Domestic Relations

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West Virginia Supreme Court of Appeals

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before the court to outweigh the importance of maintaining the confidentiality established by W.Va. Code, 27-3-1(a) [1977].

VI. DOMESTIC RELATIONS

A. Civil Child Abuse and Neglect

The case of In Interest of S.C. required Justice McHugh to examine issues regarding the burden of proof in civil child abuse and neglect proceedings. Justice McHugh held that

W.Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.

Justice McHugh concluded in In Interest of S.C. that "[e]ven when an improvement period is granted, the burden of proof in a child neglect or abuse case does not shift from the State Department of Welfare to the parent, guardian or custodian of the child. It remains upon the State Department of Welfare throughout the proceedings."

Justice McHugh addressed terminating parental rights due to neglect or abuse in Interest of Darla B. The court held initially that

[t]he decision of a circuit court terminating the rights of parents to their child pursuant to W.Va. Code, 49-6-5 [1977], will not be reversed by this Court for failure to grant the parents an improvement period, where the evidence supports a finding that the child, 38 days old, suffered from life-threatening injuries in the form of broken bones and bruises, which could not have occurred in the manner testified to by the parents, and the circuit court found "compelling circumstances" for the termination of parental rights.

Justice McHugh concluded in Darla B. that

527 Id. at Syl. Pt. 6.
529 Id. at Syl. Pt. 1.
530 Id. at Syl. Pt. 2.
532 Id. at Syl. Pt. 2.
The granting of an improvement period, pursuant to W.Va. Code, 49-6-2(b) [1980] and W.Va. Code, 49-6-5(c) [1977], unless otherwise provided by the laws of this State, is not an alternative disposition where a finding is made pursuant to W.Va. Code, 49-6-5(a)(6) [1977] that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future," and, pursuant to W.Va. Code, 49-6-2(b) [1980], "compelling circumstances" justify a denial thereof.\textsuperscript{533}

Justice McHugh outlined the responsibilities of guardian ad litems to children in abuse and neglect proceedings in the case of In re Jeffrey R.L.\textsuperscript{534} The decision stated:

Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W.Va. Code, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the West Virginia Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the West Virginia Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client. The Guidelines for Guardians Ad Litem in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the West Virginia Code, the West Virginia Rules for Trial Courts of Record, and the West Virginia Rules of Professional Conduct, and provide attorneys who serve as guardians ad litem with direction as to their duties in representing the best interests of the children for whom they are appointed.\textsuperscript{535}

Justice McHugh was called upon in State ex rel. S.C. v. Chafin\textsuperscript{536} to further delineate the duties of officials when a child is brought into custody pursuant to the abuse and neglect statutes. The court held:

W.Va. Code, 49-6-3(b) [1992] provides that, whether or not the court orders immediate transfer of custody as provided in W.Va.

\begin{footnotesize}
\textsuperscript{533} Id. at Syl. Pt. 3. \\
\textsuperscript{534} 435 S.E.2d 162 (W. Va. 1993). \\
\textsuperscript{535} Id. at Syl. Pt. 5. \\
\textsuperscript{536} 444 S.E.2d 62 (W. Va. 1994). 
\end{footnotesize}
Code, 49-6-3(a) [1992], if the court finds that there exists imminent danger to the child, the court may schedule a preliminary hearing. If at the preliminary hearing the court finds there to be no alternative less drastic than removal of the child from his or her home, the court may order that the child be delivered into the temporary custody of the Department of Health and Human Resources or some other designated person for a period not exceeding sixty days. Furthermore, if, pursuant to W.Va. Code, 49-6-2 [1992], the court finds the child to be abused or neglected, then both the Department of Health and Human Resources and the court, no later than sixty days after the child is placed in the temporary custody of the Department of Health and Human Resources, are to proceed with the disposition of the child, in compliance with W.Va. Code, 49-6-5 [1992]. W.Va. Code, 49-6-5(a) [1992] requires the Department of Health and Human Resources to file with the court a copy of the child’s case plan, including the permanency plan for the child. W.Va. Code, 49-6-5(a) [1992] defines a case plan as a written document which includes, where applicable, the requirements of a family case plan, as set forth in W.Va. Code, 49-6D-3 [1984], as well as the additional requirements set forth in W.Va. Code, 49-6-5(a) [1992]. Furthermore, W.Va. Code, 49-6-5(a) [1992] requires the court to proceed to disposition, one of those being, if the court finds the abusing parent(s) unwilling or unable to provide adequately for the child’s needs, the court may commit the child temporarily to the custody of the Department of Health and Human Resources.

