the divorce proceedings and she assigned the judgment to her attorney.<sup>281</sup> Mr. Boarman and the attorney could not reach an agreement on the judgment and the attorney moved to hold Mr. Boarman in contempt.<sup>282</sup> The judge granted the order but Mr. Boarman appealed before he could be arrested, and the judge suspended the order until the appeal was decided.<sup>283</sup>

The West Virginia Supreme Court of Appeals began by noting that it reviews the lower court's decision in these cases with a three-prong standard.<sup>284</sup> The court reviews the contempt order under an abuse of discretion standard, the facts under a clearly erroneous standard, and the questions of law under a *de novo* standard.<sup>285</sup> Under this standard of review, the court held that a judgment for attorney fees is assignable, but that "relief by way of contempt is not assignable to a private third party."<sup>286</sup>

In this case, it was conceded by the parties that a valid judgment is assignable to a third person.<sup>287</sup> However, Mr. Boarman contended that the judgment was not valid because it was made in a 1994 court order and there had been a subsequent 1997 final order where she agreed to pay all her own legal fees.<sup>288</sup> The court deferred to the findings of the trial court that the 1997 order

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<sup>280</sup> 556 S.E.2d 800 (W. Va. 2001).

<sup>281</sup> *Id.* at 802.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 803 (citing *Carter v. Carter*, 470 S.E.2d 193 (W. Va. 1996)).

<sup>285</sup> *Boarman*, 556 S.E.2d at 803.

<sup>286</sup> *Id.* at 803-04.

<sup>287</sup> *Id.* at 804.

<sup>288</sup> *Id.* at 804-06.

did not supersede or modify the 1994 order.<sup>289</sup> Therefore, Mrs. Boarman held a valid judgment when she assigned it to her attorney, and after the assignment the attorney held a valid judgment against Mr. Boarman.<sup>290</sup>

Turning to the issue of contempt proceedings against Mr. Boarman, Mr. Boarman argued that even if the judgment were assignable to a third party, the right to hold him in contempt was not.<sup>291</sup> The court agreed with this position.<sup>292</sup> There are two types of contempt in a domestic case – criminal contempt and civil contempt.<sup>293</sup> The use of contempt is warranted when a party refuses to pay alimony or support obligations because the law places a heightened importance on these payments.<sup>294</sup> It would be unconstitutional, however, to imprison someone for the non-payment of an ordinary debt.<sup>295</sup>

Through assignment, the court felt that the judgment had lost its special position and that the court’s authority could no longer be used to vindicate the wrongs against Mrs. Boarman through a contempt action.<sup>296</sup> Therefore, while Mrs. Boarman’s judgment was valid and her assignment to her attorney was valid, the attorney’s remedies against Mr. Boarman to collect on the judgment are limited to civil actions to collect money on a debt.<sup>297</sup> Thus, the trial court’s contempt order was reversed.<sup>298</sup>

## 2. *Snider v. Snider*

In *Snider v. Snider*,<sup>299</sup> the West Virginia Supreme Court of Appeals expanded the application of the divisible divorce doctrine. The original doctrine was adopted in 2000 in *Burnett v. Burnett*.<sup>300</sup> The *Burnett* court ruled that the rights of a West Virginia citizen to seek child and spousal support from a West Virginia court “is not superceded by a subsequent divorce decree obtained by a

<sup>289</sup> *Id.*

<sup>290</sup> *Boarman*, 556 S.E.2d at 805-06.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> W. VA. CODE § 48-2-22 (2000).

<sup>294</sup> *Boarman*, 555 S.E.2d at 805-06 (citing *Smith v. Smith*, 95 S.E. 199, 201 (W. Va. 1918)).

<sup>295</sup> *See id.*

<sup>296</sup> *Id.* at 806.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> 551 S.E.2d 693 (W. Va. 2001).

<sup>300</sup> 344 U.S. 541, 449 (1948).

foreign state where the foreign state did not have *personam* jurisdiction over both parties.”<sup>301</sup>

The issue before the court in *Snider* was somewhat different. This time, the court was asked to address the validity of a *preceding* divorce decree obtained *ex parte* in a foreign state, and its effect upon the jurisdiction of a West Virginia court seeking to adjudicate the property rights and obligations of the parties to a marriage.<sup>302</sup> In addressing the various jurisdictional questions, the appellate court relied heavily on the United State Supreme Court decision in *Estin v. Estin*.<sup>303</sup> In *Estin*, the Supreme Court determined that allowing one state to grant a *ex parte* divorce of the marriage, and another state with jurisdiction over both parties to address the property rights and obligations of the parties, the interests of both states are accommodated, “restricting each State to the matters of her dominant concern.”<sup>304</sup>

Mr. Snider argued that he had insufficient minimum contacts with the State of West Virginia, and therefore a West Virginia court could not constitutionally assert personal jurisdiction over him.<sup>305</sup> However, the court rejected this argument by noting that West Virginia courts have jurisdiction over domestic relations actions when at least “one of the parties . . . at the time the cause of action arose” has been “an actual bona fide resident of this state and has continued so to be for at least one year next preceding the commencement of the action.”<sup>306</sup>

In addition, the court concluded that personal jurisdiction over a non-resident defendant could be obtained upon serving the defendant with reasonable notice of the suit, provided there is sufficient minimum contacts between the defendant and the forum state.<sup>307</sup> “To what extent a nonresident defendant has minimum contacts with the forum state depends upon the facts of the individual case.”<sup>308</sup> Upon review of the facts, the court found that Mr. Snider had sufficient minimum contacts with the State of West Virginia. The court specifically found that Mr. Snider had purposefully acted to obtain benefits from the state. In fact, the marital home was located in West Virginia and he obtained financing for the home from a West Virginia bank.<sup>309</sup>

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<sup>301</sup> *Snider*, 551 S.E.2d at 697.

<sup>302</sup> *Id.* at 698 (emphasis in original).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 699.

<sup>305</sup> *Id.*

<sup>306</sup> *Snider*, 551 S.E.2d at 699.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*



Mr. Snider also argued that under West Virginia Code section 48-2-15, West Virginia courts are only empowered to grant relief “upon ordering a divorce.”<sup>310</sup> He stressed that because he obtained a divorce in a foreign jurisdiction, West Virginia courts had no authority to address unresolved domestic issues. The court, however, found that such a construction of this statute would result in an absurdity because it would force West Virginia domiciliaries to submit to the personal jurisdiction of a foreign state to resolve their personal and property rights, or forever waive those rights.<sup>311</sup>

With this broad adoption of the divisible divorce doctrine, the court held that where a foreign jurisdiction does not have personal jurisdiction over both parties to a marriage, the personal and property rights of the parties may be litigated in West Virginia separately from a divorce decree issued in another jurisdiction, and issues of spousal support and marital property survive the *ex parte* divorce decree.<sup>312</sup>

### C. Custody Rights & Parental Determinations

#### 1. State *ex rel.* Denise L.B. v. Burnside

In *State ex rel. Denise L.B. v. Burnside*,<sup>313</sup> the West Virginia Supreme Court of Appeals had to determine whether a relative of a parent had established standing to intervene in a custody dispute. In this case, Denise and Mark B. were married in 1990.<sup>314</sup> After a severe accident in July 1999, Mark B. had significant cognitive and physical limitations and moved in with his mother who lived in Martinsburg, West Virginia. Denise moved with the couple’s two children to Morgantown, West Virginia, where she resided with her mother. Denise filed a complaint for divorce in the Circuit Court of Raleigh County. A guardian ad litem was appointed to represent the interests of the children during the divorce proceedings.<sup>315</sup>

After the accident, Denise prevented the children from seeing their father and told them he was dead. In February 2, 2001, a telephone hearing was conducted by the family law master. A third party, Sherry L, the sister of Mark, took part and presented an emergency motion to intervene in the divorce action and a motion to take custody of the two children. No evidence was presented about Sherry L.’s standing to intervene. Evidence was proffered on the question

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<sup>310</sup> *Snider*, 551 S.E.2d at 699-701.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> 547 S.E.2d 251 (W. Va. 2001).

<sup>314</sup> *Id.* at 253.

<sup>315</sup> *Id.*

of custody. The guardian ad litem expressed that she had reservations about the children remaining in Denise's custody.<sup>316</sup>

Essentially, the children were left with Denise's mother while Denise lived and worked in Virginia. The guardian ad litem also testified that the families had become polarized which would harm the children. The family law master forwarded a recommended order to the circuit court recommending that Sherry L.'s petition to intervene be granted upon findings that she was a fit and proper person to have custody. She also recommended that custody be given to Sherry L. with visitation rights given to Denise.<sup>317</sup>

Mark was denied visitation rights until the children received psychological counseling.<sup>318</sup> The family law master also recommended a full evidentiary hearing concerning the custody issue be held within twenty days. The circuit court entered an order adopting the family law master's suggestions on February 2, 2001. Denise filed a petition for a writ of prohibition to halt the enforcement of the order.<sup>319</sup>

The West Virginia Supreme Court of Appeals had to determine whether the writ of prohibition was appropriate and whether Sherry L. established standing to intervene. The court held that prohibition was appropriate. It determined that Sherry L.'s attempt to intervene pursuant to West Virginia Code section 48-11-103(2) in order to obtain an *ex parte* temporary order under West Virginia Code section 48-2-13(e) was clearly erroneous as a matter of law because she did not establish standing to intervene.<sup>320</sup>

The court stated that it will consider five factors when determining whether it is appropriate to issue a writ of prohibition when it is alleged that the lower court exceeded its legitimate powers. Those five factors are

- (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (3) whether the lower tribunal's order is clearly erroneous as a matter of law;
- (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
- (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.<sup>321</sup>

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<sup>316</sup> *Id.* at 253-254.

<sup>317</sup> *Id.* at 254.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 254-55.

<sup>320</sup> *Id.* at 255-56.

<sup>321</sup> *Id.* at 255.

All five factors do not need to be satisfied but the third is given substantial weight.<sup>322</sup>

Concerning the third factor, the court found a clear error of law because Sherry L. tried to intervene under Article 2 of Chapter 48 of the West Virginia Code.<sup>323</sup> The court held that intervention of this type was not authorized by the Legislature. Sherry L. also argued her intervention was authorized by West Virginia Code section 48-11-103(2).<sup>324</sup> However, the court held that this section of the Code only applies to interventions under Article 11.<sup>325</sup> Consequently, because Sherry L. sought her *ex parte* temporary order under Article 2 of Chapter 48 and not under Chapter 11,<sup>326</sup> the court held that Sherry L. lacked standing and granted the writ of prohibition to halt the enforcement of the circuit court's order.<sup>327</sup>

## 2. *Frankel v. Frankel*

In *Frankel v. Frankel*,<sup>328</sup> the West Virginia Supreme Court of Appeals had to determine whether Andrew Frankel was entitled to sole custody of his two children. In this case, Nancy and Andrew Frankel were divorced in Texas in 1992.<sup>329</sup> Nancy moved to Huntington, WV with the couple's two children and had primary custody. Mr. Frankel tried to modify custody in Texas, and Ms. Frankel sought sole custody of the children in West Virginia. It was decided that West Virginia was considered the home state and the proper forum for the dispute. While on a visit to their father, the children were enrolled in a private school and kept in Texas by their father. Mr. Frankel returned the children to West Virginia and filed a custody petition in Cabell County, West Virginia. In August 1999, a custody hearing was held before the family law master. The focus of the hearing was on the education of the children given their learning disabilities. William, the son, had more severe learning problems than his sister.<sup>330</sup>

The family law master decided that William would be unable to acquire the appropriate language skills in the West Virginia school system. Therefore,

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<sup>322</sup> *Id.* (citing State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996), Syl. Pt. 4.).

<sup>323</sup> W. VA. CODE § 48-2-13(e)(1)(B) (1993).

<sup>324</sup> *Burnside*, 547 S.E.2d at 256.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> 550 S.E.2d 377 (W. Va. 2001).

<sup>329</sup> *Id.* at 378-79.

<sup>330</sup> *Id.*

he recommended that Mr. Frankel be given custody of William so he could attend the Texas private school.<sup>331</sup> The daughter was to remain in West Virginia under the care of Ms. Frankel. The Circuit Court of Cabell County adopted the family law master’s recommendations and entered an order on December 10, 1999.<sup>332</sup> Ms. Frankel appealed arguing that the circuit court abused its discretion by adopting the family law master’s recommendations and ordering that William be placed in his father’s custody.

The West Virginia Supreme Court of Appeals found that the circuit court had not abused its discretion.<sup>333</sup> The court reiterated the three-pronged standard of review for reviewing challenges to findings made by a family law master and subsequently adopted by a circuit court. “A final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to *de novo* review.”<sup>334</sup> After considering the record, the court noted William’s severe learning disabilities and decided it was in William’s best interests to be placed in his father’s custody so he could attend a private school in Texas. It also noted that a specialized school near Cabell County did not offer the type of remedial education William needed due to his learning disabilities. The court said William would only be able to achieve his “full potential” given specialized education unavailable in the public school system of West Virginia.<sup>335</sup> Given these facts, the court found that the circuit court had made the appropriate decision.<sup>336</sup>

Justice Starcher provided a blistering dissent in which he criticized the majority for its decision.<sup>337</sup> He disagreed with the “full potential” test which was used by the majority for the first time as a legal test to determine child custody. He found it unbelievable that the West Virginia school system could not provide sufficient remedial schooling for William’s disability. Although he doubted that the school system suffered from such a deficiency, Justice Starcher suggested that the solution is to fix the school system and “not to ship our children away.”<sup>338</sup>

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 380.

<sup>334</sup> *Id.* at 379 (citing *Burnside v. Burnside*, 194 W. Va. 263, 460 S.E.2d 264 (1995), Syl. Pt. 1.).

<sup>335</sup> *Id.* at 380.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* 380-81.

<sup>338</sup> *Id.* at 381.

Chief Justice McGraw also dissented stating that he found the majority's conclusion about the West Virginia school system unwarranted.<sup>339</sup> With Cabell County being the home of Marshall University, he felt sure that sufficient resources existed to help William overcome his disabilities. He believed the proper remedy would have been mandating that the board of education provide William with adequate education. In this case he felt the majority awarded custody to the parent with the greater financial resources.<sup>340</sup>

### 3. *Taylor v. Hoffman*

In *Taylor v. Hoffman*,<sup>341</sup> the West Virginia Supreme Court of Appeals had to decide whether the provisions of the paternity determination statute applied in an inheritance dispute. In this case, Christopher Wayne Taylor was born on June 9, 1970.<sup>342</sup> A paternity warrant was issued alleging that Barry Jordan Hoffman was his biological father. The action was settled with no admission of paternity and an agreement that Hoffman would pay Taylor's mother a monthly amount to support, maintain, and educate the child. Taylor turned eighteen on June 30, 1988.<sup>343</sup>

Jordan Hoffman died on October 6, 1994.<sup>344</sup> His wife was appointed administratrix of the estate. Taylor filed a civil action against the administratrix on October 5, 1995. However, the suit was dismissed for failure to serve the summons and complaint within 180 days. On October 9, 1998, Taylor again filed a civil action.<sup>345</sup> It alleged that Taylor was the biological son of the decedent and entitled to a share of the estate. The administratrix filed a motion for judgment on the pleadings based upon the statute of limitations set out in West Virginia Code section 48A-6-1(e)(7) which deals with paternity proceedings. Taylor responded saying that West Virginia Code section 48A-6-2(c) entitled him to bring the civil action regardless of his current age. The trial court granted the motion for summary judgment stating that West Virginia Code section 48A-6-1(e)(7) required a paternity action to be brought prior to the child's twenty-first birthday and that West Virginia Code section 48A-6-2(c) did not provide an exception.<sup>346</sup> Taylor appealed.

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<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> 544 S.E.2d 387 (W.Va. 2001).

<sup>342</sup> *Id.* at 389.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 389-90.

