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Recent Cases - Domestic Relations

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RECENT CASES—DOMESTIC RELATIONS

RECOMMENDED ORDERS

State ex rel. Coats v. Means, 423 S.E.2d 636 (W. Va. 1992).

A family law master has a mandatory, nondiscretionary duty to submit a recommended order to the circuit court within ten days after the close of the evidence in a domestic relations case.

The relator, Joan M. Coats, sought an order establishing the paternity of her infant daughter and an award of child support from the putative father. The circuit court resolved the issue of paternity; however, the issue involving child support was referred to a family law master for evidentiary development of the parties' economic circumstances. After almost three months of inaction, the relator sought a writ of mandamus compelling the master to issue a child support order.

The West Virginia Supreme Court of Appeals noted that section 48A-4-4(b) of the West Virginia Code requires that a family law master recommend "an order and findings of fact and conclusions of law to the circuit court within ten days" of the close of the evidence. The court held that because this section states the family law master's duties in terms of "shall," the family law master's duties are mandatory, and *not* discretionary. Thus, the court held that a writ of mandamus was proper, and granted the requested relief: a writ of mandamus compelling the family law master to issue a recommended order on the issue of child support within ten days.

DIVORCE DECREE

State ex rel. Dillon v. Egnor, 423 S.E.2d 624 (W. Va. 1992).

Neither a circuit court judge nor a family law master may require a nonlawyer, pro se *litigant to prepare a proposed order in order to obtain a final divorce decree.*

Relator, Mary Dillon, instituted divorce proceedings against her husband. Both were nonlawyers and appeared *pro se* before a family law master who issued and filed a recommended order with the circuit court. Both parties waived the ten day exception period. When the relator inquired about the status of the final order, she was told that none would be entered unless she prepared one for the circuit court judge to sign. The relator asserted that the circuit court judge had a mandatory, nondiscretionary duty to prepare and enter an appropriate final decree and had no authority to order her to do so instead.

The West Virginia Supreme Court of Appeals held that when a matter is submitted to the circuit court without exceptions, it is the duty of the circuit court, not the layman litigant, to prepare the final divorce order. The court based its decision on the constitutional right and public policy of self-representation in civil cases. Thus, the court prohibited the circuit court from ordering a layperson litigant to prepare his or her own divorce order.

In dicta, the court extended its ruling to include a similar prohibition on a family law master, noting that a family law master has an identical duty as that of the trial court in making self-representation accessible to *pro se* litigants. Thus, the court granted a moulded writ of mandamus, requiring the respondent judge to prepare and issue a final order within thirty days.

ADOPTION

State ex rel. Smith v. Abbot, 418 S.E.2d 575 (W. Va. 1992).

A technical finding of an invalid adoption does not automatically place custody in the hands of the natural father. Where the natural father fails to exercise his statutory right to contest an adoption performed without his consent, the equitable doctrine of laches may apply to ban any attempt to invalidate the adoption order.

Petitioner, the adoptive mother, sought a writ of prohibition to prevent respondent, the natural father, from seeking custody or increased visitation rights. R.B. was adopted by petitioner with the written consent of his natural mother. Because paternity was not certain at the time, respondent's consent was never obtained. After nine years, the respondent married R.B.'s natural mother and sought to have the original adoptive order set aside.

The West Virginia Supreme Court of Appeals held that although the statutorily mandated method of adoption had technically not been followed (the natural father's consent had never been obtained), the respondent was barred by the doctrine of laches from seeking custody. The court reiterated repeatedly that the overriding concern to be considered in all adoption cases is the welfare of the child. It also adopted a three-prong test in cases in which it must be determined whether laches applies to bar a challenge to an adoption by a natural parent:

(1) the length of time the child has resided with the adoptive parent;
(2) whether the natural parent has maintained contact with and/or supported the child; and
(3) whether the natural parent was aware of and acquiesced in the adoption.

The court applied this three-prong test and found that: (1) R.B. had been with petitioner for over nine years, (2) that respondent's contact with R.B. was infrequent and support was almost nonexistent, and, most significantly, (3) that respondent had been aware of the initial adoption and chose not to do anything until he had married the natural mother. The court ultimately concluded that the respondent had

acquiesced to the adoption because of his inaction. Thus, the court granted petitioner's writ of prohibition preventing respondent from seeking custody.

CUSTODY/VISITATION

McDougal v. McDougal, 422 S.E.2d 639 (W. Va. 1992).

The circuit court may not make further inquiries into joint custody arrangements once it finds that one parent is the primary caretaker and joint custody is opposed.