In Chafin, Justice McHugh also held that

W.Va. Code, 49-6-8(a) [1992] provides that if, twelve months after receiving physical custody of a child, the Department of Health and Human Resources has not placed the child in permanent foster care, in an adoptive home or with a natural parent, the Department of Health and Human Resources shall file with the circuit court a petition for review of the case as well as a report detailing the efforts which have been made to place the child in a permanent home and copies of the child’s case plan including the permanency plan. W.Va. Code, 49-6-8(a) [1992] further requires the circuit court to schedule a hearing to review the child’s case, to determine whether and under what conditions the child’s commitment to the Department of Health and Human Resources shall continue, and to determine what efforts are necessary to provide the child with a permanent home. At the conclusion of the hearing the circuit court shall enter an

537 Id. at Syl. Pt. 1.
appropriate order of disposition, in accordance with the best interests of the child. Under W.Va. Code, 49-6-8(a) [1992], the court shall retain continuing jurisdiction over cases reviewed under this section for so long as a child remains in temporary foster care.\textsuperscript{538}

Justice McHugh continued in \textit{Chafin} by holding that

\[ \text{[t]he purpose of the child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit. The child's case plan is to include, where applicable, the requirements of a family case plan, as set forth in W.Va. Code, 49-6-5(a) [1992] and 49-6D-3(a) [1984], as well as the additional requirements articulated in W.Va. Code, 49-6-5(a).} \textsuperscript{539} \]

Justice McHugh further stated:

\textit{W.Va. Code, 49-6-8(d) [1992] requires the Department of Health and Human Resources to file a report with the circuit court in any case where any child in the temporary or permanent custody of the Department of Health and Human Resources receives more than three placements in one year no later than thirty days after the third placement.} \textsuperscript{540}

Justice McHugh wrote in \textit{Matter of Taylor B.} \textsuperscript{541} that

\[ \text{[a] civil child abuse and neglect petition instituted by the West Virginia Department of Health and Human Resources pursuant to [W.Va.] Code, 49-6-1 \textit{et seq.}, is not subject to dismissal pursuant to the terms of a plea bargain between a county prosecutor and a criminal defendant in a related child abuse prosecution.} \textsuperscript{542} \]

\textbf{B. Child Support}

Justice McHugh held in \textit{Hopkins v. Yarbrough} \textsuperscript{543} that

\begin{itemize}
  \item \textsuperscript{538} Id. at Syl. Pt. 2.
  \item \textsuperscript{539} Id. at Syl. Pt. 4.
  \item \textsuperscript{540} Id. at Syl. Pt. 5.
  \item \textsuperscript{541} 491 S.E.2d 607 (W. Va. 1997).
  \item \textsuperscript{542} Id. at Syl. Pt. 2.
  \item \textsuperscript{543} 284 S.E.2d 907 (W. Va. 1981).
\end{itemize}
In the absence of fraud or other judicially cognizable and harmful circumstance in the procurement of a decree for child support, a circuit court is without authority to modify or cancel arrearages of a former husband’s child support payments, which payments accrued prior to the date of the adoption of such children by the wife’s subsequent husband.\textsuperscript{544}

Justice McHugh confronted the issue of maintaining an action for child support when child support is not addressed in a divorce decree in the case of \textit{Hartley v. Ungvari}.\textsuperscript{545} Justice McHugh said in \textit{Hartley} that

[under the provisions of W.Va. Code, 48-2-15 [1980], where a divorce is granted upon constructive service of process and the divorce order grants custody of a child but makes no further provision for the support of that child, the custodial parent may maintain an action against the noncustodial parent, upon obtaining personal jurisdiction thereof, for reimbursement of reasonable past support expenditures furnished to the child by the custodial parent since the divorce unless, because of circumstances, the custodial parent is estopped from asserting the action.\textsuperscript{546}]