Consequently, the West Virginia Supreme Court of Appeals had to determine whether an action was permitted by the explicit and unambiguous language of West Virginia Code section 48A-6-2(c). The court reversed the decision of the lower court stating that West Virginia Code Article 6, Chapter 48A does not provide a resolution to the inheritance issue.<sup>347</sup> It remanded the case to the circuit court to analyze on a case-by-case basis. Article 6 of Chapter 48A deals with paternity issues and enforcing child support. The issue brought before the circuit court was one of inheritance which is governed by a different portion of the West Virginia Code. Until 1999 the Legislature did not provide a scheme to outline how illegitimate children could prove entitlement to inherit from their fathers. Since the case was brought prior to the 1999 amendment of West Virginia Code section 42-1-5, the Court had to evaluate each action on a case-by-case basis. Therefore, a prospective heir born out of wedlock trying to establish a right to inherit before the 1999 amendment can maintain an action without regard to the limitations in West Virginia Code section 48A-6-1.<sup>348</sup> Limitations in the paternity statute are not applicable to civil actions by children born out of wedlock seeking to inherit from their fathers brought under West Virginia Code section 42-1-5.<sup>349</sup>

#### 4. *In re Brian James D.*

In *In re Brian James D.*,<sup>350</sup> the Court had to determine whether incarceration mandated a finding of neglect. In this case, Brian L. and Amanda K. are the parents of Brian James D.<sup>351</sup> Abuse and neglect proceedings began against the parents in May 1999 when Amanda K. was put in jail. The petition asserted that Brian L. had failed to visit or have contact with the child. The allegations were dismissed, and Brian L. was given custody of the child. In March 2000, another abuse and neglect petition was filed against the parents. Brian L. had been arrested and charged with delivery of a controlled substance. Brian James D. was placed in the temporary physical and legal custody of the West Virginia Department of Human Resources.<sup>352</sup>

An adjudicatory hearing was held on May 3, 2000. Brian L. admitted to selling drugs from his residence while Brian James D. was present. The circuit court found that Brian L. had abused and neglected his son and granted a motion allowing Brian L. to obtain a psychological evaluation regarding his fitness as a parent. The assessment revealed no drug or alcohol problems and no diagnos-

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<sup>347</sup> *Id.* at 394-95.

<sup>348</sup> *Id.* at 395.

<sup>349</sup> *Id.*

<sup>350</sup> 550 S.E.2d 73 (W. Va. 2001).

<sup>351</sup> *Id.* at 75-76.

<sup>352</sup> *Id.*

able psychiatric condition. The circuit court terminated Brian L.'s parental rights.<sup>353</sup> Brian L. did plead guilty to two counts of delivery of a controlled substance. He was granted home confinement after serving 120 days in jail. He was also placed on five years of probation. Brian L. appealed the circuit court's decision regarding the termination of his parental rights.<sup>354</sup>

The court had to determine whether the circuit court erred in terminating parental rights based solely on the fact that Brian L. was charged with and admitted to selling a controlled substance from his residence while his child was present. The court agreed with the appellant that the circuit court did err in its decision. It remanded the case back to the circuit court to develop a plan to reunify Brian L. and his child as soon as possible.

The court noted that incarceration, per se, does not warrant the termination of parental rights. It can only be considered along with other factors which impact the ability of the parent to remedy the conditions of abuse and neglect.<sup>355</sup> The court reviewed the home confinement and probation factors and felt that these conditions would likely prevent the criminal conduct from happening again. Given the child's placement in at least six different homes, the court felt the father could provide the permanency the son needed in his life.<sup>356</sup>

Justice Maynard dissented in the case.<sup>357</sup> He felt the majority ignored the best interests of the child. He felt Brian L. did not demonstrate an appreciation of the seriousness of his drug trafficking and would likely engage in drug activity in the future. Justice Maynard stated that the court had held in prior cases that the best interests of the child were paramount in abuse and neglect proceedings.<sup>358</sup> He felt those interests would be best served by terminating the parental rights and placing Brian James D. in a permanent home. Justice Davis also joined the dissent.

##### 5. *In re Edward B.*

In *In re Edward B.*,<sup>359</sup> the West Virginia Supreme Court of Appeals had to determine whether the circuit court erred in its disposition of abuse and neglect proceedings because it did not set out proper findings of fact in rendering its decision. In this case, the appellant was the mother of several children.<sup>360</sup>

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<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 76.

<sup>355</sup> *Id.* (citing *In re Emily*, 540 S.E.2d 542, 559 (W. Va. 2000)).

<sup>356</sup> *Id.* at 76-78.

<sup>357</sup> *Id.* at 78-79.

<sup>358</sup> *Id.*

<sup>359</sup> 558 S.E.2d 620 (2001).

<sup>360</sup> *Id.* at 624-25.

The Circuit Court of McDowell County terminated her parental rights to an infant son Benny, transferred exclusive legal and physical custody of three other children to their father, and transferred legal and physical custody of a fifth child to the West Virginia Department of Health and Human Resources. The mother appealed the rulings made arguing that the lower court erred because it failed to make specific findings of fact required by West Virginia Code sections 49-6-5(a)(5) and 49-6-5(a)(6) when transferring custody or terminating rights as a result of a finding of abuse or neglect.<sup>361</sup>

The court held that the lower court failed to make the statutory findings required by the applicable code provisions.<sup>362</sup> Given the lower court's disregard and frustration of the process set out by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes, the court vacated the order of disposition and remanded the case to the lower court for compliance with the process and entry of an appropriate dispositional order.<sup>363</sup> The lower court's failure to set out required findings of fact and follow the processes mandated by law jeopardized the comprehensive and fair procedures to be used in abuse and neglect cases.<sup>364</sup> Furthermore, the rules and statutes are mandatory requirements for the courts and not merely to be used as guidance.<sup>365</sup> Finally, the court noted that procedurally these directives provided the framework for appellate review of a circuit court's action. When a circuit court ignored or failed to comply with the requirements, it unnecessarily frustrated the task of the appellate court.<sup>366</sup>

#### 6. *In re Brandon Lee B.*

In *In re Brandon Lee B.*,<sup>367</sup> the West Virginia Supreme Court of Appeals had to determine whether the circuit court erred in dismissing a child neglect and abandonment petition. In this case, Brandon Lee B. was born three months premature.<sup>368</sup> His mother had been in a series of unsuccessful relationships and had warrants pending in Indiana. While Brandon remained in the hospital, his mother failed to visit him and arranged for her own arrest. The West Virginia Department of Health and Human Resources filed a child neglect and abandonment petition which was later amended to allege the his mother was

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<sup>361</sup> *Id.* at 626-28.

<sup>362</sup> *Id.* at 632-34.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 630-31.

<sup>365</sup> *Id.* at 631.

<sup>366</sup> *Id.*

<sup>367</sup> *In re Brandon Lee B.*, No. 29701, 2001 W. Va. Lexis at \*3-\*9 (Dec. 7, 2001).

<sup>368</sup> *Id.*



unfit to parent Brandon because of his special needs.<sup>369</sup> At an adjudicatory hearing, DHHR presented evidence regarding the fitness of Brandon's mother. The circuit court ordered that the child abuse and neglect petition be dismissed because it held that a finding of neglect and abuse had to be based on conditions existing at the time the petition was filed. It found that much of the evidence presented by the DHHR concerning the mother's fitness involved conditions that arose after the petition was filed; consequently, the DHHR failed to meet its burden. The DHHR appealed the holding alleging that the circuit court had erred in its holding and in not granting its petition.<sup>370</sup> Therefore, the issue before the West Virginia Supreme Court of Appeals was whether facts developed after the filing of a child abuse and neglect petition or amended petition can be considered in evaluating the conditions which existed at the time of the filing of the petition or amended petition.<sup>371</sup>

The court found that those facts can be considered as held in *State v. Julie G.*,<sup>372</sup> Furthermore, the court found that the mother lacked the stability, maturity, judgment, and discipline necessary to provide care for Brandon and that the evidence was sufficient to terminate her parental rights.<sup>373</sup> It held that the circuit court erred in concluding that it could only consider the conduct of the mother at the time of the filing of the petition in determining her fitness to have custody of her child.<sup>374</sup> The Court ordered the judgment of the circuit court reversed and remanded to the circuit court with directions to terminate the mother's parental rights.<sup>375</sup>

Justice Albright's dissent and concurrence points out the irony of the court's action in light of its disposition of *In re Edward B.*<sup>376</sup> In that case, the court admonished the circuit court for not following the rules and procedures set out in the West Virginia Code when dealing with the termination of parental rights. Yet, the court in this case terminated parental rights without allowing the circuit court to hold a disposition hearing as required by Rules 33 and 35 of the Rules of Procedure for Child Abuse and Neglect Proceedings. Given that the court had no authority to terminate parental rights without the mandatory pre-

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<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> 201 W. Va. 764 (1997).

<sup>373</sup> *Brandon Lee*, at \*12-\*14.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at \*14-\*18.

requisite of a dispositional hearing, Justice Albright dissented from that portion of the majority opinion.<sup>377</sup>

7. *State ex rel. Jeanne U. v. Canady*

In *State ex rel. Jeanne U. v. Canady*,<sup>378</sup> the court had to determine whether a father was entitled to visitation rights with respect to his son. In this case, while Jeanne U. was married to David U., she became pregnant with Stephen M.'s child.<sup>379</sup> She gave birth to Jordan U. on May 27, 1989. Stephen M. was advised by his attorney that he had no legal standing to pursue an action for paternity since Jeanne U. was married to another man, but he still made some visits and paid child support. Jeanne U. and David U. subsequently divorced in 1992. When Stephen M. requested a family law master hearing to determine paternity, Jeanne U. began to refuse child support payments and visitation. Stephen M. then pursued legal remedies from 1993 until 1997, finally filing a declaratory judgment action in lower court to be adjudicated as Jordan's biological father and to establish visitation and support.<sup>380</sup>

The lower court determined from the guardian ad litem's report and Stephen M.'s testimony that there was a substantial relationship between Stephen M. and Jordan U. The judge denied Jeanne U.'s request to testify, however, finding her testimony unnecessary.<sup>381</sup> The judge's order provided that a child psychologist would conduct an investigation to determine if disclosure of who his father is would be harmful to Jordan U. and to come up with a visitation schedule. Both Jeanne U. and Stephen M. agreed to be bound by the psychologist's recommendations.<sup>382</sup>

The psychologist's report stated that Jordan should be told who his father is. The report further recommended visitation, and recommended that a psychologist facilitate the visitation. The court ordered that the recommendations of the psychologist were in the best interest of Jordan U., and that they be implemented. The judge appointed a visitation coordinator, but Jeanne U. still refused to tell her son who his father was. Jeanne U. then filed for a writ of prohibition to prevent enforcement of the order on the grounds that she was improperly deprived of an opportunity to be heard on the issue of the best interests

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<sup>377</sup> *Id.* at \*15-\*18.

<sup>378</sup> 554 S.E.2d 121 (W. Va. 2001).

<sup>379</sup> *Id.* at 126.

<sup>380</sup> *Id.* at 126-27.

<sup>381</sup> *Id.* at 127.

<sup>382</sup> *Id.*

of her son. She then informed her son that Stephen M. was his biological father, but still wanted to reverse the order granting visitation rights to Stephen M.<sup>383</sup>

The standard of review in this case was a five-factor test taken from *State ex Rel. Hoover v. Berger*:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.<sup>384</sup>

These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.<sup>385</sup>

The court distinguished this case from *State ex Rel. Roy Allen S. v. Stone*,<sup>386</sup> where it found that a biological father must prove by clear and convincing evidence certain factors before he will have standing to raise the issue of paternity of a child born to a married woman who is not his wife: 1) that he has developed a parent-child relationship with the child in question and 2) that the child will not be harmed by allowing the paternity action to proceed.<sup>387</sup> Distinction between this case and *Roy Allen S.* is that Roy did not include a stipulation that the individual was the child's biological father. In *Roy*, the issue was standing to raise the issue of paternity, and standing to establish paternity. In this case paternity has already been resolved.<sup>388</sup>

However, "the finding of paternity only entitles the natural father an opportunity to request to invoke his parental rights . . . [I]t would remain for the circuit court to determine issues of visitation, custody, etc., based on the best interests of the child."<sup>389</sup> *Roy* further held that "even if he proves paternity, he

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<sup>383</sup> *Id.*

<sup>384</sup> 483 S.E.2d 12 (W. Va. 1996).

<sup>385</sup> *Id.*

<sup>386</sup> 474 S.E. 2d 554 (W. Va. 1996).

<sup>387</sup> *State ex. Rel. Jeanne U.*, 554 S.E.2d at 128 (citing *State ex. Rel. Roy Allen S.*, 474 S.E.2d at syl pt. 6).

<sup>388</sup> *Id.*

<sup>389</sup> *Id.* (quoting *State ex. Rel. Roy Allen S.*, 474 S.E.2d at 566).

still is not necessarily entitled to intrude further into the marital family (if it has survived) or into existing child-parent relationships, including any relationship that has developed between the presumed father and the child . . . .”<sup>390</sup> The West Supreme Court of Appeals concluded that the trial court was correct in its determination that evidence of a substantial relationship was not required in this case because of the stipulation regarding paternity. The court held, however, that the “substantial relationship” inquiry serves a dual role in evaluating issues of paternity and appropriate visitation rights – 1) a gatekeeping role in determining a putative father’s standing to raise the issue of paternity and must be proven as a prerequisite to permitting the action by the father, and 2) an issue to be examined with regard to the best interests of the child - with the existence of a substantial relationship as one of the many factors to be evaluated, significant but not dispositive.”<sup>391</sup>

The court remanded the case to the trial court for an examination of the issue of visitation in light of Jordan’s best interests, consisting of an evidentiary hearing including testimony of parties and witnesses and taking into account Jordan’s preferences considering his age, maturity level, and ability to make an independent judgment.<sup>392</sup> The court further held that Jeanne U. should be allowed to testify in the hearing on the best interests issue, and that while the trial court should take into account the opinions of the parties, the guardian ad litem, the psychologist and other experts, the final power of disposition is in the hands of the trial court to exercise its independent judgment and the court’s judicial power.<sup>393</sup> “The best interests of the child is the polar star by which all matters affecting children must be guided.”<sup>394</sup>

#### 8. *State ex rel. Brandon v. Moats*

In *State ex rel. Brandon v. Moats*,<sup>395</sup> the West Virginia Supreme Court of Appeals had to decide the constitutionality of West Virginia’s grandparent’s visitation statute. In this case, Carol Jo L. and David Allen C., birth parents of Alexander David, divorced in 1998 and Carol L. was awarded sole care, custody, and control of Alexander.<sup>396</sup> David Allen C. was awarded visitation rights. In accordance with the divorce order, David Allen’s visitation rights were exercised under the supervision of Linda K, his mother (the child’s paternal grand-

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<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 127-28.

<sup>392</sup> *Id.* at 129-30.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 130 (quoting *In re Brian D.*, 461 S.E.2d 429 at syl. pt. 7).

<sup>395</sup> 551 S.E.2d 674 (2001).

<sup>396</sup> *Id.* at 676-77.

mother). In February 2000, Carol Jo L. remarried and her new husband legally adopted the child in May of 2000. After the adoption, Carol L. (the mother) sent Linda K. a letter informing her that she no longer had grandparent's rights and would no longer visit Alexander.<sup>397</sup> Thereafter, the grandparents filed an action in circuit court on May 23, 2000 seeking visitation rights.<sup>398</sup>

The petitioners entered a motion to dismiss, based on the theory that the respondents did not have standing under the Grandparent Visitation Act. The family law master recommended dismissal on those grounds. Then, the respondents sought review of that recommended disposition before the circuit court. The Circuit court rejected the family law master's recommendation and recommitted the matter to the family law master for an evidentiary hearing. Here, the petitioners (the parents) seek a writ of prohibition to prevent the matter from proceeding to the evidentiary hearing.<sup>399</sup> The court held that the Grandparent Visitation Act does not violate the substantive due process right of liberty extended to a parent in connection with his/her right to exercise care, custody, and control of his/her children without undue interference from the state.<sup>400</sup>

The court discussed two main issues in this case—standing and the constitutionality of West Virginia's Grandparent Visitation Act.<sup>401</sup> On the issue of standing, the court held that the paternal grandparents had standing to petition for visitation under the Act, even though the child had since been legally adopted by his mother's new husband.<sup>402</sup> The court explained that the Act gives grandparents standing even if no other domestic relations action is pending and also points out that the Act explicitly states that it is the exclusive legislation regarding grandparent's visitation. Therefore, the statutes regarding the dissolution of legal relationships in adoptions are inapplicable.<sup>403</sup>

As to the constitutionality of the Act, the court compared the statute to the one found unconstitutional in *Troxel v. Granville*,<sup>404</sup> and found that West Virginia's statute is constitutional on its face because it requires a consideration of the best interests of the child and the protection of the parent-child relationship from interference.<sup>405</sup> The court asserted that West Virginia's Act is much more narrowly tailored than Washington's and particularly emphasized that

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<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at 677.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 677-82.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> 530 U.S. 57 (2000).

<sup>405</sup> *Id.* at 688-92.

West Virginia's statute lists parental preference as to visitation as a factor for determining the best interests of the child. The court did not address the as-applied challenge to the Act because of the procedural phase of the case.<sup>406</sup>

Justice Davis submitted a dissent in which she expressed concern about the effects the majority opinion would have on adoption law in the state.<sup>407</sup> Previously, adoptions were considered a complete divestiture of an adoptee's former familial and legal ties, but this decision allows a legal relationship to survive an adoption by allowing grandparents to petition for visitation of their former grandchildren under the Act. Davis was also concerned about the security and finality of adoptions. Additionally, Davis asserted that the opinion should only be applied prospectively (not retroactively) because it was a departure from prior precedent and applying it retroactively would not provide enough notice.

