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James A. Liotta

West Virginia University College of Law

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DOMESTIC RELATIONS—CHILD SUPPORT—EQUAL OBLIGATION OF PARENTS

A father petitioned for the reduction of a support order requiring him to pay \$250 per month for support and fifty dollars per month toward orthodontist fees for the benefit of his two minor children. Following the entry of the original support order, the mother had secured employment at a net salary of \$8400 per year, and the father's annual income had decreased from \$12,400 to \$10,600. The court of common pleas denied the petition,¹ and upon appeal, the Superior Court of Pennsylvania affirmed this decision.² The father appealed. *Held*, vacated and remanded. The combination of the decrease in the father's income and the additional income from the mother's employment constituted a change in circumstances sufficient to modify the original court order.³ *Conway v. Dana*, 318 A.2d 324 (Pa. 1974).

In *Conway*, the Supreme Court of Pennsylvania held that the presumption that the father must bear the primary burden of financial support of minor children, when based solely upon his sex and without regard to the actual circumstances of the parties, "is clearly a vestige of the past and incompatible with the present recognition of equality of the sexes."⁴ The court went on to say that the support of minor children is the equal responsibility of mother and father; both must be required to discharge the obligations in accordance with their respective capacities and abilities.⁵

¹ Ct. of C.P., Fam. Div., Alleg. Co., at No. D1878 (1970).

² 221 Pa. Super. 827, 292 A.2d 428 (1972).

³ As a general rule, child support orders in divorce decrees are modifiable. Modification proceedings require proof of a change in circumstances occurring after the original order is entered. In West Virginia the power to modify support orders is found in W. VA. CODE ANN. § 48-2-15. (Cum. Supp. 1974).

⁴ *Conway v. Dana*, 318 A.2d 324, 326 (Pa. 1974). The court based its holding on the recently adopted Equal Rights Amendment to the Pennsylvania Constitution which provides that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. 1 art. I, § 27. For a discussion on the possible effects of this amendment on support law in Pennsylvania, see Comment, *The Support Law and the Equal Rights Amendment in Pennsylvania*, 77 DICK L. REV. 1 254 (1972).

Earlier Pennsylvania decisions dealing with this problem held that: (1) the primary duty of support for minor children rests with the father; and (2) the income or financial resources of the mother are to be treated only as an attending circumstance. *Commonwealth ex rel. Bortz v. Norris*, 184 Pa. Super 594, 135 A.2d 771 (1957); *Commonwealth ex rel. Silverman v. Silverman* 180 Pa. Super. 94, 117 A.2d 801 (1955).

⁵ 318 A.2d at 326. In *Centracchio v. Meinhold*, Ct. of C.P., Fam. Div., Alleg.

The traditional American view has been that the support of a minor child is primarily the father's obligation and that a mother's income, assets, and ability to provide for minor children are irrelevant to the father's primary obligation.⁶ As evidenced by the *Conway* decision, however, there is an emerging trend to consider child support a duty of both parents and to require each to contribute to a child's support in proportion to his or her financial ability.⁷ This tendency has especially appeared in decisions based upon modern statutes.⁸

In the 1973 case of *D'Ambrosio v. DiAmbrosio*, the Oregon Court of Appeals upheld a lower court ruling that denied a custodial father an order requiring a noncustodial mother to pay child support.⁹ The court, however, did not base its finding on the primary obligation of a father to support minor children. To the contrary, the court quoted from a modern statute in holding that the sex of a noncustodial parent is immaterial in determining responsibility to contribute to child support.¹⁰ Another 1973 case, *Birge v.*

Co., at No. D1304 (Sept. 26, 1974), the court, citing *Conway*, ordered the noncustodial mother earning \$376 per month to pay child support of thirty dollars per month to the custodial father who was earning \$743 per month. This figure was determined by prorating each parent's earnings and requiring each parent to pay his or her proportionate share of the total expenses incurred for child support.

⁶ *E.g.*, *Brock v. Brock*, 281 Ala. 525, 205 So. 2d 903 (1967); *Zarifis v. Zarifis*, 28 Conn. Supp. 128, 253 A.2d 673 (Super. Ct. 1969).

⁷ For an overview of the development of this trend, see Comment, *Domestic Relations: The Expanding Role of the Mother in Child Support*, 27 ARK. L. REV. (1973).

⁸ See text accompanying notes 8-14 *infra*. For a more detailed discussion of the relative responsibility of husband and wife for support of minor children based on modern statutes, see Annot., 1 A.L.R.3d 324 (1965); Annot., 1 A.L.R.3d 382 (1965).