In \textit{Lambert v. Miller},\textsuperscript{547} Justice McHugh stated that “[a] child support order may be modified only upon a substantial change of circumstances which was unanticipated by either of the parties at the time the order was entered and upon a showing that the benefit of the child requires such modification.”\textsuperscript{548}

Justice McHugh also held:

Remarriage of a divorced parent, standing alone, is not sufficient to justify modification of a child support order. It is, however, a circumstance that may be considered in weighing the equities of the situation, where other factors are present which may warrant the trial court, in its sound discretion, to modify the order.\textsuperscript{549}

Justice McHugh stated in \textit{Holley v. Holley}\textsuperscript{550} that

[w]hen a family law master or a circuit court enters an order

\textsuperscript{544} \textit{Id. at Syl.} (citation omitted).
\textsuperscript{545} 318 S.E.2d 634 (W. Va. 1984).
\textsuperscript{546} \textit{Id. at Syl. Pt. 1}.
\textsuperscript{547} 358 S.E.2d 785 (W. Va. 1987).
\textsuperscript{548} \textit{Id. at Syl. Pt. 1}.
\textsuperscript{549} \textit{Id. at Syl. Pt. 3}.
\textsuperscript{550} 382 S.E.2d 590 (W. Va. 1989).
awarding or modifying child support, the amount of the child support shall be in accordance with the established state guidelines, set forth in 6 W.Va. Code of State Rules §§ 78-16-1 to 78-16-20 (1988), unless the master or the court sets forth, in writing, specific reasons for not following the guidelines in the particular case involved.\textsuperscript{551}

Justice McHugh held in \textit{Scott v. Wagoner}\textsuperscript{552} that

\textit{[i]n a case involving child support, if compelling equitable considerations are present, under the provisions of W.Va. Code, 48-2-15(e), as amended, a court has the authority to enforce the child support obligation as a lien against the deceased obligor's estate. To the extent that Robinson v. Robinson, 131 W.Va. 160, 50 S.E.2d 455 (1948), is inconsistent herewith, it is overruled.}\textsuperscript{553}

Justice McHugh stated in \textit{Soriano v. Soriano}\textsuperscript{554} that

\textit{[i]n a case where the dependency exemption is allocated, that is, where a trial court requires the custodial parent to execute the necessary waiver pursuant to 26 U.S.C. § 152(e)(2)(A), as amended, the trial court should set forth its reasons for doing so in the order awarding child support. These reasons should clearly demonstrate that it is more equitable to allocate the dependency exemption to the noncustodial parent than it would be to allow the custodial parent to claim the dependency exemption.}\textsuperscript{555}

Justice McHugh discussed the form which payments to third parties may take in a divorce action in the case of \textit{Sly v. Sly}.\textsuperscript{556} Justice McHugh stated initially:

\textit{W.Va. Code, 48-2-15(b)(4) [1991] provides that if the circuit court, upon ordering a divorce, requires payments to third parties in the form of home loan installments, land contract payments, rent, payments for utility services, property taxes, insurance coverage, or other expenses reasonably necessary for the use and occupancy of the marital domicile, those payments shall be deemed to be alimony, child support or installment payments for}

\begin{footnotes}
\item[551] Id. at Syl. (citation omitted).
\item[552] 400 S.E.2d 556 (W. Va. 1990).
\item[553] Id. at Syl.
\item[554] 400 S.E.2d 546 (W. Va. 1990).
\item[555] Id. at Syl. Pt. 2.
\end{footnotes}
the distribution of marital property in such proportion as the circuit court may direct. *W.Va. Code*, 48-2-15(b)(4) [1991] further provides that if the circuit court does not set forth in the order that a portion of such payments are deemed to be child support or installment payments for the distribution of marital property, then all such payments shall be deemed to be alimony.\(^{557}\)

The court concluded in *Sly* that

[w]here the circuit court, though not specifically using the term "child support," sets up a house payment provision in the final divorce decree to serve as child support for the minor child or children of the divorcing parties, such a provision shall be deemed to be child support under *W.Va. Code*, 48-2-15(b)(4) [1991].\(^{558}\)