9. *State ex rel. Dep't of Health & Human Resources v. Wavey Glenn G.*

In *State ex rel. Dep't of Health & Human Resources v. Wavey Glenn G.*,<sup>408</sup> the West Virginia Supreme Court of Appeals reversed a lower court's decision finding that the appellant was the biological father of an infant.<sup>409</sup> Therefore, the circuit court had erred when it required him to pay child support and reimburse AFDC for expenditures.

In this case, a civil action was instituted by the DHHR on behalf of Therece T. against the appellant to establish paternity and child support.<sup>410</sup> When the appellant failed to file an answer to the complaint, the DHHR moved for default judgment. The appellant also failed to appear at the family law master hearing. As a result, the law master filed a recommended order establishing paternity. The appellant filed exceptions to the order and indicated specifically that he was not the child's father. In addition, he indicated that he had requested blood testing to determine paternity, but was denied testing by the child's mother. The circuit court, unaware the appellant's exception, filed a motion for hearing. The appellant did not appear at this hearing, and the court adopted the law master's recommendation, establishing paternity and awarding child support. Upon reviewing the case, the court found that West Virginia Code section 48A-6-1(h) permits default judgment in a paternity action where the defendant fails to appear "or otherwise defend" the claim against him.<sup>411</sup> In the instant

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<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at 691-92 (Davis, J., dissenting).

<sup>408</sup> 557 S.E.2d 267 (2001).

<sup>409</sup> *Id.* at 269.

<sup>410</sup> *Id.* at 269-70.

<sup>411</sup> *Id.* at 270-71.

case, the appellant had filed timely exceptions, even though he failed to appear at the hearing. Because exceptions had been filed, the court found that the appellant had met the provision of 48A-6-1 and reversed the lower court decision and remanded the matter for entry of an order requiring genetic testing to determine whether the appellant is the father the infant child.<sup>412</sup>

#### 10. *Bowman v. Blevins*

In *Bowman v. Blevins*,<sup>413</sup> the court upheld the decision of a family law master and circuit court determining that two grandchildren may choose to live with their grandparents.<sup>414</sup> The appellant in this case was a former West Virginia resident and the father of two children both of whom were born in West Virginia. In 1986, following their mother's death, the children moved to North Carolina to live with their father. Subsequently, one of the children moved back to West Virginia to live with the maternal grandparents.<sup>415</sup>

This case started when the grandparents filed a child custody action in circuit court. The petition asserted, *inter alia*, that both children wanted to reside with the grandparents. After a hearing on the matter, the family law master issued an order awarding custody of the two children to the appellees. The order was approved by the circuit judge.<sup>416</sup> The appellant argued that the family law master did not have jurisdiction because the petition was filed by a non-parent. However, the court, relying on its early decision in *Overfield v. Collins*,<sup>417</sup> rejected this argument.

The *Overfield* court recognized jurisdiction in a similar type of case, where a non-parent filed a petition which set forth all of the reasons why the change of custody was required, and proper notice and service was obtained.<sup>418</sup> In addition, the court concluded that an opposing party must be given the right to present evidence as to the reasons why custody should not be changed, and obtain a decision from a neutral, detached tribunal.<sup>419</sup> The court in the present case found that the grandparents had followed the procedure outlined in the *Overfield* case.<sup>420</sup>

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<sup>412</sup> *Id.* at 271-72.

<sup>413</sup> 557 S.E.2d 303 (W. Va. 2001).

<sup>414</sup> *Id.* at 304.

<sup>415</sup> *Id.* at 304-05.

<sup>416</sup> *Id.* at 305.

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

The appellant also argued that the lower court placed too much weight on the children's stated preferences. However, the court declined to accept this argument based on the Court's earlier analysis in *Rose v. Rose*.<sup>421</sup> In *Rose*, the court outlined certain standards to evaluate child preferences.<sup>422</sup> In the present case, the court found that the children were beyond the age of discretion, and that the children's preferences were reasonable and that they were not under any undue influence. In addition, the grandparent's home was a fit place, and the children had strong ties there. Based on these facts, the court reversed the lower court and granted custody to the grandparents.<sup>423</sup>

#### 11. *State ex rel. W. Va. v. Pancake*

In *State ex rel. W. Va. v. Pancake*,<sup>424</sup> the West Virginia Supreme Court of Appeals determined that circuit courts have jurisdiction to conduct a hearing even though a parent has relinquished parental rights, when the parent claims that the relinquishment was obtained by means of duress and fraud.<sup>425</sup> The governing statute, West Virginia Code section 49-6-7, provides that "an agreement of a natural parent in termination of parental rights will be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud."<sup>426</sup> The court held that such a provision would be meaningless if a trial court could not conduct a hearing to determine whether such circumstances existed.<sup>427</sup>

By the facts presented at trial, and by the determination of the circuit court judge, the court felt that this case presented at least some suspicion that the father had relinquished his parental rights under duress and fraud. Because issues such as these are clearly questions of fact, the court concluded that the provisions of West Virginia Code section 49-6-7 allow a circuit court to conduct a hearing to determine whether the signing by a parent of an agreement relinquishing parental rights was free from fraud and duress.<sup>428</sup>

The concurring opinion of Justice Davis stressed the prevailing principle of issues regarding relinquishment of parental rights, the so-called polar star principle in such cases, that being the best interests of the child.<sup>429</sup> She ad-

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<sup>421</sup> 340 S.E.2d 176 (1986).

<sup>422</sup> *Id.* at 179-80.

<sup>423</sup> *Blevins*, 557 S.E.2d at 30.

<sup>424</sup> 544 S.E.2d 403 (W. Va. 2001).

<sup>425</sup> *Id.* at 406.

<sup>426</sup> *Id.* at 406 (citing W. VA. CODE § 49-6-7 (1977)).

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* at 405-06.

<sup>429</sup> *Id.* at 406-07.



dressed the heavy burden of proof for the parent, and specifically reminded trial courts of the importance of this principle before making any final custody decision.<sup>430</sup>

#### D. Child Support & Alimony

##### 1. *State ex rel. Dep't of Health & Human Resources v. Baker*

In *State ex rel. Dep't of Health & Human Resources v. Baker*,<sup>431</sup> the West Virginia Supreme Court of Appeals affirmed a lower court's finding that monies received from the exercise of a stock option were included in the definition of gross income, and therefore are not immune from child support attachment.<sup>432</sup> In the same decision, the court reversed the lower court's ruling with regard to attribution of income in the case of an employee who was involuntarily terminated.

In *Baker*, the appellant was adjudicated to be the father of an infant child.<sup>433</sup> During the hearing for child support determination, he indicated that he had just lost his job, but was in the process of challenging his termination. The family law master included as "gross income" to earnings that the appellant had received from the exercise of stock options, and the circuit court adopted the family law master's recommendation.<sup>434</sup> The appellant challenged both the inclusion of the stock option earnings and income attribution in calculating the child support payment.

The court went directly to the relevant and controlling statute to determine the meaning of "gross income." Under West Virginia Code section 48A-1A-19(a), "gross income" is defined as both "earned and unearned income"<sup>435</sup> and also includes earnings from capital gains.<sup>436</sup> The court concluded that none of the exclusions to capital gains under West Virginia Code section 48A-1A-19(d), applied to these earnings.<sup>437</sup> As a result of the strict statutory interpretation, the court concluded that the income from the exercise of stock options should be used to calculate the child support obligation.

The court, however, also concluded that the attribution of income used by the circuit court was incorrect because the appellant did not voluntarily ter-

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<sup>430</sup> *Id.*

<sup>431</sup> 557 S.E.2d 267 (W. Va. 2001).

<sup>432</sup> *Id.* at 269.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Id.* at 270.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

minate his employment in order to avoid paying child support.<sup>438</sup> According to West Virginia Code section 48A-1A-3, attribution of income is expressly permitted based on an obligor's prior level of income when the individual voluntarily leaves employment or voluntarily alters his employment so as to be unemployed, underemployed, or employed below full earning capacity.<sup>439</sup> Because the appellant's employment was terminated by the employer, there were no facts to support the application of attribution of income in this case.<sup>440</sup>

## 2. *Hickman v. Hickman*

In *Hickman v. Hickman*,<sup>441</sup> the defendant, Ms. Hickman appealed an order which modified her divorce decree by reducing monthly child support payment, terminating alimony, and terminating payment of health insurance premiums by her former spouse.<sup>442</sup> Ms. Hickman asked that the court reinstate the divorce decree, and in the alternative, asserted that the trial court abused its discretion in imposing the retroactive payment.<sup>443</sup>

After the couple married in 1990, Mr. Hickman adopted Ms. Hickman's daughter, who was suffering from a muscle disease called hypotonic diplegia.<sup>444</sup> After the divorce, alimony payments that were ordered because Ms. Hickman was unable to work because she had to stay home and care for her daughter. However, Mr. Hickman filed for a modification of the divorce decree by presenting evidence from the daughter's physician that she no longer needed special care from her mother. The trial court found that Ms. Hickman was not precluded from working and that she had skills to obtain gainful employment. Also, Mr. Hickman showed that he had a significant reduction in income due to his retirement. Therefore, the lower court found that a substantial change of circumstances had occurred that would permit a modification of the divorce decree, and affirmed that part of the trial court's judgment.<sup>445</sup>

The court agreed with Mr. Hickman as far as the reduction in child support and alimony.<sup>446</sup> However, the court reversed and remanded the issue of the retroactive payment, because the record was inadequate to determine whether

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<sup>438</sup> *Id.* at 270-72.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at 272.

<sup>441</sup> 558 S.E.2d 607 (W. Va. 2001).

<sup>442</sup> *Id.* at 608-09.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> *Id.* at 609.

<sup>446</sup> *Id.* at 609-11.

Ms. Hickman had the ability to pay such a judgment and if this payment will be a financial hardship to her.<sup>447</sup>

### 3. *Hager v. Hager*

In *Hager v. Hager*,<sup>448</sup> Mr. Grady Hager appealed an order from the Circuit Court of Boone County, which denied a motion made by him under Rule 60(b) of the West Virginia Rules of Civil Procedure to alter the judgment in his divorce case. When he and Ms. Hager were divorced, she stated that she had never been previously employed and that she was disabled and incapable of working. The family law master found that she had no income earning ability whatsoever and recommended that she receive \$800 per month in alimony and that Mr. Hager pay for her health insurance and attorney's fees. After the entry of the court's judgment, which accepted the family law master's findings, Mr. Hager learned that Ms. Hager had actually been working and earning money; therefore, he filed a motion for the court to modify that alimony award. He alleged that Ms. Hager had committed fraud on the family law master and the court. The circuit court found that he had not met the burden of proof under Rule 60(b).<sup>449</sup>

The West Virginia Supreme Court of Appeals found that by failing to testify fully and completely, Ms. Hager acted falsely and committed fraud and therefore the circuit court should have set aside the alimony award and reconsidered its decision.<sup>450</sup> Therefore, the decision was reversed and remanded.

Justice Davis dissented, pointing to the evidence that Ms. Hager was disabled and that she had only held a few "odd jobs" for which she received minimum wage or less.<sup>451</sup> Moreover, Ms. Hager had been forced to take these odd jobs out of financial destitution due to her divorce. Davis asserted that Ms. Hager only briefly engaged in odd jobs and that these jobs do not establish fraud or that she was able to maintain full-time employment. She also cited Ms. Hager's age (55) and the fact that she does not have a high school diploma or any marketable employment skills. Also, as a result of her health problems, she was unable to work an eight-hour job. Davis claimed that the majority's decision rewarded Mr. Hager for his adultery (the reason for the divorce) by allowing him to maintain the same standard of living while his ex-wife lived in poverty. She called the majority opinion "a retreat to former times when draconian

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<sup>447</sup> *Id.*

<sup>448</sup> 2001 W.Va. LEXIS 145, \*15-\*16 (Nov. 7, 2001).

<sup>449</sup> *Id.* at \*3-\*4.

<sup>450</sup> *Id.* at \*7-\*9.

<sup>451</sup> *Id.* at \*10.

barriers were erected to prevent women from obtaining alimony simply because they were women."<sup>452</sup>

#### 4. *Sinclair v. Sinclair*

*Sinclair v. Sinclair*<sup>453</sup> is an appeal from an order of the Circuit Court of Preston County granting a judgment against Mr. Sinclair in the amount of \$7,624.51 to reimburse the State of West Virginia for Aid to Families with Dependent Children (AFDC) for benefits paid to his wife on behalf of their children. Mr. Sinclair claimed that he was totally disabled and without income during the period in which his wife received the benefits. He also contended that the lower court erred in entering an order enforcing a judgment that was received in violation of federal regulations and in the absence of a hearing.<sup>454</sup>

In 1989, the appellant and Mrs. Sinclair separated and she applied for AFDC benefits. She also assigned her right to bring suit against the appellant for child support payments to the West Virginia Department of Health and Human Resources (DHHR).<sup>455</sup> In 1992, a complaint seeking to establish an amount of child support owed by the appellant was filed through the DHHR. The complaint requested that Mr. Sinclair be required to reimburse the DHHR for support paid on the behalf of the children. Mr. Sinclair failed to file an answer to the complaint or to appear. Therefore, a default judgment was entered against Mr. Sinclair for the benefits. In 1993, a family law master issued findings of fact and conclusions of law, finding that Mr. Sinclair's employment status was unknown and that the State was entitled to reimbursement of \$9,346.00 for benefits paid to the children. In 1998, Mrs. Sinclair filed for divorce and no child support was ordered because she and the appellant filed a Joint Parenting Plan. In 2000, the DHHR filed a motion for decretal judgment requesting enforcement of the 1993 AFDC reimbursement order.<sup>456</sup>

The court cited its holding in *State ex rel. Deptment of Human Sevices v. Huffman* that the DHHR may receive only those rights to recoup the benefits paid under the AFDC that the recipient could assign—the recipient's right to support and maintenance.<sup>457</sup> The "right to support and maintenance is dependent on the ability of the responsible relative to pay and the determination of ability to pay must be made through an administrative hearing or court proceed-

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<sup>452</sup> *Id.* at \*15-\*16.

<sup>453</sup> 557 S.E.2d 761 (W. Va. 2001).

<sup>454</sup> *Id.* at 763-64.

<sup>455</sup> *Id.*

<sup>456</sup> *Id.* at 764.

<sup>457</sup> 332 S.E.2d 866 (1985).

ing.”<sup>458</sup> In *Huffman*, the court recognized that it had to follow federal regulations that establish mandatory procedures for the determination of the amount of reimbursement to which the DHHR would be entitled.<sup>459</sup> The court concluded that neither the 1993 nor the 2000 judgments were based upon the findings of a *Huffman* hearing, and that the appellant has a right to a hearing to determine his ability to pay reimbursement. Therefore, the case was reversed and remanded for a *Huffman* hearing.<sup>460</sup>

Justice Davis and Justice Maynard dissented.<sup>461</sup> In the dissenting opinion written by Justice Davis, she asserted that Mr. Sinclair waived his right to a *Huffman* hearing because he failed to answer the complaint against him in 1992, and he did not file a petition for review of the recommended decision or appeal the final order in 1993. Mr. Sinclair only sought appeal for the decision in 2000, but in his Petition for Review, he did not allege any mistake, inadvertence, surprise, excusable neglect or unavoidable cause, fraud, misrepresentation, or other misconduct as required by Rule 60(b).<sup>462</sup> Davis stated that the majority’s opinion allowed Mr. Sinclair to “arrogantly refuse to answer a complaint that would have given him a *Huffman* hearing” and to “pompously decide when he would prefer to raise the issue of a *Huffman* hearing.”<sup>463</sup> “She asserted that because Mr. Sinclair chose to sleep on his rights for seven years, that he has waived his right for a *Huffman* hearing.”<sup>464</sup>

##### 5. *Steel v. Hartwick*

In *Steel v. Hartwick*,<sup>465</sup> the West Virginia Supreme Court of Appeals had to determine whether a father was entitled to reimbursement for overpayment of child support. In this case, appellant and appellee were divorced in 1991. Appellant was ordered to pay appellee \$135 per week for each of their two children in child support.<sup>466</sup> In 1995, the appellant was severely injured at work and was unable to work. He continued to make child support payments throughout this time. In 1997, appellant petitioned the court for a reduction in his child support payments. Soon after filing this petition, the appellant was

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<sup>458</sup> *Id.* at 402.

<sup>459</sup> *Id.* at 765.

<sup>460</sup> *Id.*

<sup>461</sup> *Id.* at 767.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*

<sup>465</sup> 551 S.E.2d 42 (W.Va. 2001).