The family law master found that the appellant, Alice R. McDougal, was the primary caretaker of the children. He also found that the appellant was a fit parent and deserved sole custody of her two minor children. Despite these findings, the circuit court awarded the appellant and the appellee, John A. McDougal, joint custody. In response to appellant's petition for review, the circuit court conducted a hearing. At that hearing, over the appellant's objection, the circuit court heard the appellee's oral petition for custody. The circuit court then ordered the parties and their children to undergo psychological testing. Approximately three months later, the appellee filed a "Motion for Reconsideration of Custody" at which time the court interviewed one of the children *in camera* and ordered more psychological testing. After receiving the psychologist's written evaluation, the circuit court modified the custody arrangement recommended by the family law master and awarded the parties joint legal custody, again over the objection of the appellant.

The West Virginia Supreme Court of Appeals reviewed its prior decisions regarding joint custody awards and concluded that the circuit court had inappropriately reviewed the joint custody issue, even going so far as to label it a "nonissue." The court reiterated an earlier assertion that the primary factor in custody proceedings is the children's welfare. Crucial to the success of joint custody and implicit in securing the optimum for the child's welfare is cooperation between the parents. Here the court balked at the notion of joint custody because the appellant had clearly objected and the parties lived in separate

states. Thus, the Supreme Court of Appeals concluded that the circuit court had erred, and it reversed the lower court's order regarding joint custody.

CUSTODY/VISITATION

Moses v. Moses, 421 S.E.2d 506 (W. Va. 1992).

> *The existence of contradictory evidence regarding which parent was the primary caretaker in the record is not sufficient, alone, to establish an abuse of the trial judge's discretion.*

Appellee-father instituted divorce proceedings and sought custody of his three infant children. Appellant-mother answered and counterclaimed for custody. A special family law master concluded that the appellant was the primary caretaker and that the evidence was insufficient to establish her as an unfit parent. The appellant was subsequently awarded custody. The Appellee took exception to the master's finding and sought review by the circuit court. The circuit court reviewed the master's record and concluded that the appellee was the primary caretaker and that appellant was an unfit parent. It then reversed the master's order and granted custody to appellee.

The West Virginia Supreme Court of Appeals recognized that the record was contradictory and concluded that the evidence equally supported that either party was the primary caretaker. The court cited a presumption that it is in the child's best interest to be placed in the custody of the primary caretaker. It then concluded that a finding of contradictory evidence in the record did not rise to the level of an abuse of discretion, and therefore affirmed the trial court's holding granting appellee-father custody.

The court rejected the lower court's finding that the appellant was an unfit mother. It held that the standard is whether the parent's conduct, regardless of whether it is morally pure or not, has a deleterious effect on the children. The court noted that there was no evidence that the appellant's conduct had any deleterious effect on the children. Therefore, the lower court's finding was deficient.

Despite this finding, the court refused to overrule the lower court and instead affirmed placement of custody with the appellee-father. It remanded the case on the issue of the precise details of the appellant's visitation rights.

CUSTODY/VISITATION

Ortner v. Pritt, 419 S.E.2d 907 (W. Va. 1992).

> *When a natural parent seeking custody fails to take physical custody of the child, fails to participate in the appellate proceedings, and fails to produce evidence showing that the child will acquire a significant benefit as a result of the change of custody, custody may be awarded to the psychological parent.*

The appellant, the natural mother of John, sought his custody from the appellee, John's grandmother. The appellant, John, and his father (the appellee's son) resided with the appellee until John's father's death. The appellant then moved out, leaving John with the appellee. It was not clear from the record how much time John subsequently spent with the appellant. The trial court found that since neither party could be held to be the primary caretaker, the natural parent ought to prevail and awarded custody to the appellant. The appellant, however, failed to take physical custody of John, failed to participate in the appellate proceedings, and also failed to make any inquiry into the status of the case with her own trial counsel.

The West Virginia Supreme Court of Appeals held that the standard for change of custody cases is whether the child would acquire a "significant benefit" as result of the change of custody. Applying this standard, it reversed the lower court, noting the circumstances surrounding the child's present place of custody and the absence of any evidence that a change of custody would be of "significant benefit" to the child.

CUSTODY/VISITATION

Mary D. v. Watt, No. 20453, 1992 WL 113562 (W. Va. May 29, 1992).[1]

> *When determining visitation rights, a family law master and circuit court may not merely accept the criminal verdict of acquittal in a child molestation case, but must independently inquire as to whether that parent sexually abused the child. Further, a family law master or circuit court need only find credible evidence that sexual abuse occurred before requiring that any visitation be supervised.*

After the petitioner-mother learned that the respondent-father had sexually abused their three minor children, she filed for divorce. Subsequently, the respondent was charged and acquitted of eight counts of child molestation. Respondent then sought visitation rights which were granted by the family law master. Petitioner's motion requesting that a custody/visitation hearing be held by the circuit court was denied. Petitioner challenged that ruling on appeal, contending that the requisite good cause had been established by which the circuit court should have revoked the matter from referral to a family law master.