Justice McHugh observed in *Robinson v. McKinney*\(^{559}\) that "[t]he ten-year statute of limitations set forth in *W.Va. Code*, 38-3-18 [1923] and not the doctrine of laches applies when enforcing a decratal judgment which orders the payment of monthly sums for alimony or child support."\(^{560}\) Justice McHugh held next in *Robinson* that "[i]n order to ensure that the best interests of the child are considered, ordinarily an agreement to modify or terminate a child support obligation is effective only upon entry of a court order, authorized by *W.Va. Code*, 48-2-15(3) [1991], which modifies or terminates the child support obligation."\(^{561}\)

In *Costello v. McDonald*\(^{562}\) Justice McHugh wrote:

It is presumed that when the obligor fails to make his or her child support payments as ordered, the obligee assumed that additional burden in such a manner so as to protect the welfare of the child, and, therefore, in the event the obligee dies, his or her estate is entitled to recoup from the obligated party the child support arrearage which accrued prior to the death of the obligee. This presumption may be rebutted if the court makes written findings on the record that there is clear, cogent, and convincing evidence that the welfare of the child for whom the child support payments were ordered, was adversely affected or would be adversely affected if the child support arrearage is given to the obligee's estate. Whether the presumption has been rebutted is within the...

\(^{557}\) *Id.* at Syl. Pt. 1.

\(^{558}\) *Id.* at Syl. Pt. 2.

\(^{559}\) 432 S.E.2d 543 (W. Va. 1993).

\(^{560}\) *Id.* at Syl. Pt. 6.

\(^{561}\) *Id.* at Syl. Pt. 7.

\(^{562}\) 473 S.E.2d 736 (W. Va. 1996).
sound discretion of the court and will have to be determined on a case-by-case basis. If the presumption is rebutted, then the court must determine the amount of child support arrearage which should be given to the child in order to ensure that the child has suitable shelter, food, clothing, medical attention, education, and maintenance in the station of life he or she is accustomed to living. If, however, the child becomes emancipated or reaches the age of majority, then the court must determine the amount of child support arrearage which should be awarded in order to ensure that the emancipated child or the child who has attained the age of majority is put in the same position as he or she would have been had the child support been timely paid. Furthermore, if a minor child is involved, then the court must outline a procedure whereby it is ensured that the minor child receives the benefits of the child support arrearage.\(^{563}\)

Justice McHugh held in \textit{Carter v. Carter}:\(^{564}\)

Even though a custodial parent has interfered with or discouraged visitation between a noncustodial parent and the parties’ children, a trial court may not reduce the amount of child support arrearages owed by the noncustodial parent in order to punish the custodial parent for such interference or discouragement of visitation.\(^{565}\)

\textbf{C. Child Custody}

Justice McHugh stated in \textit{Phillips v. Phillips}:\(^{566}\) that

[u]pon a petition seeking a change in the custody arrangement of a child from joint custody to sole custody, the primary criterion considered by a circuit court or family law master should be the best interests of the child and the mutual ability of the parties in reaching shared decisions with respect to those interests, and not solely whether a change in circumstances has occurred.\(^{567}\)

Justice McHugh held in \textit{Sams v. Boston}:\(^{568}\) that

\(^{563}\) \textit{Id. at Syl.}\n
\(^{564}\) 479 S.E.2d 681 (W. Va. 1996).\n
\(^{565}\) \textit{Id. at Syl. Pt. 3.}\n
\(^{566}\) 425 S.E.2d 834 (W. Va. 1992).\n
\(^{567}\) \textit{Id. at Syl. Pt. 4.}\n
\(^{568}\) 384 S.E.2d 151 (W. Va. 1989).
[a] state remains the “home state” of the children, for purposes of the Uniform Child Custody Jurisdiction Act, specifically, W.Va. Code, 48-10-2(5) and 48-10-3(a)(1) [1981], and for purposes of the Parental Kidnapping Prevention Act, specifically, 28 U.S.C. § 1738A(b)(4) and § 1738A(c)(2)(A) (1982), for a reasonable period of time, where the children have been abducted to and concealed in another state by one of the parents.569

D. Child Visitation

In Ledsome v. Ledsome,570 Justice McHugh held that “[a] court, in defining a parent’s right to visitation, is charged with giving paramount consideration to the welfare of the child involved.”571 Ledsome also addressed the relationship of child support payments on a parent’s right of child visitation. Justice McHugh held in Ledsome that