<sup>466</sup> *Id.* at 43-44.

notified that he had been adjudicated as disabled under the Social Security Act and was entitled to retroactive disability benefits from the time of his injury in 1995. As a part of the award, his ex-wife also received retroactive Social Security benefits for the dependent children in the amount of \$6, 709 for each child. The appellant petitioned the circuit court to require the appellee to reimburse him for the child support payments he had made in the period from July 1995 to August 1997, claiming that she had been paid twice and in effect, had been unjustly enriched.<sup>467</sup>

The circuit court reduced his child support payments, but refused to order appellee to reimburse the appellant for child support payments.<sup>468</sup> The appellant sought review of this decision of the circuit court. Upon review, the court concluded that the children had a legal right to receive the child support and the social security benefits and the found no legal basis for depriving them of their property.<sup>469</sup> The court cited the Social Security Act (42 U.S.C. § 407), which states that a person's right to receive benefits is not transferable and that any money paid under the Act is not subject to legal process.<sup>470</sup> Also, the court stated that the United States Supreme Court had interpreted this statute to mean that the use of any legal process to reach social security benefits is barred.<sup>471</sup> Therefore, if it were to require a reimbursement, it would have to be from a fund other than those awarded by Social Security.<sup>472</sup>

The court also found that child support payments are made for the benefit of children and that these payments are the children's entitlement and property. Also, the court asserted that the social security benefits were also made for the benefit of the children and are considered the children's property. Accordingly, the court held that since the children had a legal right to these benefits, they were not unjustly enriched and that it would be inequitable to require appellee to reimburse the appellant for the child support payments.<sup>473</sup>

## 6. *State ex. rel Dep't of Health & Human Resources v. Wertman*

*State ex. rel Dep't of Health and Human Resources v. Wertman*<sup>474</sup> involves two certified questions from the Circuit Court of Berkeley County. The first question was whether West Virginia Code section 51-2A-1 allows "family

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<sup>467</sup> *Id.* at 44.

<sup>468</sup> *Id.*

<sup>469</sup> *Id.* at 45.

<sup>470</sup> *Id.*

<sup>471</sup> *Id.* (citing *Philpott v. Escex City*, 409 U.S. 413 (1973)).

<sup>472</sup> *Id.*

<sup>473</sup> *Id.* at 45-46.

<sup>474</sup> 557 S.E.2d 773 (W. Va. 2001).

law masters to enter enforceable orders imposing sanctions, including incarceration, for indirect civil contempt for failure to pay child support.”<sup>475</sup> The circuit court answered this question in the affirmative.<sup>476</sup> The second question was whether these orders, even if permitted under the West Virginia Code, were constitutional.<sup>477</sup> The circuit court also answered this question in the affirmative.<sup>478</sup>

After making sure the questions were properly before the court, the court invoked its power to reformulate the question as follows:

Under the provisions of the West Virginia Constitution, are family law masters, serving through December 31, 2001, in the family court division of the circuit courts pursuant to the provisions of Chapter 51, Article 2A of the West Virginia Code, judicial officers, having the authority to enter enforceable orders imposing sanctions, including incarceration, for indirect civil contempt of a court order to pay child support?<sup>479</sup>

The facts of the case revolve around two family law masters serving Morgan and Jefferson Counties.<sup>480</sup> These family law masters did not set any contempt hearings for failures to pay alimony or child support, and the BCSE petitioned the Circuit Court to issue a writ of mandamus to order the family law masters to “conduct civil contempt proceedings . . . to enter orders in those cases instead of recommending them to the circuit court for entry, and to impose incarceration in appropriate cases.”<sup>481</sup> The circuit court granted the writ of mandamus, and the family law masters filed a motion for consideration.<sup>482</sup> The lower court then sent the two certified questions to the court.<sup>483</sup>

Using a *de novo* standard of review, the court decided that family law masters do not have the power to enter such orders.<sup>484</sup> The Unified Family Court Amendment to the state constitution creates a system to rule on family

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<sup>475</sup> *Id.* at 776.

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> *Wertman*, at 775.

<sup>480</sup> *Id.*

<sup>481</sup> *Id.* at 776.

<sup>482</sup> *Id.*

<sup>483</sup> *Id.*

<sup>484</sup> *Wertman*, at 777-78.

law matters.<sup>485</sup> Before this amendment it was clear that family law masters were not judicial officers.<sup>486</sup> However, even after the amendment, family law masters are not “constitutionally vested with judicial power” and “serve only as assistants to the circuit courts...in carrying out their functions.”<sup>487</sup> Because the power to enter contempt orders is solely a power of the court, and because family law masters have no power to enter a final and binding order, the family law masters are not empowered to enter contempt orders.<sup>488</sup>

### 7. *Stewart v. Stewart*

In *Stewart v. Stewart*,<sup>489</sup> the West Virginia Supreme Court of Appeals reviewed whether mental cruelty was present and also reviewed determinations of child support and alimony. In this case, Richard Stewart and Willa Kay Stewart were married on May 27, 1972, and had three children, only one of whom is still under the age of majority.<sup>490</sup> Willa Kay Stewart worked part-time at the beginning of the marriage, but when her children were born she became a full-time homemaker. Richard Stewart is a partner in an accounting firm. After twenty-two years of marriage, the Stewarts separated and Mrs. Stewart filed for divorce on the grounds of mental cruelty and irreconcilable differences. Mr. Stewart had been seen in the company of a blonde female and had been observed kissing her in public. Mr. Stewart said she was his running companion and he only kissed her to reassure her when she found out that she had breast cancer.<sup>491</sup>

The family law master granted Mrs. Stewart’s divorce on the grounds of mental cruelty, gave Mrs. Stewart custody of the one child who was still a minor, ordered child support, and ordered \$4,488 per month in permanent alimony.<sup>492</sup> Also, Mr. Stewart was ordered to pay her one-half interest in the accounting partnership and her attorney and expert witness fees. Richard Stewart challenged the finding of mental cruelty, the award of permanent alimony, the amount of the alimony, and the order to pay his wife’s attorney and expert witness fees. The circuit court upheld the finding of mental cruelty and upheld the award of permanent alimony, but lowered the amount of alimony to \$3,837 per

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<sup>485</sup> W.VA. CONST. ART. VIII, § 16.

<sup>486</sup> W.VA. CONST. ART. VIII, § 1.

<sup>487</sup> *Wertman*, at 778.

<sup>488</sup> *Id.* at 778-79.

<sup>489</sup> 550 S.E.2d 86 (W. Va. 2001).

<sup>490</sup> *Id.* at 88.

<sup>491</sup> *Id.*

<sup>492</sup> *Id.*



month.<sup>493</sup> The court also upheld the award of attorney's and expert witness fees. Mr. Stewart appealed these findings to the West Virginia Supreme Court of Appeals.

The court began by noting that the standard of review for reviewing determinations of the lower court this type of case is three-pronged: 1) "underlying findings of fact should be reviewed under a clearly erroneous standard," 2) "questions of law should be reviewed *de novo*," and 3) "questions of statutory construction should be reviewed *de novo*."<sup>494</sup> Additionally, what constitutes mental cruelty depends on the circumstances.<sup>495</sup> Conduct "which humiliates and embarrasses the other party and exposes the other party to public mockery of the marriage to such an extent that it tended to destroy the other party's mental and emotional well-being, is adequate to establish fault sufficient to support an award of alimony."<sup>496</sup> Based on the facts of the case, the court held that the finding of the trial court was not clearly erroneous and therefore affirmed the finding of mental cruelty.

On the question of whether alimony should be permanent, Mr. Stewart believed that Mrs. Stewart was entitled, at most, to rehabilitative and not permanent alimony.<sup>497</sup> The court noted that these matters are within the sound discretion of the court and will not be disturbed on appeal unless it clearly appears that such discretion has been abused.<sup>498</sup> Rehab alimony is used "mainly where a younger dependent spouse entered the marriage with marketable skills, which then deteriorated through non-use," or capability for self-support developed through training or academic study. Key factors are potential work skills of the spouse requesting alimony and whether that type of work was available, as well as the age and health of the requesting spouse.<sup>499</sup> In this case Mrs. Stewart was fifty, was his wife for twenty-two years, and did not have a significant work history. Also, there was no evidence that her board of regents degree combined with any additional education or training would enable her to become permanently employed.<sup>500</sup> Therefore, the court concluded that the findings regarding the permanency alimony were not erroneous and that the circuit judge did not abuse his discretion.

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<sup>493</sup> *Id.*

<sup>494</sup> *Id.* at 89 (citing *Burnside v. Burnside*, 460 S.E.2d 264 (W. Va. 1995)).

<sup>495</sup> *Stewart*, 550 S.E.2d at 89. (citing *Thacker v. Thacker*, 23 S.E.2d 64, syl. pt. 1 (W. Va. 1942)).

<sup>496</sup> *Id.* (quoting *Dyer v. Tsapsis*, 249 S.E.2d 509 (W. Va. 1978)).

<sup>497</sup> *Id.* at 90.

<sup>498</sup> *Id.* (citing *Nichols v. Nichols*, 236 S.E.2d 36 (W. Va. 1977)).

<sup>499</sup> *Id.* (citing *Molnar v. Molnar*, 314 S.E.2d 73 (W. Va. 1984)).

<sup>500</sup> *Stewart*, 550 S.E.2d at 90.

Regarding the amount of the alimony, the court did rule that the trial court erred in granting \$3,837 per month in permanent alimony when Mr. Stewart only received \$6,000 per month in income. The trial court and family law master had based alimony awards on an income of \$12,746/month. The court concluded that accounting partnership was worth \$200,000 and gave Mrs. Stewart \$100,000, but \$6000 of Mr. Stewart's \$12,000 income went to retire obligations arising out of the partnership interest. The West Virginia Supreme Court of Appeals had previously ruled: "When values are computed for specific simple assets for the purpose of marital distribution, the rule is that the indebtedness owed against the asset should be deducted from its fair market value."<sup>501</sup> The court said that it was not clear that the valuation of the partnership took into account the debts of the partnership, so it appeared on the face of the record that the court abused its discretion in basing the alimony on the \$12,000 per month in income. Therefore, on the determination of alimony, the judgment of the circuit court was reversed and remanded for additional findings of fact and a recalculation deducting amount Mr. Stewart does not receive but which goes to the partnership debt.

Finally, the court upheld the payment of his wife's attorney's fees and court costs, finding that the circuit court judge had not abused his discretion.<sup>502</sup> Fees are awarded when "a party has incurred attorney fees and costs unnecessarily because the opposing party has asserted unfounded claims or defenses for vexatious, wanton, or oppressive purposes."<sup>503</sup> The purpose of the statutory language was to enable a spouse who didn't have financial resources to obtain reimbursement for costs and fees.<sup>504</sup> The evidence in this case showed that the wife received a majority of illiquid assets, practically making it impossible for her to meet her cost and fee obligations. Consequently, the circuit court's order was affirmed as to the finding of mental cruelty, the award of permanent alimony, and the award of attorney and expert's fees. The judgment was reversed and remanded as to the amount of alimony for a recalculation of the amount of Mr. Stewart's income taking into account obligations arising out of the accounting partnership.<sup>505</sup>

## 8. *Edwards v. Edwards*

In *Edwards v. Edwards*,<sup>506</sup> the West Virginia Supreme Court of Appeals had to review a circuit court decision to change the beginning date of child sup-

<sup>501</sup> *Id.* at 91 (quoting *Kimble v Kimble*, 411 S.E.2d 472 (W. Va. 1991)).

<sup>502</sup> *Id.* at 92 (citing *Bond v. Bond*, 109 S.E.2d 16 (W. Va. 1959)).

<sup>503</sup> W. VA. CODE § 48-2-13(a)(6)(B) (2001).

<sup>504</sup> *Stewart*, 550 S.E.2d at 92 (citing *Bettinger v. Bettinger*, 396 SE 2d 709 (W. Va. 1990)).

<sup>505</sup> *Id.* at 92-93.

<sup>506</sup> 547 S.E.2d 249 (W. Va. 2001).

port payments. In this case, Rhonda and Gregory Edwards were married in 1978. Mr. Edwards filed for divorce in 1994. Two children resulted from the marriage. The family law master recommended an order in 1995. The parties sought review of that order and the circuit court remanded it back for a supplemental hearing which did not take place until October 1997. A new recommended order was prepared in June 1998 and was reviewed again by the circuit court. It was again remanded for a second supplemental hearing. On February 13, 1999 the family law master again recommended an order. It suggested that custody was to be given to Rhonda Edwards, and Gregory Edwards was to pay child support in the amount of \$463 per month. However, the date on which the payments were to begin was left unclear. The circuit court reviewed the order and entered it with two changes on December 30, 1999. The dates in the recommended order regarding child support and alimony payments were drawn through and replaced with the date October 1, 1999. The circuit court provided no reasoning for the changes.<sup>507</sup> Rhonda Edwards appealed the order of the circuit court.

The court had to decide whether the circuit court have the authority to alter the dates upon which Mr. Edwards was required to begin paying alimony and child support.<sup>508</sup> The court reversed the circuit court's order and remanded the case for further proceedings. The court set out the standard regarding review of family law master's findings of fact from *Stephen H. v. Sherry L.H.*:<sup>509</sup> "A circuit court should review findings of fact made by a family law master only under a clearly erroneous standard, and it should review the application of law to the facts under an abuse of discretion standard."<sup>510</sup>

The court noted that the circuit court cannot substitute its own findings merely because it is not in agreement with the family law master.<sup>511</sup> Under West Virginia Code section 48A-4-20(c), the circuit court must set out its own findings in conclusions in writing if it changes a family law master's recommendation. The circuit court did not comply with this requirement and changed the dates without making factual findings or conclusions. Thus, the court reversed the order. It also noted that when relief such as alimony or child support is granted, Rule 23 of the Rules of Practice and Procedure for Family Court 2000 mandates that the relief is to be retroactive to the date of service of the motion for relief unless good cause exists for adopting a different date.<sup>512</sup> Here, the circuit court left the Supreme Court of Appeals without a basis for reviewing

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<sup>507</sup> *Id.* at 249-50.

<sup>508</sup> *Id.*

<sup>509</sup> 465 S.E.2d 841, syl. pt. 1 (W. Va. 1995).

<sup>510</sup> *Id.* at 250.

<sup>511</sup> *Id.* at 250-51.

<sup>512</sup> *Id.*

its reasoning or any findings which may have indicated good cause for the date changes.<sup>513</sup>

*E. Review of Decisions of the DHHR: State ex rel. Aaron M. and Anthony H. v. Dep't of Health & Human Resources*

In *State ex. rel. Aaron M. and Anthony H. v. Dep't of Health & Human Resources*,<sup>514</sup> Anthony H and Aaron M were abused and neglected children. The parental rights of their mother were taken away and their maternal grandmother was granted permanent custody. Also, the court ordered DHHR to provide medical care, treatment and services for the physical emotional and psychological needs of the children. The children received therapy from Wellspring Family Services for three years until the therapist there felt she did not have enough expertise to deal with the children's myriad of problems – attention deficit hyperactivity disorder, fetal alcohol syndrome, depression, sexual abuse as a child, pyromania, and attachment disorder.<sup>515</sup>

The children's Multidisciplinary Treatment Team decided that Anthony should be evaluated by Denise Flint, a child therapist with Coddington & Associates known to be an expert in attachment disorders. The circuit court ordered that Anthony receive therapy from Ms. Flint for \$75/hr. and that DHHR promptly pay.<sup>516</sup> There was an outstanding bill of \$2,522.50 and Ms. Flint refused to treat him until it was paid. She filed a motion for contempt, but DHHR paid her what was due and owing and the motion was withdrawn. At the next six month review, she had diagnosed him with post-traumatic stress disorder, attention deficit disorder and reactive attachment disorder. The court approved a fee for her services of \$90/hour. Again, there was an undue bill for \$1,530. The DHHR said that the bill would only be paid at the Medicaid rate. The Guardian ad litem then filed a petition for a writ of mandamus to compel the DHHR to pay Ms. Flint's past due bill.<sup>517</sup>

A "writ of mandamus will not issue unless three elements coexist – 1) a clear legal right in the petitioner to the relief sought, 2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel, and 3) the absence of another adequate remedy."<sup>518</sup> The court held that while Ms. Flint was entitled to payment of her services, she was not entitled to reimbursement in excess of the Medicaid rate. The office she worked in had an agreement to ac-

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<sup>513</sup> *Id.*

<sup>514</sup> 2001 W. Va. LEXIS 40 \* 40 (Jan. 9, 2001).

<sup>515</sup> *Id.* at \*3-\*4.

<sup>516</sup> *Id.* at \*3-\*5.