The West Virginia Supreme Court of Appeals held that allegations of sexual abuse in divorce proceedings were extraordinary and almost automatically constituted the requisite "good cause" by which the circuit court may retain or revoke a matter. The court cited its concern for the harm to the child that could be caused by delay of any appeal made, as well as by the possibility that the child would be required to repeat his or her testimony on appeal.

The court took a strong stance regarding allegations of sexual abuse. It held that a parent's acquittal of criminal charges of sexual abuse, standing alone, was not a sufficient basis by which a family law master or circuit court may determine custody or visitation rights. Further, it held that a family law master or circuit court need only

1. This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

find *credible evidence* that sexual abuse occurred before requiring that any visitation be supervised. The court explicitly announced the following standard to requiring supervised visitation after allegations of sexual abuse:

> (1) a finding has been made with respect to whether a parent sexually abused the child;
> (2) that finding is supported by credible evidence; and
> (3) the risk of harm of a restricted visitation right to the parent who allegedly committed the sexual abuse is weighed against the risk of harm to the child.

In light of its new standards, the court remanded the case to determine whether good cause existed for the circuit court to retain jurisdiction, and whether credible evidence existed to support the allegation that respondent had sexually abused his children.

CUSTODY/VISITATION

Cunningham v. Cunningham, 423 S.E.2d 638 (W. Va. 1992).

> *Evidence that the noncustodial parent enjoys a good relationship with his children is insufficient, standing alone, to justify a change of custody.*

The appellant, Karen Cunningham, and the appellee, Michael Cunningham, were divorced and custody of their three children was granted to the appellant. At the time of the divorce, it was known that the appellant had joined the Navy and would often be deployed overseas. Despite this, the appellant was found to be a fit and proper person to assume custody of the children. The appellee was granted visitation rights and required to pay monthly child support. Since the divorce, the appellant was deployed for several overseas assignments, each for several months at a time. During those periods the children remained with the appellant's mother (i.e., their grandmother) and sometimes with the appellee-father. Also since the divorce, the appellee has often been in arrears in his support payments. Emphasizing that the appellant was often an "absentee mother," the appellee petitioned for and was granted custody of the children by the circuit court.

The West Virginia Supreme Court of Appeals reversed the lower court, holding that evidence that a noncustodial parent has a good relationship with his children is not sufficient, standing alone, to justify a change of custody. The court restated its two-part test for determining when a change of custody is justified: (1) a showing that the parties have experienced a change in circumstances and (2) the change in custody would materially promote the welfare of the child. Applying this test to the instant case, the court held that it had not been satisfied. The court relied primarily on the facts that the possibility of military deployment was known at the time of the divorce and that the record showed that the children remained appellant's first priority. Thus, the court held that the circuit court erred in modifying the custody arrangement and returned custody to the appellant.

ALIMONY/CHILD SUPPORT

Woods v. Guerra, 419 S.E.2d 900 (W. Va. 1992).

A lower court may not retroactively modify an alimony award if that modification amounts to more than a mere correction of clerical errors.

In the original divorce decree between the parties, the appellee-husband was ordered to make alimony payments of $500 per month until further order by the court. No further order of the court regarding alimony was made. The appellee ceased payment of alimony after only eleven months. Several years later, the appellee sought judicial sale of the former marital property, and the appellant-wife, the highest bidder, bought the property. The appellant subsequently refused to pay the money owed, claiming that back alimony, attorney's fees, and costs were owed to her. The appellee contended that no money was owed, alleging that the order of alimony was intended to last only a year and that this omission was a mere clerical error. The trial court agreed with the appellee and amended the original divorce decree to reflect an alimony payment period of only one year. The trial court then awarded the appellee both the money for the sale and a credit rental value.

The West Virginia Supreme Court of Appeals reversed the lower court's finding that the original alimony order was intended to last

only for one year. It rejected the lower court's application of Rule 60(a) of the West Virginia Rules of Civil Procedure, holding that Rule 60(a) applied only to errors that were "purely clerical" in nature. The court recognized that the trial court's amendment was substantive and significantly affected the parties' rights. The court also noted that the appellee had signed the original order and never attempted to obtain a reduction or elimination of the alimony. The court held the lower court's action was a clear case of an abuse of discretion which justified reversal.

The court also addressed the appellant's contention that the trial court's calculations of the credits were incorrect, but found no error on the trial court's part. However, the court did reverse the lower court's finding on the question of back alimony, and ordered the appellee to pay back alimony from his last date of payment up through and including the date of sale of the property, without interest.

ALIMONY/CHILD SUPPORT

Belcher v. Terry, 420 S.E.2d 909 (W. Va. 1992).