[t]he right of a parent, not in custody of his or her child, to visit that child may not ordinarily be made dependent upon the payment of child support by that parent. However, when a court finds that the parent’s refusal to make child support payments is contumacious, or willful or intentional, that parent’s visitation rights may be reduced or denied, if the welfare of the child so requires.572

Justice McHugh took up the right of grandparents to visit grandchildren in Petition of Nearhoof.573 He said initially that “[a] trial court, in considering a petition of a grandparent for visitation rights with a grandchild or grandchildren pursuant to W.Va. Code, 48-2-15(b)(1) [1986] or W.Va. Code, 48-2B-1 [1980], shall give paramount consideration to the best interests of the grandchild or grandchildren involved.”574 Justice McHugh then stated:

Upon the petition of a grandparent, pursuant to W.Va. Code, 48-2B-1 [1980], seeking visitation rights with a grandchild or grandchildren, who is the child or are the children of the grandparent’s deceased child, a trial court may order that the grandparent shall have reasonable and seasonable visitation rights with the grandchild or grandchildren provided such visitation is in

569 Id. at Syl.
570 301 S.E.2d 475 (W. Va. 1983).
571 Id. at Syl. Pt. 1.
572 Id. at Syl. Pt. 2.
574 Id. at Syl. Pt. 1.
the best interest of the grandchild or grandchildren involved, even though the grandchild or grandchildren has or have been adopted by the spouse of the deceased child's former spouse.\textsuperscript{575}

Justice McHugh was called upon to confront the impact of allegations of child sexual abuse on child visitation during divorce proceedings in the case of \textit{Mary D. v. Watt}.\textsuperscript{576} The court held initially:

Because an allegation of sexual abuse of a child involved in a divorce proceeding is extraordinary, such allegation would constitute "good cause" or grounds for a more expeditious resolution by the circuit court as contemplated by \textit{W.Va. Code}, 48A-4-1(i) [1991], and accordingly, custody and visitation matters relating thereto may be retained by the circuit court, or, if already referred to a family law master, such referral may be revoked.\textsuperscript{577}

Justice McHugh then held:

Prior to ordering supervised visitation pursuant to \textit{W.Va. Code}, 48-2-15(b)(1) [1991], if there is an allegation involving whether one of the parents sexually abused the child involved, a family law master or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law master or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child. Furthermore, the family law master or circuit court should ascertain that the allegation of sexual abuse under these circumstances is meritorious and if made in the context of the family law proceeding, that such allegation is reported to the appropriate law enforcement agency or prosecutor for the county in which the alleged sexual abuse took place. Finally, if the sexual abuse allegations were previously tried in a criminal case, then the transcript of the criminal case may be utilized to determine whether credible evidence exists to support the allegations. If the transcript is utilized to determine that credible evidence does or does not exist, the transcript must be made a part of the record in the civil proceeding so that this Court,

\textsuperscript{575} \textit{Id.} at Syl. Pt. 2.

\textsuperscript{576} 438 S.E.2d 521 (W. Va. 1992).

\textsuperscript{577} \textit{Id.} at Syl. Pt. 1.
where appropriate, may adequately review the civil record to conclude whether the lower court abused its discretion.\textsuperscript{578}

Justice McHugh concluded in \textit{Mary D.} that

[w]here supervised visitation is ordered pursuant to \textit{W.Va. Code, 48-2-15(b)(1)} \textsuperscript{[1991]}, the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.\textsuperscript{579}

\textbf{E. Paternity}

In \textit{State ex rel. J.L.K. v. R.AI.}\textsuperscript{580} Justice McHugh held:

A woman, who conceived a child while she was married, but gave birth to the child while she was unmarried, may not obtain a warrant, pursuant to \textit{W.Va. Code, 48-7-1} \textsuperscript{[1969]}, accusing a person other than her former husband of being the father of the child if she has not lived separate and apart from her former husband for a space of one year or more prior to the birth of the child.\textsuperscript{581}

Justice McHugh indicated in \textit{State ex rel. Division of Human Services v. Benjamin P.B.}\textsuperscript{582} that