<sup>517</sup> *Id.*

<sup>518</sup> *Id.* at \*5-\*6 (citing *State ex. rel. Kucera v. City of Wheeling*, 170 S.E.2d 367, syl. pt. 2 (W. Va. 1969)).

cept Medicaid rates for Dr. Coddington’s services and the agreement provided that “[t]he provider shall provide for the compliance of subcontractors with applicable federal requirements and assurances.” Also, 42 C.F.R. § 447.15 (1985) states that:

A state plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amount paid by the agency plus any deductible, coinsurance or co-payment required by the plan to be paid by the individual.<sup>519</sup>

The court then stated that the parties disagree as to whether Ms. Flint is an employee or independent contractor, but found that regardless she could not be paid above Medicaid rates for her services.<sup>520</sup> The court granted the writ of mandamus and ordered DHHR to pay for her services at the Medicaid rate, credited by any excess of the Medicaid rate she received in prior billings.<sup>521</sup> Also, the court held that the children’s grandmother could not be charged for the difference between the Medicaid rates and the agreed upon rates because, under West Virginia Code section 16-29D-4, another source cannot be billed for the difference when Medicaid pays less than the agreed upon rate.<sup>522</sup>

*F. Statutory Enactments*

1. Senate Bill 24

The purpose of this act is to establish children’s centers for the monitoring of custodial responsibility.<sup>523</sup> The act provides exclusions, requires promulgation of rules, sets standards for centers, requires certification, requires contracts for the use of centers, authorizes evaluation of centers, authorizes suspension or revocation of certifications, permits representations upon certification, prohibits false representation of certification through provision of penalties, and allows courts to order use of centers and require payment of fees.<sup>524</sup>

Section 1001 is the Legislative findings: an increasing number of children live with one parent and have been exposed to violence in the home, and it is in the best interests of children that the exercise of custodial responsibility, including the exchange of children, be monitored in order to observe and record

<sup>519</sup> *Id.* (citing 42 C.F.R. § 447.15 (1985)).

<sup>520</sup> *Id.* at \*7-\*8.

<sup>521</sup> *Id.*

<sup>522</sup> *Id.*

<sup>523</sup> S.B. 24, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>524</sup> *See id.*

it and discourage/prevent inappropriate conduct.<sup>525</sup> This act provides for safe and neutral centers to monitor the exercise of custodial responsibility. Section 1002 provides exclusions. The centers are not applicable to therapeutic visitation exchanges or any activity conducted by the state or others in abuse and neglect proceedings pursuant to 49-6 or 49-6a in which assessment, evaluation, formulation of a treatment plan, case management, counseling, therapy, etc. occur.<sup>526</sup>

Section 1003 provides that a board shall propose rules by consulting with judges, magistrates, law-enforcement officers, etc. and other individuals it deems appropriate.<sup>527</sup> At a minimum the rules should include physical facility requirements, including ADA accommodations, requirements for qualification and training for the centers staff and for the evaluators of the centers, the period of certification and the fees.<sup>528</sup> Section 1004 provides that every center shall require the persons using the center to sign a written contract that use of the services can be terminated for violation of the contract.<sup>529</sup>

Section 1005 provides for certification and revocation or suspension of certification of the centers.<sup>530</sup> The board shall accept applications and grant or deny expeditiously, may direct an evaluation of center that has applied for certification, or that already has been certified, to make sure that the center complies and that it has the ability to monitor custodial responsibility.<sup>531</sup> Evaluators may be members of the board, designees of the board or peer evaluation by other centers.<sup>532</sup> If the board finds that the center is not complying with the article, the rules pursuant thereto or other law, it may suspend or revoke certification.<sup>533</sup>

Section 1006 provides that certified centers may represent their certification.<sup>534</sup> No person may represent that a center is certified if it is not. To do so is a misdemeanor with a fine of no more than \$500.<sup>535</sup> Section 1007 provides that judges or magistrates may order persons to apply as a condition of custody and to comply with the terms and conditions of the services. Centers don't have

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<sup>525</sup> W. VA. CODE § 48-26-1001 (2001).

<sup>526</sup> W. VA. CODE § 48-26-1002 (2001).

<sup>527</sup> W. VA. CODE § 48-26-1003 (2001).

<sup>528</sup> *Id.*

<sup>529</sup> W. VA. CODE § 48-26-1004 (2001).

<sup>530</sup> W. VA. CODE § 48-26-1005 (2001).

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

<sup>533</sup> *Id.*

<sup>534</sup> W. VA. CODE § 48-26-1006 (2001).

<sup>535</sup> *Id.*

to perform services in excess of their capacity or scope. Judges may also require person to pay a reasonable amount for the use based on ability to pay and other criteria. If adult parties agree to the use of the center, they may provide services to those not ordered to use the center.<sup>536</sup> This bill was approved on May 1, 2001, it passed on April 13, 2001, and went into effect 90 days from passage.<sup>537</sup>

## 2. Senate Bill 59

This section amends and reenacts West Virginia Code section 48-2-402 which relates to persons authorized to celebrate marriages.<sup>538</sup> The secretary of state must establish a central registry of persons authorized to celebrate marriages in West Virginia.<sup>539</sup> All persons meeting the qualifications shall be listed in the registry.<sup>540</sup> Prior to October 1, 2001, every county clerk must submit to the secretary of state a list of every person authorized to celebrate marriages by order issued in his/her respective counties since 1960. The secretary of state will put those names in the registry.<sup>541</sup>

The section states the qualifications of religious representatives authorized to celebrate marriages. Those qualifications include: being at least eighteen years of age; having authorization to perform marriages by a church, synagogue, spiritual assembly, or religious organization; and being in regular communion with the church, synagogue, spiritual assembly or religious organization of which he or she is a member.<sup>542</sup>

From September 1, 2001, the secretary of state will make an order authorizing a person who is a religious representative to celebrate the rights of marriage in all counties in West Virginia. The registration fee must be paid first in order to receive such order. The fee is established by the secretary of state and may not exceed \$25. A person must give bond in the amount of \$1,500 with surety approved by the commission. This bond can be avoided by providing proof that the religious representative is ordained or authorized by his/her respective church, synagogue, spiritual assembly or religious organization.

All money received will be placed in a special revenue revolving fund entitled the "Marriage Celebrants Registration Fee Administration Fund."<sup>543</sup>

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<sup>536</sup> W. VA. CODE §48-26-1007 (2001).

<sup>537</sup> S. B. 24, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>538</sup> S. B. 59, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>539</sup> W. VA. CODE § 42-2-202 (2001).

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

<sup>542</sup> *Id.*

<sup>543</sup> *Id.*

The funds will be used to pay expenses incurred by the implementation and operation of the registry program.<sup>544</sup>

Marriages performed by a person authorized by law to celebrate marriages cannot be invalidated on the sole basis that the person was not listed in the registry.<sup>545</sup> The registry is to be updated periodically and sent to every county clerk. This amendment was effective ninety days after its April 14, 2001 passage date.<sup>546</sup>

### 3. Senate Bill 157

This is an act to amend and reenact W.Va. Code 18-1-1, by providing certain additional definitions.<sup>547</sup> The significant modifications to this code section are as follows: (i) The addition of a definition for “social worker,” which is defined as “a nonteaching school employee who, at a minimum, possesses an undergraduate degree in social work from an accredited institution of higher learning and who provides various professional social work services, activities or methods as defined by the state board for the benefit of students”;<sup>548</sup> (k) The addition of a definition for “career clusters,” which is defined as a “broad grouping of related occupations”;<sup>549</sup> (l) The addition of a definition for “work-based learning,” which is defined as “structured activity that correlates with and is mutually supportive of the school-based learning of the student and includes specific objectives to be learned by the student as a result of the activity”;<sup>550</sup> (m) The addition of a definition for “school-aged juvenile,” which is defined as “any individual who is entitled to attend or who, if not placed in a residential facility, would be entitled to attend public schools in accordance with: (1) Section five, article two of this chapter; (2) sections fifteen and eighteen, article five of this chapter; or (3) section one, article twenty of this chapter”;<sup>551</sup> (n) The addition of a definition for “student with disability,” which is defined as “an exceptional child, other than gifted, pursuant to section one, article twenty of this chapter”;<sup>552</sup> (o) The addition of a definition for “high density county,” which is defined as “a county whose ratio of student population to square miles

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<sup>544</sup> *Id.*

<sup>545</sup> *Id.*

<sup>546</sup> S. B. 59, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>547</sup> S. B. 204, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>548</sup> W. VA. CODE § 18-1-1 (2002).

<sup>549</sup> *Id.*

<sup>550</sup> *Id.*

<sup>551</sup> *Id.*

<sup>552</sup> *Id.*



is greater than the state average ratio as computed by the state department of education”,<sup>553</sup> and (p) The addition of a definition for “casual deficit,” which is defined as, “a deficit of not more than 3 percent of the approved levy estimate or a deficit that is nonrecurring from year to year.”<sup>554</sup>

#### 4. Senate Bill 640

This act amends section 44A of the West Virginia Guardianship and Conservatorship Act, by adding a new section that provides for the filing of a petition for the appointment of a guardian or conservator of a minor.<sup>555</sup> The petition may now be filed if the minor is at least seventeen years and ten months of age and would qualify as a “protected person.”<sup>556</sup> A protected person is defined as, “an adult individual, eighteen years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity: (A) To meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (B) to manage property or financial affairs or to provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator.”<sup>557</sup>

Before the enactment of this statute, the petition could only be filed after the protected person had turned eighteen years old. This statute further provides that the hearing shall only occur no sooner than fourteen days before the minor’s eighteenth birthday if the trier of fact is the mental hygiene commissioner and no more than seven days prior to the birthday if a circuit judge conducts the hearing.

#### G. Conclusion

In 2001, the West Virginia Supreme Court of Appeals decided a number of controversial cases dealing with topics ranging from grandparents’ visitation rights to the quality of the public schools in West Virginia. The court’s validation of grandparents’ visitation rights in *Moats* is notable because the United State Supreme Court recently invalidated a grandparents’ visitation rights statute in Washington, and the validity of similar statutes has come into question across the nation. West Virginia has joined the increasing number of states across the country which have set up child custody monitoring centers.

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<sup>553</sup> *Id.*

<sup>554</sup> *Id.*

<sup>555</sup> S.B. 640, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>556</sup> W.VA. CODE § 44A-2-1a (2001).

<sup>557</sup> W.VA. CODE § 44A-1-4.

Many of this year's family law cases dealt with the allocation of child support and alimony awards reflecting the complexities in this area of the law. While there are no broad themes running through the case opinions, the court remained mindful that, "the best interests of the child is the polar star by which all matters affecting children must be guided."<sup>558</sup>

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#### IV. ENVIRONMENTAL LAW

##### A. *Introduction*

In 2000 and 2001, the West Virginia Supreme Court of Appeals decided numerous cases that impact the practice of environmental law in West Virginia. Also, the West Virginia Legislature enacted and amended several statutes associated with surface mining, water pollution control, taxes on synthetic coal, and the promotion of clean coal technology. This survey, in particular, evaluates the latest environmental cases pertaining to the effects of promises or statements made in mining permits pursuant to preexisting waivers of the right of subjacent support, to permit requirements for coal mining incidental to the development of land for other use, to judicial ascertainment clauses in mineral leases, to the termination of mineral leases upon a cessation of production, and to the delegation of damages involving dismissed WVSCMRA actions prior to judicial review.

##### B. *The Effect of Promises or Statements made in Mining Permits Required by West Virginia Surface Mining Control and Reclamation Act on Pre-existing Waivers of the Right of Subjacent Support*

The Supreme Court of Appeals's decision in *Antco, Inc., John Antulov, Margaret Antulov and Steve Antulov v. Dodge Fuel Corporation*<sup>559</sup> illustrates the interplay between the terms and conditions of mining permits and preexisting deeds waiving subjacent support. The decision in *Dodge Fuel* indicates that the terms and conditions of mining permits, rather than waivers in preexisting deeds, determine whether coal operators in underground mining operations are required to provide subjacent support to surface owners. In its mining permit application, Dodge Fuel Corporation promised to provide subjacent support to the surface owner. The court held that the promise to provide subjacent support "may have, in effect, invalidated or limited [Dodge Fuel's] otherwise valid

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<sup>558</sup> In re Brian D., 461 S.E.2d 429 at syl. pt. 7.

<sup>559</sup> 550 S.E.2d 622 (W. Va. 2001).

waiver of subjacent support.”<sup>560</sup> To avoid invalidating waivers of subjacent support, the court’s decision in *Dodge Fuel* suggests that coal operators should not, as a condition of their mining permit, promise to provide subjacent support. Even for permit applications involving properties where surface owners have validly waived the right to subjacent support, violation of a promise, made in a mining permit application, to provide subjacent support will be regarded as a violation of the mining permit. Violation of the mining permit will be regarded as a violation of statute and therefore constitute *prima facie* evidence of negligence by the coal operator.<sup>561</sup>

The plaintiffs in *Dodge Fuel*, Antco, Inc., et al., purchased 110 acres from Consolidation Coal Company in 1986. The deed “contained a reservation of the mining rights in favor of the grantor.”<sup>562</sup> The deed also contained a specific waiver waiving “subjacent support, and “any liability for any damages caused by subsidence that might result when the coal beneath the property was mined.”<sup>563</sup> In 1993, the defendant, Dodge Fuel Corporation, acquired the rights to the coal under the property owned by Antco, Inc. Pursuant to West Virginia mining regulations, in its permit application Dodge detailed the possible consequences of its mining activity on “mining-related subsidence.” In particular, in conditions six and seven of an attachment to its permit application, Dodge stated that “if subsidence causes material damage or reduces the value of reasonably foreseeable use of the surface lands, [it would] restore the land to a condition capable of supporting uses it was capable of supporting before subsidence *regardless of the right to subsidize*.” In addition, Dodge promised that the plaintiffs’ quarry would “be protected by leaving at least 50% of the total coal in place” in the section of the mine extending beneath the limestone quarry.<sup>564</sup> The permit was approved by the West Virginia Department of Environmental Protection (“DEP”). After issuance of the mining permit, the defendant began mining coal under the plaintiffs’ limestone quarry. The plaintiffs argued that the mining activity resulted in subsidence which damaged their equipment at the limestone quarry, “making it economically unfeasible to continue their quarry operations.”

The case was brought before the Circuit Court of Marion County. The plaintiffs alleged that the subsidence resulting in the damage to their quarrying equipment was caused by mining activities conducted by Dodge Fuel Corporation in violation of statements six and seven included in its mining permit application, and that violation of the mining permit made Dodge Fuel Corporation strictly liable for damage caused by the subsidence. Alternatively, the plaintiffs

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<sup>560</sup> *Id.* at 628.

<sup>561</sup> *Id.* at 634.

<sup>562</sup> *Id.* at 625.

<sup>563</sup> *Id.*

<sup>564</sup> *Id.* at 626. (emphasis added)

argued that violation of the terms of the mining permit were violations of statute and therefore could be used to establish a *prima facie* case of negligence against Dodge. Dodge argued that because of the preexisting waiver in the deed, “despite any statements made in its permit application . . . it had the right to mine and to cause the land to subside, within limits of mining law, without any liability for any damage to [the plaintiff’s] quarry equipment.”<sup>565</sup> The trial court held that the surface owners had waived subjacent support and granted summary judgment to Dodge. The plaintiffs appealed.

The plaintiffs’ argument revolved around the effect of the enactment of the West Virginia Surface Control and Mining and Reclamation Act (“WVSMCRA”), West Virginia Code section 22-3-1 on preexisting waivers to subjacent support. Because the plaintiffs asked the court to “review the conduct of [Dodge Fuel] in light of” WVSMCRA, the court first had to determine if the provisions of WVSMCRA applied to subsidence caused by *underground* mining operations. The court held that “even though the Act contains the word ‘surface’ in its title, it clearly still applies to the facts of this case.”<sup>566</sup> The court noted in the Act, the definition of “surface mining operation” included surface operations and *surface impacts incidental to an underground coal mine.*<sup>567</sup> Although the court noted that its decision to apply the WVSMCRA to underground coal operations “seem[ed] somewhat at odds” with its holding in *Rose v. Oneida Coal Co., Inc.*,<sup>568</sup> where the court held that WVSMCRA did not apply to the effects of underground mining, it did not attempt to distinguish the facts in this case from those in *Rosa v. Oneida Coal Co., Inc.*

After determining that the WVSMCRA applied to the underground coal operations in this case, the West Virginia Supreme Court of Appeals addressed the three remaining key issues: the validity of the waiver of subjacent support in the deed, the effect of the Energy Policy Act of 1992 on the liability standard for subsidence damage caused by underground coal operations, and the effect of the promises made by the defendant in the mining permit application on the preexisting waiver included in the deed. Concerning the validity of the waiver of subjacent support in the deed, the court noted that waivers of subjacent support are valid “provided that the language of the deed and the circumstances surrounding the conveyance show a clear intention by the surface owner to waive such support.”<sup>569</sup> “Although mining compan[ies were] the beneficiary of broad form waivers in deeds drafted in the early 1900’s”, [the court has held that] broad form waivers [are] not sufficient” to waive rights granted by the

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<sup>565</sup> *Id.* at 629.