⁹ 515 P.2d 1353, 1354 (Ore. App. 1973). In *D'Ambrosio*, the parties were divorced, the mother was given custody of the children, and the father was ordered to pay child support. Two years later, pursuant to a motion by the father, custody of the children was given to the father. The father did not then seek or receive an award of child support. He later sought an order requiring the mother to pay child support; the trial court denied his motion because he failed to show a change of circumstances subsequent to the date when he obtained custody and failed to seek support. The appellate court affirmed this decision but added that if the motion had been timely, the mother very probably would have been required to pay some child support.

¹⁰ *Id.* The court relied on *Ore. Rev. Stat.* § 107.105(1) (1974) which states that the court has power to decree

(a) For the future care and custody of the minor children of the marriage as it may deem just and proper . . . No preference in custody shall be given to the mother over the father for the sole reason that she is the mother.

Simpson, held that a divorced wife has an equal duty of contributing to the support of the parties' minor children.¹¹ In reaching this holding, the court referred to "a sweeping reformation of the laws pertaining to severance of marriages"¹² and quoted from a recently revised statute that made child support the equal duty of both parents.¹³ In *Plant v. Plant*, decided in June of 1974, an Illinois court held that contrary to the contention that the father is primarily responsible for child support, such support is a joint and several obligation of both parents.¹⁴ The court went on to say that with the emancipation of women and the change in times, the traditional view that child support is exclusively a husband's obligation is outmoded.¹⁵

Must a father, solely because of his sex, accept the principal burden of financial support of minor children in West Virginia?

(b) For the recovery from the party not allowed the care and custody of such children, such amount of money . . . as may be just and proper for such party to contribute toward the support and welfare of such children.

¹¹ 280 So.2d 482 (Fla. Dist. Ct. App. 1973). The circuit court ordered the father to pay child support and the mother was awarded custody of the children. *Id.* The mother subsequently remarried. The father later filed a petition to modify the child support order alleging that he was making less money than he had made at the time the order was initially entered and that the income and financial circumstances of the mother's present husband were material and relevant to the mother's ability to contribute to the support of the children. *Id.* at 482-83. The lower court denied the petition. The appellate court reversed with directions to grant appellant a new hearing. *Id.* at 483.

¹² *Id.* at 483.

¹³ *Id.* The court quoted from FLA. STAT. ANN. § 61.13 (Cum. Supp. 1974) which states that "the court may at any time order either or both parents owing a duty of support to a child of the marriage to pay such support as from the circumstances of the parties and the nature of the case is equitable." *Id.*

¹⁴ 20 Ill. App. 3d 5, 7, 312 N.E.2d 847, 849 (1974). The circuit court awarded child custody to the wife pursuant to a separate maintenance decree entered in 1967. The decree made no allowance to her for attorney fees or child support but reserved the question for future ruling by the court. *Id.* at 848. At the time of the entry of the decree the husband was an alcoholic, without funds, unemployed, and confined to a hospital. Five years later, he was declared an incompetent. At that time his assets were forty thousand dollars that he had recently inherited. These assets were being used for his care in a nursing home. The wife filed a petition seeking retroactive allowance for child support, and this petition was denied by the trial court. The appellate court affirmed. *Id.* at 851.

¹⁵ *Id.* at 8, 312 N.E.2d at 850. The court relied on an Illinois statute. ILL. ANN. STAT., ch. 40 § 19 (1956) provides that "the court may make such order touching the alimony and maintenance of the wife or husband, the care, custody and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just"

Traditionally, the answer to this question has been yes. It was the duty of the father to provide for the support of his minor children.¹⁶ The marriage contract imposed upon him the obligation to support and maintain his wife and children, and he could not relieve himself of this obligation.¹⁷ The mother was bound to accept this duty when the father was unable to provide.¹⁸ The amount to be paid for child support was determined by the child's needs and by the father's fortune and station in life.¹⁹

With the 1969 passage of the amendments to West Virginia Code dealing with divorce, annulment, and separate maintenance,²⁰ however, the Legislature has opened the door to speculation on the obligation between parents to support children. Alimony can now be awarded to either spouse.²¹ In awarding alimony, the courts are to consider the needs, earnings, earning capacity, and property of both husband and wife.²² In actions for divorce and annulment pendente lite, preliminary relief in the form of separate maintenance and child support is now available to either the wife or the husband.²³ Upon ordering a divorce, the court "may make such further order as it shall deem expedient, concerning the care, custody, education, and maintenance of the minor children

¹⁶ *Post v. Post*, 95 W. Va. 155, 157, 120 S.E. 385, 386 (1923).

¹⁷ *Norman v. Norman*, 88 W. Va. 640, 645, 107 S.E. 407, 410 (1921).