[t]he dismissal with prejudice of a paternity action initiated by a mother against a putative father of a child does not preclude the child, under the principle of res judicata, from bringing a second action to determine paternity when the evidence does not show privity between the mother and the child in the original action nor does the evidence indicate that the child was either a party to the original action or represented by counsel or guardian ad litem in

\begin{thebibliography}{99}
\bibitem{578} \textit{Id.} at Syl. Pt. 2.
\bibitem{579} \textit{Id.} at Syl. Pt. 3.
\bibitem{580} 294 S.E.2d 142 (W. Va. 1982).
\bibitem{581} \textit{Id.} at Syl.
\bibitem{582} 395 S.E.2d 220 (W. Va. 1990).
\end{thebibliography}
that action.\textsuperscript{583}

Justice McHugh indicated in \textit{Nancy Darlene M. v. James Lee M., Jr.},\textsuperscript{584} that

\[ \text{[a]n adjudication of paternity, which is expressed in a divorce order, is res judicata as to the husband and wife in any subsequent proceeding. Therefore, the provisions of W.Va. Code, 48A-7-26 [1986], part of the Revised Uniform Reciprocal Enforcement of Support Act, W.Va. Code, 48A-7-1 to 48A-7-41, as amended, which authorizes the adjudication of paternity under certain circumstances is not applicable if an adjudication of paternity is expressed in the divorce order.}\textsuperscript{585} \]

\textbf{F. Termination of Parental Rights}

The issue of termination of parental rights in \textit{Nancy Viola R. v. Randolph W.},\textsuperscript{586} turned on the father’s conviction for the murder of the child’s mother. Justice McHugh held that “[a] conviction of first degree murder of a child’s mother by his father and the father’s prolonged incarceration in a penal institution for that conviction are significant factors to be considered in ascertaining the father’s fitness and in determining whether the father’s parental rights should be terminated.”\textsuperscript{587}

Justice McHugh also said that “[w]here parental rights of a father have been terminated because of his conviction of the first degree murder of the child’s mother, and other acts of violence to her and threats of violence to the child, permanent guardianship may be given to the West Virginia Department of Human Services.”\textsuperscript{588}

Termination of parental rights, due to inaction by a parent to abuse of the child, was addressed by Justice McHugh in \textit{Matter of Scottie D.}.\textsuperscript{589} Justice McHugh held:

\[ \text{Termination of parental rights of a parent of an abused child is authorized under W.Va. Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing} \]

\textsuperscript{583} \textit{Id.} at Syl. Pt. 5.
\textsuperscript{584} 400 S.E.2d 882 (W. Va. 1990).
\textsuperscript{585} \textit{Id.} at Syl. Pt. 1.
\textsuperscript{586} 356 S.E.2d 464 (W. Va. 1987).
\textsuperscript{587} \textit{Id.} at Syl. Pt. 2.
\textsuperscript{588} \textit{Id.} at Syl. Pt. 3 (citation omitted).
\textsuperscript{589} 406 S.E.2d 214 (W. Va. 1991).
evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.Va. Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent’s version as to how a child’s injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.590

In Scottie D., Justice McHugh also addressed the role of a guardian ad litem in termination proceedings. Justice McHugh stated:

In a proceeding to terminate parental rights pursuant to W.Va. Code, 49-6-1 to 49-6-10, as amended, a guardian ad litem, appointed pursuant to W.Va. Code, 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian ad litem, an appeal is necessary.591

Justice McHugh indicated in In re Jeffrey R.L.592 that

[parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.593

G. Adoption

The case of West Virginia Department of Human Services v. La Rea Ann C.L.594 involved a teenager who sought to relinquish parental rights to her child. Justice McHugh noted initially that


590 Id. at Syl. Pt. 2.
591 Id. at Syl. Pt. 3.
593 Id. at Syl. Pt. 3.
48-4-5(a) [1984]) is, ordinarily, to make revocable any relinquishment of child custody by a minor parent to a licensed private child welfare agency or to the West Virginia Department of Human Services which has not yet been approved by a court of competent jurisdiction.595

The court then held:

Where the child has spent a substantial period of time in the home of foster parents, pending a ruling by the trial court on whether to approve a minor parent's relinquishment of child custody to a licensed private child welfare agency or to the West Virginia Department of Human Services, extraordinary circumstances exist which demand that the best interests of the child not only be considered but be given primary importance. In such a case the minor parent's right to revoke his or her relinquishment ceases to be absolute, due to the passage of the unreasonable period of time.596

H. Modification of Divorce Decree

Justice McHugh stated in Segal v. Beard597 that "[a] family law master lacks jurisdiction to hear a petition for modification of an order when the modification proceeding does not involve child custody, child visitation, child support or spousal support."598

The court also held that "[a] circuit court lacks jurisdiction under W.Va. Code, 48-2-15(e) [1986] to modify a divorce decree when the modification proceeding does not involve alimony, child support or child custody."599 Justice McHugh concluded in Segal that

[i]t is tolled until an aggrieved party is served with notice of the filing of the recommended decision. The family law master must serve notice of the filing of the recommended decision.600

595 Id. at Syl. Pt. 1.
596 Id. at Syl. Pt. 2.
598 Id. at Syl. Pt. 1 (citation omitted).
599 Id. at Syl. Pt. 2.
600 Id. at Syl. Pt. 3.
In Blevins v. Shelton, Justice McHugh ruled that

[a] circuit court lacks jurisdiction under W.Va. Code, 48-2-15(e), as amended, to modify a divorce decree by awarding rent, retroactively or prospectively, to a former spouse who is a co-owner of the marital home which is occupied under the divorce decree by the other former spouse and one or more of their minor children, when the rent is sought solely because a new spouse is also residing in the marital home.

I. Annulment of Marriage

In Harvey v. Harvey, Justice McHugh addressed the issue of obtaining an annulment due to a bigamous marriage. Justice McHugh held:

Pursuant to W.Va. Code, 48-2-1[1935], bigamous marriages are “void from the time they are so declared by a decree of nullity.” To obtain an annulment of a bigamous marriage, an order or decree must be entered in a court of competent jurisdiction declaring the nullity. Orders merely setting forth the conviction and sentence of a defendant for the felony offense of bigamy under W.Va. Code, 61-8-1[1931], are not sufficient standing alone to constitute an annulment of a bigamous marriage.

J. Alimony

Justice McHugh relied upon the decision of F.C. v. I.V.C. to address alimony issues in Crutchfield v. Crutchfield. Justice McHugh held in Crutchfield that “[a]limony may be awarded under W. Va. Code, 48-2-4(a)(7) against a ‘faultless’ party if ‘principles of justice’ so require, considering the financial needs of the parties and other factors listed in [W.Va.] Code, 48-2-16.” The ruling in Crutchfield was inconsistent with a previous decision by the court. Therefore, Justice McHugh went on in Crutchfield to hold that “[t]he Syllabus of Dyer v. Tsapis, 162 W.Va. 289, 249 S.E.2d 509 (1978), is modified in that W.Va. Code,
Two issues involving alimony were addressed by Justice McHugh in *Zirkle v. Zirkle.* The court held initially in the opinion that

> absent a court order, augmented black lung benefits received by an ex-spouse pursuant to Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§ 901 et seq., and 20 C.F.R. §§ 725 et seq., after an alimony award has been ordered by a court, which court did not consider such benefits, may not be deducted from an alimony obligation by the ex-spouse ordered to pay such alimony.

Justice McHugh next held in *Zirkle* that

> arrearages of alimony, per se, is not a sufficient ground for a court to refuse to consider a petition for modification of alimony unless the court determines that the ex-spouse had the ability to comply with the order awarding alimony and the failure to pay the arrearages was contumacious, or willful or intentional or otherwise in contempt of court.

Justice McHugh held in *Peremba v. Peremba* that "[w]hen alimony is sought under W.Va. Code, 48-2-4(a)(7), the court may consider substantial inequitable conduct on the part of the party seeking alimony as one factor in its decision. Substantial inequitable conduct is conduct which the trier of fact may infer caused the dissolution of the marriage."