<sup>566</sup> *Id.* at 628.

<sup>567</sup> *Id.* (citing W. VA. CODE § 22-3-3 (2000) (emphasis added).

<sup>568</sup> 466 S.E.2d 794 (W. Va. 1995).

<sup>569</sup> *Antco, Inc.*, 550 S.E.2d at 629.

WVSMCRA.<sup>570</sup> However, because the deed in this case was executed in 1986, and because both parties were experienced in the coal mining business, the court held that the waiver was valid.<sup>571</sup>

Because the court found that the waiver of subjacent support was valid, it next addressed the two claims put forth by the plaintiffs, (1) that the Energy Policy Act of 1992 created a strict liability standard for subsidence damage, and (2) that promises made by the defendant in the mining permit application became terms or conditions of the permit and that, regardless of a previous waiver by deed, violation of the terms or conditions of the mining permit was a violation of statute and could be considered *prima facie* evidence of negligence against the defendant. The court first addressed the plaintiffs claim that the Energy Policy Act of 1992 created a strict liability standard. The court noted that this claim “[e]ssentially . . . assert[s] that changes in federal law have invalidated all waivers of subjacent support.”<sup>572</sup> In response to this claim, the court noted that the section of the Energy Policy Act of 1992 relied on by the plaintiffs dealt only with damage caused to “residential dwellings and non-commercial buildings.”<sup>573</sup> The court held that “because the dispute [in this case] concerns a commercial rock crusher,” not a residential dwelling or non-commercial building, the strict liability standard established by the Energy Policy Act of 1992 did not apply.<sup>574</sup>

The court noted that the “cynosure of this case [was] how Dodge’s actions [in applying for the permit] may have, in effect, invalidated or limited” the preexisting waiver of subjacent support.<sup>575</sup> The plaintiffs argued that violation of the terms of the mine permit constituted a violation of statute and therefore could “serve as *prima facie* evidence of the mining company’s negligence.”<sup>576</sup> In response, the mining company (i.e. Dodge) argued that it had the right to be negligent because of the waiver in the deed. The court held that to “accept Dodge’s argument . . . would be to eviscerate the entire permitting process.”<sup>577</sup> Regardless of valid preexisting waivers, a “mining company may choose . . . to

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<sup>570</sup> *Id.* at 630. See also *Cogar v. Sommerville*, 379 S.E.2d 764 (W. Va. 1989).

<sup>571</sup> *Id.*

<sup>572</sup> *Id.* at 630.

<sup>573</sup> *Id.* at 633.

<sup>574</sup> *Id.* The plaintiffs also argued that if the federal rules did not apply because they specifically mention *noncommercial* structures, the state rules would apply and provide strict liability because the state law can afford the surface owner greater protection than the federal rules and the state rules do not specifically mention *noncommercial* structures. The court noted that it was not clear if the state rules only applied to noncommercial structures but because it found for the plaintiffs on other grounds, it did not address the scope of the state rules in this opinion.

<sup>575</sup> *Id.* at 628.

<sup>576</sup> *Id.* at 633.

<sup>577</sup> *Id.* at 634.

promise certain activity that the law does not absolutely require. But even if not required by law, once the state accepts and approves of those promises, they become the terms and conditions of the permit, and the mining company must honor them.”<sup>578</sup> The “terms and conditions of a mining permit issued pursuant to the [WVSMCRA] may limit rights that a mining company otherwise would have enjoyed.”<sup>579</sup> The court noted that because a mining company must have a valid mining permit to mine, “violation of the terms or conditions of a permit issued pursuant to the [WVSMCRA] is... a violation of statute.”<sup>580</sup> The court concluded its opinion by noting that “any violation of statute is considered *prima facie* evidence of negligence,” and that if the plaintiff can establish that the defendant violated a statute, the case turns on an issue of fact to be decided by the jury, rather than an issue of law to be decided by the judge. Because the plaintiffs alleged that Dodge violated its mining permit, the inquiry in the case involved issues of material fact that were not appropriate for summary judgment. The court remanded the case to the circuit court.

C. *Permit Requirements for Coal Mining Activity Incidental to Development of Land for Commercial, Residential, Industrial, or Civic Use*

The recent decision by the West Virginia Supreme Court of Appeals in *DK Excavating, Inc. v. Miano*, Director, West Virginia Division of Environmental Protection<sup>581</sup> clarified the effect of West Virginia Code section 22-3-3(u)(2)(ii), an amendment to West Virginia’s surface mining regulation plan, on the requirement of permits for coal extraction incidental to land development. The court held that West Virginia’s amendment could not take effect as part of the State’s program until the federal Office of Surface Mining (hereafter “OSM”) approved the amendment. Because the OSM denied approval of the amendment, and because “it is beyond dispute that once a state plan is approved under the Surface Mining Control and Reclamation Act, any subsequent amendments to such plan do not become effective until approved by the OSM,” West Virginia’s proposed amendment excluding the need for permits for extraction incidental to land development *did not* amend West Virginia’s surface mining plan.<sup>582</sup> Coal mining operations are not excluded from the permit requirements of the Surface Mining Control and Reclamation Act simply because the coal extraction is incidental to land development.

The plaintiff, DK Excavating, Inc., (“DK”) sought approval from the DEP to extract and sell coal, without a permit, from a two-acre site where it

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<sup>578</sup> *Id.*

<sup>579</sup> *Id.*

<sup>580</sup> *Id.*

<sup>581</sup> 549 S.E.2d 280 (W. Va. 2001).

<sup>582</sup> *Id.* at 285.

intended to construct an equipment shop.<sup>583</sup> The DEP informed DK that, under current law, a mining permit was required for the coal extraction even if the coal extraction was incidental to land development on a small site. DK appealed the decision of the DEP to the West Virginia Surface Mine Board, where the decision of the DEP was affirmed. DK then appealed the decision of the West Virginia Surface Mine Board to the Circuit Court of Nicholas County. The circuit court held that, based on the 1997 amendment to West Virginia Code section 22-3-3, the mining activities to be conducted by DK did not fall under the definition of “surface mining” and therefore no mining permit was required.<sup>584</sup> The DEP appealed the decision of the circuit court to the West Virginia Supreme Court of Appeals.

The focus of the case before the court centered on the effect of a 1997 amendment to the WVSMCRA. The amendment narrowed the definition of “surface mining” under the WVSMCRA to expressly exclude “coal extraction authorized as an incidental part of development of land for commercial, residential, industrial, or civic use.”<sup>585</sup> W.Va. Code § 22-3-3(u)(2)(ii). Both parties agreed “that the coal extraction at issue...[came] within the ambit of this statutory definition, which is referred to as the ‘private construction exemption’.”<sup>586</sup> The issue was the enforceability of the statutory private construction exemption created by W.Va. Code § 22-3-39(u)(2)(ii). The DEP argued that, because the OSM denied approval of the amendment creating the private construction exemption, the amendment did not validly amend the WVSMCRA. The court quickly resolved this issue in favor of the DEP, holding that “[u]nder federal law, any subsequent changes to [an] approved state plan must ... be approved by OSM.”<sup>587</sup> Changes to laws or regulations within a state plan approved under SMCRA “do not take effect for purposes of a state program until approved as an amendment by the [OSM].”<sup>588</sup> Because the OSM denied approval of the amendment creating the private construction exemption, the amendment did not affect the WVSMCRA; the DEP and West Virginia Surface Mining Board were correct in holding that a permit was required, even if the coal extraction at issue was incidental to land development.<sup>589</sup>

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<sup>583</sup> *Id.* at 282.

<sup>584</sup> *Id.*

<sup>585</sup> W. VA. CODE § 22-3-3(u)(2)(ii).

<sup>586</sup> *DK Excavating*, 549 S.E.2d at 282.

<sup>587</sup> *Id.* at 283. See also *Schultz v. Consolidation Coal Co.*, 474 S.E.2d 467 (W. Va. 1996).

<sup>588</sup> *Id.* See also 30 C.F.R. § 732.17(g).

<sup>589</sup> *Id.* at 283. OSM denied approval of the amendment because it found that the “West Virginia program amendment propose[d] precisely the same blanket exemption [for private construction] which Congress explicitly rejected.” *Id.*

DK argued that the preemption provision under SMCRA was not automatic and that once a state passed an amendment to the state plan approved under SMCRA, the federal government must affirmatively act to invalidate the state amendment.<sup>590</sup> The court held that “this argument proves indefensible when viewed against the language of 30 C.F.R. § 732.17(g), which clearly states that no change to an approved state plan ‘shall take effect for purposes of a State program until approved as an amendment’.”<sup>591</sup> State law inconsistent with SMCRA is “superseded by the provisions of SMCRA.”<sup>592</sup> The court supported its position by noting that the Supremacy Clause of the United States Constitution demanded that the laws of the United States be the supreme law of the land.

The court ruled in favor of the DEP, overturning the holding of the circuit court. Amendments to the WVSMCRA can not take effect without approval by OSM. Proposed amendments do not become effective until approved by the OSM; no affirmative action on the part of the federal government, beyond disapproval of the OSM, is required to prevent a proposed state amendment from effecting a state plan approved under SMCRA. Because the OSM denied approval of West Virginia’s proposed amendment creating a private construction exemption to WVSMCRA, that proposed amendment did not affect the WVSMCRA. Because the private construction exemption did not become effective in West Virginia, the circuit court erred in holding that DK was not required to obtain a mining permit for coal extraction incidental to its private construction project. Until an amendment containing a private construction exemption is approved by OSM, a permit under WVSMCRA is required for coal extraction, even if the extraction is incidental to private construction.<sup>593</sup>

*D. Judicial Ascertainment Clauses, Apportionment of Attorney Costs and the Determination of Royalties in Oil and Gas Leases*

The West Virginia Supreme Court of Appeals’s decision in *Wellman v. Energy Resources, Inc.*<sup>594</sup> will have a significant impact on how property owners and companies involved in the exploration of oil and gas view existing, and negotiate future oil and gas leases in West Virginia. In *Wellman v. Energy Resources, Inc.*, the court resolved three issues deriving from the breach and resulting termination of an oil and gas lease. The court first declared that “judicial ascertainment” clauses in oil and gas leases are not enforceable in West Virginia.<sup>595</sup> Second, the court joined several other states in declaring that, “unless

<sup>590</sup> *Id.* at 284.

<sup>591</sup> *Id.*

<sup>592</sup> *Id.*

<sup>593</sup> *Id.* at 285.

<sup>594</sup> 557 S.E.2d 254 (W. Va. 2001).

<sup>595</sup> *Id.* at 261-62.



the lease provides otherwise,” the lessee must bear all costs in the production and marketing of the product;<sup>596</sup> thereby denouncing recent attempts of oil and gas producers to charge landowners with a pro-rata share of the various incurred expenses.<sup>597</sup> Finally, the court solidified the policy of the State of West Virginia in supporting conservation through the maximum recovery of oil and gas,<sup>598</sup> concluding a lessee must afford the lessor a reasonable opportunity to continue the operation of a capable, producing well, where the lessee desires to remove its well equipment from the operative well.<sup>599</sup>

The particular provisions of the lease are extremely critical to the determination of this case, and the results of this decision will undoubtedly shape the language and negotiations of future oil and gas leases. In short, the appellees, James T. Wellman and Grace Wellman (“Wellman”), held two oil and gas leases on two tracts of land owned by appellants, Energy Resources, Inc. (“Energy Resources”).<sup>600</sup> The leases contained provisions stipulating the leases would run for 10 years and “for so long thereafter as drilling or working operations for oil or gas were conducted.”<sup>601</sup> Each lease provided that Energy Resources would begin operations for the drilling of one well on the leased tracts during the operative and primary ten-year term of the lease.<sup>602</sup> In addition, the leases required Energy Resources to pay a “delay rental” until one well was operative and, once operative, pay a royalty of one-eighth of the market value of any gas or oil produced and sold from the properties.<sup>603</sup> Importantly, each lease also contained a “judicial ascertainment clause,”<sup>604</sup> maintaining that the lease shall never be forfeited or terminated until a court determines the lessee failed to perform an obligation of the lease.<sup>605</sup>

According to the largely undisputed facts, the court determined that Energy Resources breached the oil and gas leases.<sup>606</sup> Specifically, the court found Energy Resources did not commence drilling of a well on either tract at any time during the primary ten-year term of the leases, nor did it pay the delay rental fee

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<sup>596</sup> *Id.* at 265.

<sup>597</sup> *See id.* at 264.

<sup>598</sup> *See id.* at 266; *see also* W.VA. CODE § 22C-9-1 (2000).

<sup>599</sup> 557 S.E. 2d at 266.

<sup>600</sup> *Id.* at 257.

<sup>601</sup> *Id.*

<sup>602</sup> *Id.*

<sup>603</sup> *Id.* at 257-58.

<sup>604</sup> *Id.* at 258. The lessee, Energy Resources, refers to this clause as a “right to cure” clause; meanwhile, the court prefers to label it as a “judicial ascertainment” clause.

<sup>605</sup> *Id.*

<sup>606</sup> *See id.*

as proscribed in the leases.<sup>607</sup> Although Energy Resources did rework a previously abandoned well drilled by a prior lessee on one of the tracts, placed it back in operation during the term of the leases and paid Wellman a royalty of the sales from that gas, it first subtracted a pro-rata share from the royalty, comprising of the various expenses incurred in producing and bringing the product to market.<sup>608</sup> Energy Resources paid Wellman a royalty of one-eighth of \$.87 for each thousand cubic feet of gas it sold. However, Energy Resources should have, as stipulated in the lease, paid a royalty based on the market value of the gas of one-eighth of \$2.22 per thousand cubic feet of gas sold.

The Circuit Court of Logan County, in granting Wellman's motion for summary judgment, held the leases were terminated due to Energy Resources' failure "to drill a well on the property within the term of the leases, due to its failure to pay delay rentals, and due to its failure to pay a proper one-eighth royalty on the production from the reworked well."<sup>609</sup> In addition, the court awarded Wellman substantial damages for Energy Resources' failure to pay the proper royalties on the gas extracted because it did not show it was entitled to deduct expenses from the market value of the gas sold.<sup>610</sup> The circuit court also awarded Wellman pre-judgment interest, post-judgment interest, and attorney's fees and costs.<sup>611</sup>

On appeal, Energy Resources first claimed the circuit court's determination that the leases were terminated under the circumstances of the case was error because the leases contained what it called "right to cure" or "judicial ascertainment" clauses, requiring the court to first determine that it had failed to meet its obligations and until after it had been given an additional time to comply with its obligations.<sup>612</sup> In examining other states' treatment of such clauses<sup>613</sup> and assessing West Virginia's public policy concern of judicial economy<sup>614</sup>, the court explicitly held, based on "compelling public policy reasons," that "judicial ascertainment" clauses in oil and gas leases are not enforceable in West Virginia.<sup>615</sup> Further, the court held, in lieu of finding such clauses void

<sup>607</sup> *Id.*

<sup>608</sup> *Id.*

<sup>609</sup> *Id.* at 258.

<sup>610</sup> *Id.*

<sup>611</sup> *Id.* at 258-259.

<sup>612</sup> *See id.* at 259.

<sup>613</sup> *See* Waddle v. Lucky Strike Oil Co., 551 S.W.2d 323 (Tenn. 1977); Lamczyk v. Allen, 134 N.E.2d 753 (1956); Frick-Reid Supply Corporation v. Meers, 52 S.W.2d 115, 118 (Tex. Circ.App. 1932); Smith v. Sun Oil Co., 172 La. 655, 135 So. 15 (1931).

<sup>614</sup> *See* State ex rel. Sowards v. County Commission of Lincoln County, 474 S.E.2d 919 (1996); Glover v. Narick, 400 S.E.2d 816 (1990).