¹⁸ W. VA. CODE ANN. § 48-8-1 (1966) provides that it is a criminal offense for any parent to neglect or refuse to provide for the support and maintenance of minor children. This statute, coupled with the father's primary duty to support minor children, implies a secondary obligation to the mother.

¹⁹ 88 W. Va. at 645-46, 107 S.E. at 410. *See also* W. MORRIS, LAW OF DOMESTIC RELATIONS IN WEST VIRGINIA § 15.13, at 232 (1973).

²⁰ On April 1, 1969, the divorce, annulment, and separate maintenance law of West Virginia was partially rewritten and formally enacted by the Legislature. Acts of the 59th W. Va. Leg. Ch. 49, §§ 48-2-1 to -31, Reg. Sess. (1969). For a discussion of the effect of these changes, see Comment, 72 W. VA. L. REV. 104 (1970).

²¹ W. VA. CODE ANN. § 48-2-15 (Cum. Supp. 1974) provides that "[u]pon ordering a divorce, the court may make such further order as it shall deem expedient, concerning the maintenance of the parties, or either of them"

²² *Id.* § 48-2-16 provides that in determining the amount of alimony the court "shall take into consideration . . . the financial needs of the parties, the earnings and earning ability of the husband and wife, the estate, real and personal, and the extent thereof as well as the income derived therefrom of both the husband and wife"

²³ *Id.* § 48-2-13 provides that "[t]he court may . . . make any order that may be proper to compel either party to pay any sum necessary for the maintenance of the other party . . . or to provide for the custody and maintenance of the minor children of the parties, during the pendency of the action"

. . . ."²⁴ For purposes of affecting such an order, the court "may make any order concerning the estates of the parties, or *either of them*, as it shall deem expedient."²⁵ These statutory provisions,²⁶ and the legislative trend that they reflect, suggest that child support is the equal responsibility of both parents in West Virginia.

It is not clear from judicial interpretation of these provisions what position the West Virginia Supreme Court of Appeals will take regarding equal parental responsibility for child support. There are no recent West Virginia cases dealing directly with this issue; however, some predictions can be made from the court's construction of the revised statutes that deal with alimony, separate maintenance, and child support in actions *pendente lite*.

In *State ex rel. Varner v. Janco*, the court granted a writ of habeas corpus to the petitioner who was imprisoned for failure to keep his alimony payments current.²⁷ At the time of the alimony award, petitioner was earning \$750 per month. He later suffered two heart attacks resulting in total and permanent disability and was unable to comply with the original order.²⁸ The court, in awarding the writ, examined the earnings, earning capacity, property holdings, and financial needs of both husband and wife. Finding that the lower court abused its discretion in failing to reduce alimony, the court held that a proper allowance of alimony was to be made "in consideration of all the circumstances of the case and of the parties, and within the spirit of Section 16, Article 2, Chapter 48 of the Code, 1931, as amended, wherein consideration is required to be given to the circumstances and needs of the parties involved."²⁹

²⁴ *Id.* § 48-2-15.

²⁵ *Id.* (emphasis added). The language quoted was not changed in the 1969 revision.

²⁶ A curious omission in the 1969 legislative revisions of the domestic relations law is that the husband, while having the right to receive alimony and separate maintenance *pendente lite*, is not given the equal opportunity to receive separate maintenance from the wife. *Id.* § 48-2-28. In West Virginia, alimony is defined as the allowance resulting from the divorce. *Brady v. Brady*, 151 W. Va. 900, 908, 158 S.E.2d 359, 365 (1967). Separate maintenance *pendente lite* is an allowance awarded during the pendency of an action for divorce or annulment. *Harlan v. Triplett*, 197 S.E.2d 653, 654 (W. Va. 1973). Separate maintenance is an allowance resulting from a suit for separate maintenance; this suit may only be instituted by a wife against her husband. W. VA. CODE ANN. § 48-2-28 (Cum. Supp. 1974).

²⁷ 191 S.E.2d 504, 508 (W. Va. 1972).

²⁸ *Id.* at 505.

²⁹ *Id.* at 508.

Childress v. Childress involved proceedings by a former wife for an increase in support and maintenance payments.³⁰ The original support and maintenance payments had been determined by a contractual agreement between the husband and wife, and this agreement was approved and confirmed by the court that granted the divorce.³¹ Distinguishing a court approved contractual support and maintenance agreement from judicially awarded alimony,³² the court defined alimony as “an allowance judicially granted to a wife for her support and may be modified upon application subsequent to its original award when a party demonstrates a legally cognizable need for modification.”³³ This definition recognizes that either party can seek modification of an alimony award, but it does not recognize that either party can be awarded alimony. This definition was rendered four years after the statute was enacted that made alimony available to either husband or wife.