In *Sauls v. Howell,* Justice McHugh held that

> matured, unpaid installments provided for in a decree of divorce, which decree ordered a husband to pay to his former wife $2,700, "in lieu of alimony" at $150 per month, stand as decretal judgments against the husband, and the wife is entitled to institute suggestion proceedings under W.Va. Code, 38-5-10 [1931], to recover upon those judgments, and she need not institute ancillary proceedings to reduce the amount of those judgments to a sum

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608 *Id.* at Syl. Pt. 2 (citation omitted).
609 304 S.E.2d 664 (W. Va. 1983).
610 *Id.* at Syl. Pt. 1.
611 *Id.* at Syl. Pt. 2.
613 *Id.* at Syl. Pt. 1.
K. Cohabitation and Common Law Marriage

Justice McHugh held in Goode v. Goode that "[p]ursuant to the statutory requirements of W.Va. Code, 48-1-5 [1969], every marriage in this state must be solemnized under a license. Therefore, the validity of a common-law marriage is not recognized." Justice McHugh also said:

A court may order a division of property acquired by a man and woman who are unmarried cohabitants, but who have considered themselves and held themselves out to be husband and wife. Such order may be based upon principles of contract, either express or implied, or upon a constructive trust. Factors to be considered in ordering such a division of property may include: the purpose, duration, and stability of the relationship and the expectations of the parties. Provided, however, that if either the man or woman is validly married to another person during the period of cohabitation, the property rights of the spouse and support rights of the children of such man or woman shall not in any way be adversely affected by such division of property.

L. Committee for Incompetent

Justice McHugh noted in Old National Bank of Martinsburg v. Hendricks that "W.Va. Code, 27-11-4 [1974] creates a fiduciary relationship between a committee, appointed to manage the estate of an incompetent, and the incompetent, for whom the committee is appointed." The court also held:

When the sales price of an incompetent's real estate is increased, beyond that obtained by the committee, to its fair market value, through the efforts of an interested person, then that interested person is entitled to attorney's fees, pursuant to W.Va. Code, 37-1-15 [1959], based upon the efforts to increase the sales price, in an amount which is reasonable and just. In that situation, attorney's fees awardable pursuant to W.Va. Code, 37-1-15 [1959] shall be charged against the compensation of the committee and

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615 Id. at Syl. Pt. 1.
617 Id. at Syl. Pt. 2.
618 Id. at Syl. Pt. 3.
620 Id. at Syl. Pt. 3.
not against the estate itself.\textsuperscript{621}

Justice McHugh held in \textit{Sowa v. Huffman}\textsuperscript{622} that "[t]he duties of a guardian ad litem, who is appointed pursuant to W.Va. Code, 27-11-1(b) [1990] to represent an alleged incompetent in a competency proceeding, end when the Committee is appointed and the appeal period has expired."\textsuperscript{623}

\section*{VII. Property Law}

\subsection*{A. Eminent Domain}

Use of the prior purchase price of property in an eminent domain proceeding was addressed by Justice McHugh in \textit{West Virginia Department of Highways v. Mountain Inc.}\textsuperscript{624} In that opinion Justice McHugh held:

In an eminent domain proceeding to take private property for public use the purchase price of the property approximately four and a half years prior to the filing of such proceeding is not admissible when there has been a showing that a substantial change in the physical characteristics of the property has occurred since the sale took place and the original purchase price is not probative of the fair market value of the property at the time of the taking.\textsuperscript{625}

In the case of \textit{West Virginia Department of Highways v. Fisher},\textsuperscript{626} Justice McHugh addressed the issue of jury bias or prejudice in an eminent domain proceeding. The court held that

[i]n an eminent domain action, although all prospective jurors stated that they could return a verdict free from bias or prejudice, where the record indicates that [thirteen] prospective jurors were acquainted with the landowners and/or their appraisal witnesses, which witnesses testified at trial, and, of the petit jury selected from those prospective jurors, six jurors were acquainted with the landowners and/or such appraisal witnesses, a likelihood of bias or prejudice on the part of the jury existed sufficient to require that

\textsuperscript{621} Id. at Syl. Pt. 4.

\textsuperscript{622} 443 S.E.2d 262 (W. Va. 1994).

\textsuperscript{623} Id. at Syl. Pt. 2.

\textsuperscript{624} 279 S.E.2d 192 (W. Va. 1981).

\textsuperscript{625} Id. at Syl.

\textsuperscript{626} 289 S.E.2d 213 (W. Va. 1982).