<sup>615</sup> *Wellman*, 557 S.E. 2d at 261-62.

under public policy, judicial ascertainment clauses “do not preclude a court in which a controversy over an oil and gas lease is tried from rendering a final judgment and finally resolving that controversy.”<sup>616</sup>

Second, the court, finding persuasive other states’ rejections of pro-rata applications to royalty payments, held, the lessee, in an oil or gas lease, has to bear all costs incurred in “exploring for, producing, marketing, and transporting the product to the point of sale.”<sup>617</sup> In rejecting the pro-rata application to royalty payments, the court adopted the view that, in an oil or gas lease, the lessee impliedly covenants to market oil and gas produced and, in doing so, the lessee bears the cost of compliance with this covenant.<sup>618</sup> Recognizing that West Virginia has historically required the lessor to bear the cost of complying with covenants under the lease, the court concluded “that if an oil and gas lease provides for a royalty based on proceeds received by the lessee, *unless the lease provides otherwise*, the lessee must bear all costs” of discovery and production.<sup>619</sup>

Next, as to the return of the property used in conjunction with the well, Energy Resources claimed the circuit court erred in failing to require Wellman to return its equipment used in conjunction with the operative well. Although generally, a lessee should be permitted to remove its equipment within a reasonable time after the termination of a lease, the court acknowledged several exceptions to this rule. One specific exception alluded to by the court specified that “a lessee may not remove equipment even if he has abandoned or lost his interest in an oil and gas well if the removal of the equipment destroys a well which is capable of producing.”<sup>620</sup> Thus, employing this exception and relying on the West Virginia Legislature’s inclination to favor the conservation and maximum recovery of oil and gas,<sup>621</sup> the court held, “when an oil or gas well remains capable of producing oil or gas at the termination of a lease covering such well,” a lessee desiring to remove the well equipment must allow a lessor, or an agent chosen by the lessor, a reasonable opportunity to qualify under the bonding statute<sup>622</sup> to continue the operation of the well.<sup>623</sup>

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<sup>616</sup> *Id.* at 262.

<sup>617</sup> *See id.* at 265.

<sup>618</sup> *Id.*; *See also* Garman v. Conoco, 886 P.2d 652 (Colo. 1994); Wood v. TXO Production Corp., 854 P.2d 880, 882 (Okla. 1992); Gilmore v. Superior Oil Co., 388 P.2d 602, 606 (Kan. 1964); Warfield Natural Gas Co. v. Allen, 88 S.W.2d 989, 991 (Ky. 1935).

<sup>619</sup> 557 S.E.2d at 265 (emphasis added).

<sup>620</sup> *See* 4 Howard R. Williams & Charles J. Myers, *Oil and Gas Law* § 674.2 (2000).

<sup>621</sup> *See* W. VA. CODE § 22C-9-1 (2000).

<sup>622</sup> *See* W. VA. CODE § 22-6-26 (2000).

<sup>623</sup> *Wellman*, 557 S.E.2d at 265. If the lessor decides to so qualify, “a court, upon application by either party, may determine and order payment for the value of the lessee’s equipment, reduce by the costs of removing such equipment from the leasehold and by the cost of plugging the well  
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*E. Calculation of Damages Upon a Termination of a Mineral Lease Upon an Unexcused Cessation of Production in Violation of the Terms of the Lease*

In *Bryan v. Big Two Mile Gas Co.*,<sup>624</sup> the West Virginia Supreme Court of Appeals established a method of calculating damages where a party terminates a mineral lease upon an unexcused cessation of production and, thereafter, resumes production. The decision in *Big Two Mile Gas* indicates that an oil or gas company that terminates an oil or gas lease, due to its cessation of production, “must pay to the property owner the value of the gas that was produced after the lease termination, less a portion of the reasonable costs of production.”<sup>625</sup>

The predecessors-in-title to both the appellant, Mrs. Bryan, and the appellee, Big Two Mile Gas Company (hereafter “BTM”), entered into an oil and gas lease in 1935 that contained a “thereafter” clause, providing that the lease would last “for the [primary] term of one (1) year and so long thereafter as oil or gas, or either of them is produced.”<sup>626</sup> The lease also accorded a royalty to the lessor, equaling “1 cent for every thousand cubic feet of gas produced from the well.”<sup>627</sup> A well was drilled, gas production began, and royalty payments were paid during the primary term of the lease.<sup>628</sup> Indeed, continuous gas production continued until the period of time at issue.

In 1987, BTM, due to financial restraints, ceased gas production and royalty payments.<sup>629</sup> In fact, during the discovery phase, disputed records indicated that BTM also temporarily ceased gas production from the well from November 1979 to April 1980.<sup>630</sup> In 1989, Mrs. Bryan contacted BTM and advised them that she believed that BTM’s right to operate the well terminated upon its cessation of production in 1987.<sup>631</sup> Again, in 1991, Mrs. Bryan and her attorney wrote a letter to BTM in which they asserted that non-production of the well terminated BTM’s right to operate the well.<sup>632</sup> In response, BTM informed

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assumed by the lessor.” *Id.*

<sup>624</sup> 2001 WL 1585653 (W. Va. 2001).

<sup>625</sup> *Id.* at \*2.

<sup>626</sup> *Id.*

<sup>627</sup> *Id.*

<sup>628</sup> *Id.*

<sup>629</sup> *Id.* at \*3.

<sup>630</sup> *Id.*

<sup>631</sup> *Id.*

<sup>632</sup> *Id.*

Mrs. Bryan that it had resumed production in 1990.<sup>633</sup> Subsequently, BTM sent Mrs. Bryan a royalty check for the gas produced since production resumed in 1990.<sup>634</sup> However, Mrs. Bryan refused payment and filed suit against BMT in 1993. Specifically, Mrs. Bryan asserted, “BTM had lost its right to operate the well because of BTM’s cessation of production.”<sup>635</sup> At trial, Mrs. Bryan claimed the cessation of production “had terminated BTM’s leasehold rights to produce and sell gas from the well.”<sup>636</sup>

The circuit court separated the case into a liability phase and a damages phase. The jury found BTM has terminated its leasehold rights and determined that Mrs. Bryan was entitled to a “reasonable royalty” on gas produced after the 1979-1980 cessation.<sup>637</sup> Mrs. Bryan appealed the damages judgment where she claimed entitlement “to the actual value of the gas taken and sold from the well after 1979, without any deduction for costs of production.”<sup>638</sup>

First, the court, finding the lease between BTM and Mrs. Bryan contained a habendum clause,<sup>639</sup> found the law “well-settled” that a lease of this type “automatically terminates when there is a cessation of mineral production, unless the cessation of production is excused under the ‘temporary cessation of production doctrine.’”<sup>640</sup> The quintessence of the “temporary cessation of production doctrine” is that a temporary cessation necessary to make repairs or replacements, perform maintenance, or deal with unexpected loss of market, is excusable and will not automatically terminate a mineral lease, “so long as the lessee is diligent in accomplishing the maintenance, repairs, replacements, or marketing.”<sup>641</sup> The court held “that a mere temporary cessation of production during the secondary term of a mineral lease that requires production to keep the lease in effect”—examples include cessations for equipment repairs, technical problems, reworking operations, unexpected loss of a market, etc.—“does not result in the automatic termination of the lease if the cessation can be characterized as excusable under the ‘temporary cessation of production doctrine.’”<sup>642</sup>

<sup>633</sup> *Id.*

<sup>634</sup> *Id.*

<sup>635</sup> *Id.*

<sup>636</sup> *Id.*

<sup>637</sup> *Id.*

<sup>638</sup> *Id.*

<sup>639</sup> See *McCullough Oil, Inc. v. Rezek*, 346 S.E.2d 788, syl. pt. 2 (W. Va. 1986).

<sup>640</sup> 2001 WL 1585653, \*4 (W. Va. 2001).

<sup>641</sup> *Id.* at \*5.

<sup>642</sup> *Id.* at \*6. The court listed several factors relevant in determining whether a period of cessation of production is excusable. Some of these factors include: “the length of time without production, the reason for the period of cessation, and whether the lessee exercised reasonable diligence to resume production, bearing in mind the continuing affirmative duty of the lessee under

The court found the cessation periods were inexcusable because BMT could have replaced any malfunctioning equipment in a matter of days during the first cessation of production in 1979-1980.<sup>643</sup> Also, the court concluded that the nearly three years of cessation during the secondary term of the lease was sufficient time to allow BTM to pursue another market for gas.<sup>644</sup> The court found the jury's determination that both periods of cessation were inexcusable was permissible.<sup>645</sup>

Second, as to the issue of damages, the court held:

[w]here a mineral lease has automatically terminated due to an unexcused period of cessation of production by the lessee, and mineral production is subsequently resumed by the former lessee without the informed and knowing agreement by the mineral owner to a renewal of the lease and the resumption of production, the former lessee is a trespasser with regard to mineral production subsequent to the lease's termination, and the mineral owner may recover in damages from the former lessee the actual value of the minerals removed after the lease's termination with no deduction for the cost of producing unless the former lessee shows that the renewal of production was the result of innocent conduct on his part.<sup>646</sup>

Finding BMT a trespasser after the lease termination in the original cessation of production in 1979, the court concluded the record did not support a finding that BMT's trespass was willful after the 1979-1980 cessation. However, the court did conclude BMT's trespass was willful after the 1987-1990 cessation.<sup>647</sup> Thus, the court appropriated damages with the 1979-1980 cessation as the "value of the gas taken from the well and sold by BTM after the lease terminated in 1979, less the actual cost of production."<sup>648</sup> However, because BMT was considered a willful trespasser due to Mrs. Bryan's notice to BMT that she considered BMT as such, calculated the damages associated with the 1987-1990 cessation as "the full value of the gas taken from the well without any deduction for costs of production."<sup>649</sup>

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such a lease to product and market minerals to keep the lease in effect." *Id.*

<sup>643</sup> *Id.*

<sup>644</sup> *Id.*

<sup>645</sup> *Id.*

<sup>646</sup> *Id.* at \*9.

<sup>647</sup> *See id.* at \*9, n.9.

<sup>648</sup> *Id.* at \*9-\*10.

<sup>649</sup> *Id.* at \*10.

*F. Delegation of Damages and Award of Costs Involving a WVSCMRA Action Dismissed Before Judicial Review*

In *Louden v. West Virginia Division of Environmental Protection*,<sup>650</sup> the West Virginia Supreme Court of Appeals construed the West Virginia Surface Mining Regulation Rules to permit an award of litigation expenses from an action brought pursuant to the WVSCMRA.<sup>651</sup> Although the West Virginia Surface Mining Regulation Rules<sup>652</sup> detail the standards for awarding fees and costs in administrative appeals involving “permitting actions” under WVSCMRA, the court had never addressed the question as to which party was liable for plaintiff’s fees and costs in challenging a permit where a party, presumptively the company applying for the permit, and not the DEP, changes its position regarding the issuance of the permit.

Initially, the citizens, here the appellees, challenged DEP’s decision to grant Green Valley Coal Company’s (hereafter “Green Valley”) request for an amendment to an existing permit to allow Green Valley to inject coal slurry into an abandoned underground mine.<sup>653</sup> Following an unsuccessful appeal to the Surface Mine Board (hereafter “SMB”), the appellees retained counsel and filed a petition in the Kanawha County Circuit Court for judicial review of the SMB decision.<sup>654</sup> However, three months later, DEP rescinded the permit upon Green Valley’s request.<sup>655</sup> After all briefs were submitted to the trial court, the appellees learned of the rescission and joined DEP in moving to dismiss the appeal for judicial review.<sup>656</sup> Upon appellees’ motion, the trial court ordered DEP to pay the citizens’ attorney fees and costs.<sup>657</sup> This appeal involves the trial court’s order obliging DEP to pay the citizens’ litigation costs.

In affirming portions of the trial court’s judgment, the court first rejected DEP’s contention that Green Valley was liable for “all or part of the costs awarded, given the fact that Green Valley caused the resolution of the case by requesting that DEP rescind the permit.”<sup>658</sup> The court found that “the only regulatory basis for assessing attorney’s fees against Green Valley is a violation of

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<sup>650</sup> 551 S.E.2d 25 (W. Va. 2001).

<sup>651</sup> See 551 S.E.2d at 25.

<sup>652</sup> See W. VA. CODE ST. R. 2 § 20.12.

<sup>653</sup> 551 S.E.2d at 26.

<sup>654</sup> *Id.*

<sup>655</sup> *Id.*

<sup>656</sup> *Id.* at 27.

<sup>657</sup> *Id.*

<sup>658</sup> *Id.* at 29.

WVSCMRA, the state regulations, or a permit issued thereunder.”<sup>659</sup> Since the court found that there had not been a violation in this case, “there is no authority for assessment of attorney’s fees against Green Valley.”<sup>660</sup>

Next, the court concluded the term “judgment,” as used in the West Virginia Surface Mining regulations that govern administrative proceedings determining when and how fees and costs may be awarded, includes “any order that constitutes an ending of judicial participation in the matter in controversy, whether by an agreed order of dismissal or otherwise.”<sup>661</sup> Thus, the court approved of an otherwise appropriate award of costs and expenses made in actions pursuant to the WVSCMRA, upon an agreed order of dismissal of an appeal from the SMB, regardless of the fact that the dismissal was unrelated to a change in the DEP’s position.<sup>662</sup>

Lastly, in remanding the issue as to whether the appellees made a significant contribution to the determination of the issue,<sup>663</sup> the court propounded to require the circuit court’s order awarding costs and expenses pursuant to an action under WVSCMRA to contain specific findings of fact which provide sufficient detail to provide appellate review.<sup>664</sup>

## G. *Changes in State Statutory Environmental Law*

### 1. Senate Bill 631

The West Virginia Legislature enacted chapter five-c of the code of West Virginia creating the West Virginia Clean Coal Technology Act.<sup>665</sup> In enacting the Clean Coal Technology Act, the legislature created the West Virginia Clean Coal Technology Council to develop pilot projects relating to clean coal and alternative coal use. In so doing, the legislature recognized coal as “an important fuel source for keeping the household energy costs low in the state of West Virginia” and vital to the economy of West Virginia.<sup>666</sup> Also, the legislature acknowledged that the continued protection of the state’s environment, public health and welfare, air quality, operation of existing industries and enhancement of long-term economic health required “that technologies be explored to

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<sup>659</sup> *Id.*

<sup>660</sup> *Id.*

<sup>661</sup> *Id.* at 29-39.

<sup>662</sup> *Id.*

<sup>663</sup> *Id.* at 31.

<sup>664</sup> *Id.* at 30.

<sup>665</sup> S.B. 631, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>666</sup> W. VA. CODE § 5C-2-1(a)(1).



increase the efficiencies and decrease the emissions from electricity generated coal.”<sup>667</sup>

The Act provides that clean coal technologies and alternative coal use be explored in order to: “(1) preserve fuel diversity and maintain reliable, low-cost sources of electric power; (2) identify technologies for reducing the emissions from existing coal electric generation; and (3) identify new, cleaner coal-fired electric generation technologies that may be used to provide new generating capacity.”<sup>668</sup>

Section 5C-2-3 specifically creates the West Virginia Clean Coal Technology Council in which the legislature maintains oversight and is entrusted to “coordinate actions for the study and development of clean coal technology pilot projects” in West Virginia.<sup>669</sup> In addition, the Council is to be composed of three state senators, three state delegates, two members representing coal operators, two members representing coal miners and two members experienced in the field of coal technology.<sup>670</sup>

Some of the enumerated duties of the Council shall include: coordination of activities of the designated state agency with appropriate private, public, state or federal agencies; direction to study, develop and promulgate requests for pilot projects in West Virginia; and assessing technologies, economics, environmental benefits, and the importance of clean coal technologies to energy policy in West Virginia.<sup>671</sup>

## 2. Senate Bill 574

In 2001, Senate Bill 574 was enacted to amend section twenty-two, article eleven, chapter twenty-two of the code of West Virginia.<sup>672</sup> The amendment implemented two significant changes. First, the amendment increased the maximum daily penalty for violations of the Act from \$10,000 to \$25,000 per day. Second, the amendment included a new subsection, subsection b, instructing the director to propose, for legislative promulgation, rules to establish a mechanism for administrative resolution of violations through consent orders or agreements as an alternative to civil action.<sup>673</sup>

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<sup>667</sup> § 5C-2-1(b).

<sup>668</sup> § 5C-2-1(c).

<sup>669</sup> § 5C-2-3(a).

<sup>670</sup> § 5C-2-3(b).

<sup>671</sup> § 5C-2-5.

<sup>672</sup> S.B. 574, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>673</sup> W. VA. CODE § 22-11-22 (2001).

### 3. Senate Bill 463

Senate Bill 463, enacted in 2001, amended article thirteen and thirteen-a of chapter eleven of the West Virginia Code.<sup>674</sup> The Senate Bill added subsections two-f and three-e, to chapter eleven, article thirteen and thirteen-a, respectively.

Under chapter eleven, article thirteen, section two-f, every person manufacturing synthetic fuel from coal in the state of West Virginia for sale, profit, or commercial use will be taxed at a rate of fifty cents per ton of synthetic fuel manufactured. Synthetic fuel, as defined in this bill, includes fuel manufactured from coal for which credit is allowable for federal income tax purposes under section twenty-nine of the United States Internal Revenue Code, but does not include coke or coke gas. The tax proceeds generated by this bill are to be deposited into a "Mining and Reclamation Operations Fund" and are to be used for improving infrastructure and economic development.