In *Harlan v. Triplett* the court recognized the Legislature’s departure from the past in extending equality to the sexes in divorce and annulment actions pendente lite.³⁴ The wife attacked, by writ of prohibition, an order pendente lite that did not provide her with temporary maintenance, alimony, attorney’s fees, and court costs. In denying the writ, the court said, “In a significant departure from the past, the Legislature has now provided that preliminary relief in civil actions seeking resolution of marital difficulties is available either to the wife or husband, as in the judgment of the court, factual presentations require.”³⁵

In *Corbin v. Corbin*, the court introduced a dual standard for determining the nature and amount of an alimony award.³⁶ The Supreme Court of Appeals looked to both the statutorily revised criteria and to the traditional criteria.³⁷ The *Corbin* case involved a husband’s appeal from a lower court order increasing the alimony

³⁰ 196 S.E.2d 657, 658 (W. Va. 1973).

³¹ *Id.* The contractual agreement was a property settlement agreement allotting a sum certain payable by the husband to the wife for support and maintenance.

³² *Id.* at 659. The court said that the approval of a contractual agreement in a final order does not operate to make the agreement a part of, and enforceable as, a decree of the court.

³³ *Id.* (emphasis added).

³⁴ 197 S.E.2d 653, 654 (W. Va. 1973).

³⁵ *Id.* The court relied on W. VA. CODE ANN. § 48-2-13 (Cum. Supp. 1974) in reaching this decision.

³⁶ 206 S.E.2d 898 (W. Va. 1974).

³⁷ *Id.* at 903-04.

and child support to be paid to his former wife. The court quoted the revised alimony statute that is based on sexual equality and added that it is within the sound discretion of the trial judge to assign weight to the criteria provided by the statute.³⁸ The opinion recognized that "the norms of society are rapidly changing with regard to the role of women"³⁹ and cited three recent cases from other jurisdictions that state that a woman capable of reorganizing her life in such a way as to support herself might not be entitled to alimony.⁴⁰ Nevertheless after recognizing the new trend, the court then applied the traditional sexually discriminatory standards in determining the outcome of this case. Citing three old West Virginia cases which held that the amount of alimony should be determined by the wife's station in life and the husband's earning ability,⁴¹ the court affirmed the decision of the lower court increasing the wife's alimony award.⁴² *Corbin* suggests that the trial court, in determining an award of alimony, can look either to the revised statutes dealing with alimony or to the traditional standards. If this is so, the court has lessened to a great extent the impact of the revised domestic relations statutes treating men and women equally.

Will the court in West Virginia continue to indulge in the fiction that the father, because of his sex, is necessarily the best provider and that the mother is not capable of fulfilling the financial aspects of the parental obligation? No West Virginia cases are directly in point with the *Conway* decision or any of the other recent decisions that have ruled on this question. The Legislature, in revising West Virginia's domestic relations law, demonstrated its intent that men and women be treated equally with regard to both their marital and their parental role. In the few decisions that have been based on these revised statutes, the results have been conflicting and unclear. As evidenced by *Harlan*, *Varner*, and

³⁸ *Id.* at 903. The opinion states that the statute doesn't require that specific weight be assigned to any one criteria and the trial judge, in his discretion, can give that weight which he deems necessary to any or all of the criteria.

³⁹ *Id.*

⁴⁰ *Id.* The cases that the West Virginia court cited were: *Cooper v. Cooper*, 214 N.W.2d 682 (Minn. 1974); *Pollak v. Pollak* 282 So. 2d 30 (Fla. 1973); and *Payton v. Payton*, 187 A.2d 899 (D.C. App. 1963).

⁴¹ 206 S.E.2d at 904. The cases that the court cited were: *Dayton v. Dayton*, 109 W. Va. 759, 156 S.E. 105 (1930); *Reynolds v. Reynolds*, 72 W. Va. 349, 78 S.E. 360 (1913); and *Henrie v. Henrie*, 71 W. Va. 131, 76 S.E. 837 (1913).

⁴² 206 S.E.2d at 907.

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Corbin, the court is aware of the legislative departure from tradition; however, as *Childress* and *Corbin* point out, the court has not exclusively bound itself to the letter or the spirit of these revised domestic relations statutes and will continue to apply traditional standards.

If the West Virginia Supreme Court of Appeals chooses to follow the emerging trend evidenced by *Conway*, it could grant child support awards based on a more realistic view that reflects changing attitudes and policies regarding the role of the sexes. The economic welfare of minor children would in no way be sacrificed, and by using such criteria as the needs, earnings, earning capacity, and property holdings of both husband and wife, a more equitable resolution of this problem would be achieved.

James A. Liotta