> *An employer may be held liable to an obligee for any amount of child support which the employer fails to withhold from the obligor's wages where the employer knowingly and willfully enters into an agreement to pay an obligor his wages in cash in order to assist the obligor in evading child support payments. Furthermore, punitive damages may also be recoverable from the employer under such circumstances.*

The circuit court certified the following question to the West Virginia Supreme Court of Appeals:

Is the employer of an obligor of child support or alimony who enters into a cash payment arrangement for the services of his employee in order to assist the obligor in avoiding the duty of payment of child support or alimony liable for actual and punitive damages resulting therefrom?

The court answered this question in the affirmative. It noted that this question was one of first impression in West Virginia, but likened

its analysis to that of a creditor situation in which an employer fails or refuses to pay a judgment creditor. Recognizing that an employer is *required* to pay a judgment creditor, the court had no difficulty expanding this rule, holding that an employer of an obligor of child support is also under the same requirement. It stated that an obligee must produce clear, cogent, and convincing evidence that the employer had knowledge of the obligor's intent to evade child support payments through receipt of cash wages.

The court also recognized a right to punitive damages, noting that substantial public policy exists favoring the payment and collection of child support. The court established clear guidelines, stating that the obligee must establish that the employer's acts were done knowingly and willfully to aid the obligor in evading child support payments. Further, any punitive damages awarded must bear a reasonable relationship to the potential harm caused.

Classifying the issue as one that had only been "tangentially raised" below, the court also held that an obligee of child support can institute proceedings against delinquent obligors and their employers to obtain payment of child support where the Child Advocate's Office (CAO) fails or refuses to bring such action. The court noted that while the primary authority for bringing such actions remains with the CAO, the obligee may initiate his or her own action in the face of the CAO's refusal or inaction.

REHABILITATIVE ALIMONY

Smith v. Smith, 420 S.E.2d 916 (W. Va. 1992).

1. When a spouse earns significantly more money than his or her partner, the partner's claims for additional training to increase his or her income and for payment of attorney's fees and court costs should be favorably considered in a divorce proceeding.
2. The commingling of separate funds in a joint account creates the presumption of marital property, and when it is used for marital purposes, the presumption may no longer be rebutted.
3. Trial courts have been authorized by the legislature to provide for medical coverage of minor children in divorce actions where such is available at a reasonable cost.

The appellant, Joyce Ann Maurer Smith, was widowed with two sons when she married the appellee, Stephen C. Smith. During eight years of marriage they had a daughter. Also, the appellee completed his training as a resident physician and had opened a solo practice. He was earning approximately $155,000 a year at the time of appeal. In contrast, the appellant completed a master's degree in nursing and was earning only $20,000 a year.

The West Virginia Supreme Court of Appeals recognized this case as one favorable for awarding rehabilitative alimony. It relied on the appellant's assertion that rehabilitative alimony would enable her to obtain a Ph.D. and increase her earning capacity by as much as $30,000 per year; however, it remanded to the lower court for further development as to the economic benefits of a Ph.D. The court also relied heavily on the extreme disparity between the parties current salaries. The court rejected the appellee's contention that a rehabilitative award should not be considered because the appellant was currently "underemployed" by working for a salary of $20,000 when she could be earning $30,000.

The court also held the great disparity between salaries to be the "touchstone" for an award of attorney's fees and court costs. It reversed the trial court's ruling that each party pay their own attorney's fees and split court costs. The court ordered the appellee to pay *both* attorney's fees and *all* costs of litigation. Further, the court recognized this case to be one in which compulsory payment by the spouse was "reasonably necessary" within the meaning of section 48-2-13(a)(4) of the West Virginia Code.

The court clarified earlier rulings regarding the commingling of funds, holding that if commingled funds are used for marital purposes, any residual claim to those funds as separate money ceases. It rejected the appellant's contention that the appellee had been unjustly enriched during their marriage because he had used the appellant's sons' social security survivors' benefits. Because the appellant had used those benefits to pay household expenses, her right to rebut any presumption that arose when she deposited the money in a joint account had been extinguished.

Finally, the West Virginia Supreme Court of Appeals held that based on sections 48-2-15(b)(3) and 48-2-15a of the West Virginia Code, the legislature had authorized trial courts to provide for medical coverage of minor children in divorce actions when it is available at a reasonable cost. The court held that section 48-2-15(b)(3) had not been repealed by the enactment of section 48-2-15(a), but merely supplemented in its procedural detail. Both sections required that trial courts consider the best source (or combined sources) for medical coverage of minor children. The court remanded on the issue of the parties' minor daughter's medical coverage, instructing the lower court to determine the appellee's amount of health care contribution in accordance with the cited statutes.

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