Section three-e of chapter eleven, article thirteen-a imposes a tax on "the business of extracting and recovering material from refuse, gob pile or other sources of waste coal . . . for sale, profit or commercial use."<sup>675</sup> The legislature imposed this tax, in "lieu of" the annual privilege tax typically imposed on the severance of coal, to serve as an incentive to encourage the exploration and development of "extracting and recovering coal material contained in refuse, gob piles and other sources of waste coal located" in West Virginia.<sup>676</sup> The rate of the tax is "two and one-half percent of the gross value of the coal." This tax will not be imposed on electrical power co-generation plants that burn material from their own refuse or gob piles. Revenue generated by this tax will be provided to the county commissions of the counties in which the refuse or gob piles are located. These funds are to be used for economic development and infrastructure improvements.

### 4. Senate Bill 689

Senate Bill 689, enacted in 2001, amended sections thirteen-a, twenty-two-a, and thirty-a of article three, chapter twenty-two of the West Virginia Code.<sup>677</sup> All of the amendments related to preblast survey and notification requirements under surface coal mining and reclamation act.

Significant amendments to section 22-3-13a include the following. First, section (a)(3) was added. Section (a)(3) extended the pre-blasting notification requirement to surface-blasting activity conducted by operators involved

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<sup>674</sup> S.B. 463, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>675</sup> W. VA. CODE § 11-13a-3e (2001).

<sup>676</sup> *Id.*

<sup>677</sup> S.B. 689, 2001 Leg., 75th Sess. (W. Va. 2001).

in underground mining operations. The last sentence of section (g) was changed so that the office of explosives and blasting must provide a copy of the pre-blast survey to owners and occupants; providing the pre-blast survey is not contingent upon request by the owners or occupants. Section (j) was amended to reflect the changes in section (a)(3). Prior to amendment, section (j) noted that “the provisions of this section shall not apply to . . . the surface impacts of underground mining methods.”<sup>678</sup> The amended section now applies to surface-blasting activity conducted in conjunction with underground mining operations.

Most changes to Section 22-3-22a and section 22-3-30a were minor. The ability to waive a “site-specific restriction within one thousand feet in writing” was removed from subsection (f) of section 22-3-22a.

### 5. Senate Bill 603

Senate Bill 603 amended sections five, nine, and twelve of article two-a, chapter five-b and section ten, article three, chapter twenty-two of the West Virginia Code.<sup>679</sup> All of the amendments related to the reclamation and economic development of surface-mining sites.

Only minor amendments were made to section 5b-2a-5. Substantial changes were made to section 5b-2a-9; subsection (f) was added. Under subsection (f), the Office of Coalfield Community Development “may secure developable land and infrastructure for a development office or county through the preparation of a master land use plan.”<sup>680</sup> State or local development authorities “may determine land and infrastructure needs within their jurisdictions through the development of a master land use plan.”<sup>681</sup> All master land use plans must be approved by the division of environmental protection and property donated pursuant to a master land use plan cannot be accepted unless: “(a) The property use is compatible with adjacent land uses; (b) the use satisfies the relevant development or redevelopment authority’s anticipated need and market use; (c) the property has in place necessary infrastructure components needed to achieve the anticipated use; (d) the use is supported by all otehr appropriate public agencies; (e) the property is eligible for bond release in accordance with section twenty-three, article three, chapter twenty-two of [the] code; and (f) the use is feasible.”<sup>682</sup>

The amendment to section 5b-2a-12 was substantive and included the addition of section (3). In accordance with this section, the Office of Coalfield Community Development must propose rules for legislative approval concern-

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<sup>678</sup> W. VA. CODE § 2-3-13a (2001).

<sup>679</sup> S.B. 603, 2001 Leg., 75th Sess. (W. Va. 2001).

<sup>680</sup> W. VA. CODE § 5b-2a-9(f) (2001).

<sup>681</sup> *Id.*

<sup>682</sup> *Id.*

ing “[c]riteria for the development of a master plan by local . . . authorities which coordinates the permitting and reclamation requirements of the division of environmental protection with these authorities.”<sup>683</sup>

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## V. EVIDENCE

### A. Introduction

During the previous term of the West Virginia Supreme Court of Appeals, the court was faced with several cases dealing with evidentiary issues. Specifically, the court dealt with evidentiary issues in criminal appeals surrounding Rule 404(b), the admissibility of certain statements made by minors while in custody, the admission of hearsay statements from unavailable witnesses, and gruesome photographs. Additionally, in the civil context, the court analyzed the admissibility of certain expert testimony.

### B. Rule 404(b): Evidence of Other Crimes, Wrongs or Acts

The court gave further consideration to West Virginia Rule of Evidence 404(b) pertaining to evidence of other crimes, wrongs or Acts in *State v. McDaniel*.<sup>684</sup> That case arose from the defendant, David E. McDaniel, being charged with sexual assault in the second degree and burglary.<sup>685</sup> At trial, the State was permitted to call a witness who testified that the defendant broke into her apartment in 1987 and raped her, although the crime was never reported and the defendant was never charged.<sup>686</sup> Further, the defendant sought unsuccessfully to impeach this witness through the use of a prior conviction for “Complicity in Theft.”<sup>687</sup>

The court began its analysis by ruling that “[t]he trial court judge must carefully scrutinize the proffered Rule 404(b) evidence before allowing the evidence to be heard by the jury. Rule 404(b) evidence must be offered for a specific and legitimate purpose.”<sup>688</sup>

The court next reviewed the procedures that the trial court must follow in evaluating such evidence. First, the trial judge is to conduct an *in camera*

<sup>683</sup> W. VA. CODE § 5b-2a-12 (2001).

<sup>684</sup> 560 S.E.2d 484 (W. Va. 2001).

<sup>685</sup> *See id.* at 486.

<sup>686</sup> *See id.*

<sup>687</sup> *See id.*

<sup>688</sup> *See id.* at 488.

hearing and after hearing arguments from both sides, must be satisfied by a preponderance of the evidence that the acts or conduct was committed.<sup>689</sup> If a sufficient showing is made at this hearing, the trial court must next determine the relevancy under Rule 401 and 402 followed by the required balancing test under Rule 403.<sup>690</sup> If the court is satisfied at this point that the evidence is admissible, a jury instruction should be given on the limited purpose for which the evidence has been admitted.<sup>691</sup> The court recommended that this limiting instruction be given at the time the evidence is received and then repeated during the trial court's general charge at the conclusion of the case.<sup>692</sup>

Turning to the merits of the case, the court determined that the conviction should be overturned because the state's purpose for offering the evidence was not legitimate.<sup>693</sup> The state contended that alleged prior victim evidence was to be offered to establish *modus operandi*.<sup>694</sup> The court found that this evidence is typically used when the identity of the defendant is in question.<sup>695</sup> Here, because the identity of the defendant was conceded and the two attacks were factually distinguishable from one another, the court reversed the conviction and remanded the case for new trial.<sup>696</sup> Further, the court also ruled that not permitting the defendant to impeach the State's witness on her prior conviction also constituted error.<sup>697</sup>

The court was also given an opportunity to construe Rule 404(b) of the West Virginia Rules of Evidence in *State v. Johnson*.<sup>698</sup> This appeal arose out of the conviction at trial of William Johnson of five counts of incest and five counts of second degree sexual assault.<sup>699</sup> One of the chief issues on appeal was whether the trial court erred by admitting evidence of prior sexual assaults by the defendant on the victim while living in Florida.<sup>700</sup>

The court began its analysis by restating the policy behind Rule 404(b):

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<sup>689</sup> *State v. McDaniel*, 560 S.E.2d 484, 487 (W. Va. 2001).

<sup>690</sup> *See id.*

<sup>691</sup> *See id.*

<sup>692</sup> *See id.*

<sup>693</sup> *See id.*

<sup>694</sup> *See id.* at 489

<sup>695</sup> *See id.*

<sup>696</sup> *See id.*

<sup>697</sup> *See id.* at 490.

<sup>698</sup> 557 S.E.2d 811 (W. Va. 2001).

<sup>699</sup> *See id.* at 815.

<sup>700</sup> *See id.* at 816.

[I]n the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to provide evidence which is relevant and legally connected with the charge for which the accused is being tried.<sup>701</sup>

The court went on to hold that a determination of whether evidence of prior bad acts should be admitted pursuant Rule 404(b) is to be done by an *in camera* hearing before trial.<sup>702</sup> The trial judge must be convinced by a preponderance of the evidence that the crime was committed and also that the evidence is relevant under Rules 401 and 402 and admitting it would not be a violation of Rule 403 of the West Virginia Rules of Evidence.<sup>703</sup>

After restating the appropriate standard, the court held that while the trial court's analysis of this evidence may have been problematic, it was not reversible error.<sup>704</sup> Specifically, the court noted that counsel for the defendant failed to object to the introduction of this evidence of prior bad acts.<sup>705</sup> Further, the court found that the plain error doctrine was inapplicable as the trial problems were probably best addressed in a habeas corpus proceeding because it involved the performance of the defendant's trial counsel.<sup>706</sup>

### C. *Admissibility of Statements Made by Juveniles While in Custody*

The West Virginia Legislature amended West Virginia Code section 49-5-2 governing Statements made by juveniles while in custody of the police. The new statute provides that extrajudicial Statements made by a juvenile under fourteen years of age while in custody are not admissible unless such Statements are made in the presence of the juvenile's counsel.<sup>707</sup> Further, Statements made by a juvenile over fourteen years of age but under sixteen years of age while in custody are not admissible unless the juvenile's counsel or parent or guardian are present.<sup>708</sup> If the parent or guardian is present but not the juvenile's counsel, the Statements are admissible only if the parent or guardian are advised of the

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<sup>701</sup> *Id.* at 817.

<sup>702</sup> *See id.* at 817-18.

<sup>703</sup> *State v. Johnson*, 557 S.E.2d 811, 818 (W. Va. 2001).

<sup>704</sup> *See id.*

<sup>705</sup> *See id.*

<sup>706</sup> *See id.* at 818-19.

<sup>707</sup> *See* W. VA. CODE § 49-5-2(1) (2001).

<sup>708</sup> *See id.*

full range of the child's rights guaranteed by the State and United States Constitutions.<sup>709</sup>

*D. Admission of Hearsay Statements From Unavailable Witnesses*

In *State v. Ladd*,<sup>710</sup> the court was faced with the determination of the admission of hearsay statements using the 804(b)(3) exception for unavailable witness. *Ladd* arose out of the conviction of Robin Ladd in Jackson County for conspiring to murder her husband.<sup>711</sup> One of the numerous errors alleged by the defendant on appeal was that the trial court erred by admitting out of court Statements by two witnesses because they were unavailable for trial because their respective attorneys were either members of the State legislature or designated employees.<sup>712</sup> The trial court allowed these Statements to be admitted because it found that the Statements fell under Statements against interest pursuant to Rule 804(b)(3) of the West Virginia Rules of Evidence.<sup>713</sup> The defendant alleged on appeal that allowing such Statements pursuant to 804(b)(3) violated the defendant's rights under the Confrontation Clause.<sup>714</sup>

While noting at the outset that the appellee conceded at oral argument that the admission of these Statements constituted plain error that warranted reversal of at least one of the three convictions of the appellant,<sup>715</sup> the court went on to analyze when such out-of-court Statements may be admitted.<sup>716</sup> The court found that extrajudicial testimony may be nonetheless admitted without violation of the Confrontation Clause by the State "(1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court Statement."<sup>717</sup> Further, the court held that the reliability prong of this test may be inferred "where the evidence falls within a firmly rooted hearsay exception."<sup>718</sup> The court then reiterated that Rule 804(b)(3) is

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<sup>709</sup> *See id.*

<sup>710</sup> 557 S.E.2d 820 (W. Va. 2001).

<sup>711</sup> *See id.* at 829-30.

<sup>712</sup> *See id.* at 833. West Virginia Code section 4-1-17 exempts either State legislators or employees of the Legislature from appearing in trials or tribunals if such trials or tribunals conflict with legislative proceedings and for certain times before an after legislative proceedings. *See* W. VA. CODE § 4-1-17 (2001).

<sup>713</sup> *See Ladd*, 557 S.E.2d at 833.

<sup>714</sup> *See id.*

<sup>715</sup> *See id.* at 836.

<sup>716</sup> *See id.*

<sup>717</sup> *Id.* at syl. pt. 8.

<sup>718</sup> *Id.* at 834 (quoting *State v. James Edward S*, 400 S.E.2d 843, 849, syl. pt. 5 (W. Va. 1990)). Disseminated by The Research Repository @ WVU, 2002

not a firmly rooted hearsay exception.<sup>719</sup> Thus, the admission of such Statements constituted error on the part of the circuit court.<sup>720</sup> In fact, the court determined that because the admission of such Statements violated the defendant's rights under the Confrontation Clause, the prejudicial impact of such an admission warranted reversal of all of her convictions.<sup>721</sup>

### E. *Gruesome Photographs*

The court was presented with another opportunity to analyze Rule 403 as it applies to gruesome crime scene photographs in *State v. Carey*.<sup>722</sup> This involved a murder case where the victim was stabbed several times and then shot twice.<sup>723</sup> The state attempted to introduce numerous photographs, including prints of the victim and also pictures of the knife, gun, and several articles of the defendant's clothing that were physically introduced into evidence as well.<sup>724</sup> It was noted at the outset that prior to trial, the circuit court conducted a hearing outside the presence of the jury and determine which photographs could be admitted and which photographs could not be admitted.<sup>725</sup>

The court affirmed this conviction, finding that the circuit court analyzed the evidence properly under Rule 403 of the West Virginia Rules of Evidence.<sup>726</sup> The court restated again that the admissibility of such photographs is to be determined under Rule 403<sup>727</sup> and done on a case-by-case basis.<sup>728</sup> Further, the court held that the "balancing test [under Rule 403] is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse."<sup>729</sup> Finding no such clear abuse of discretion, the conviction was affirmed.<sup>730</sup>

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<sup>719</sup> *See id.*

<sup>720</sup> *See id.*

<sup>721</sup> *See id.* at 844.

<sup>722</sup> 558 S.E.2d 650 (W. Va. 2001).

<sup>723</sup> *See id.* at 654.

<sup>724</sup> *See id.*

<sup>725</sup> *See id.* at 655.

<sup>726</sup> *See id.*

<sup>727</sup> Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy of admission of relevant evidence by requiring evidence to be excluded if its prejudicial impact outweighs its probative effect. *See* W. VA. R. EVID. 403.

<sup>728</sup> *State v. Carey*, 558 S.E.2d at 656. (W. Va. 2001).

<sup>729</sup> *See id.*

<sup>730</sup> *See id.* at 663.



### F. Expert Testimony

In *Watson v. Inco Alloys Int'l, Inc.*,<sup>731</sup> the West Virginia Supreme Court of Appeals concluded that the question of admissibility of expert testimony under *Daubert v. Merrell Dow Pharm., Inc.*,<sup>732</sup> and *Wilt v. Buracker*,<sup>733</sup> will only be applicable if the testimony deals with scientific knowledge.<sup>734</sup> If the expert testimony is considered technical in nature, a court should not apply the *Daubert* gatekeeper analysis.<sup>735</sup> Additionally, expert testimony in the field of engineering is generally considered technical and not scientific.<sup>736</sup>

However, in *Kumho Tire Co., Ltd. v. Carmichael*, the United States Supreme Court determined that the gatekeeper function of *Daubert* was not limited to scientific knowledge but also applied to expert testimony based on technical or other specialized knowledge.<sup>737</sup> Based on *Daubert* and *Kumho Tire*, Rule 702 of the Federal Rules of Evidence was amended to read:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>738</sup>

However, West Virginia has declined to adopt the revised federal rule.<sup>739</sup> Instead, West Virginia's Rule governing expert testimony States:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge,

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<sup>731</sup> 545 S.E.2d 294 (W. Va. 2001).

<sup>732</sup> 509 U.S. 579 (1993).

<sup>733</sup> 443 S.E.2d 196 (W. Va. 1993).

<sup>734</sup> See *Watson*, 545 S.E.2d at 296.

<sup>735</sup> See *id.*

<sup>736</sup> See *id.* at 300 (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148 (1999)).

<sup>737</sup> See *id.*

<sup>738</sup> FED. R. EVID. 702

<sup>739</sup> See *Watson*, 545 S.E.2d at 300.

skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.<sup>740</sup>

Therefore, the witness must be qualified as an expert, testify to scientific, technical or other specialized knowledge, and the testimony must assist the trier of fact.<sup>741</sup> The court concluded that any questions of reliability concerning the expert's opinion goes to the weight of the evidence and not its admissibility.<sup>742</sup>

*J. Christopher Gardill  
Ashley Wilkinson*

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<sup>740</sup> W. VA. R. EVID. 702.

<sup>741</sup> *See Watson*, 545 S.E.2d at 302.

<sup>742</sup> *See id.* at 303.