January 1990

Beyond the Best Interest of the Child: The Primary Caretaker Doctrine in West Virginia

Dan O'Hanlon
Sixth Judicial Circuit, West Virginia

Margaret Workman

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Family Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol92/iss2/3

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
BEYOND THE BEST INTEREST OF THE CHILD: 
THE PRIMARY CARETAKER DOCTRINE IN WEST VIRGINIA

DAN O'LANON* 
MARGARET WORKMAN**

I. INTRODUCTION

II. CHILD CUSTODY IN WEST VIRGINIA BEFORE GARSKA

III. CHILD CUSTODY IN OTHER STATES

IV. THE GARSKA DECISION

A. The Holding

B. The Rationale

C. Impact

V. THE PRIMARY CARETAKER DOCTRINE

A. Other States

B. Scholarly Analysis

VI. THE WEST VIRGINIA EXPERIENCE WITH THE PRIMARY CARETAKER PRESUMPTION

A. Failure to Find Primary Caretaker

B. Sexual Conduct or Misconduct as Affecting Fitness

C. Primary Caretaker and the Petition to Modify

D. Custodial Parent Voluntarily Relinquishes Custody Temporarily

E. Voluntarily Relinquished Permanent Custody

F. Both Parents Equally Primary Caretakers

* B.A., 1970, Marquette University; J.D., 1973, Arizona State University College of Law; Judge, Sixth Judicial Circuit, West Virginia. The author gratefully acknowledges the assistance of his intern, Amy Austin, in the preparation of this article.

** A.B., 1969, West Virginia University; J.D., 1974, West Virginia University College of Law; Judge, Thirteenth Judicial Circuit, West Virginia 1981-88; Justice, West Virginia Supreme Court of Appeals. The author gratefully acknowledges the assistance of her law clerk, Dianna Gullickson, in the preparation of this article.
I. INTRODUCTION

Many states, including West Virginia, have struggled to develop a rational scheme for making child custody decisions which are fundamentally fair. Historically, West Virginia, like many other states, utilized the "best interest of the child" doctrine. However, in 1981, West Virginia adopted the "primary caretaker" doctrine in Garska v. McCoy.


3. See discussion in Section II infra. This doctrine had its origin in the English law courts' repudiation of the common law rule that a man's children were his property and thus, after a divorce, he had an absolute right to their possession. See Bennett v. Alcott, 100 Eng. Rep. 90 (1787); Jones v. Brown, 170 Eng. Rep. 165 (1795); 1 W. Blackstone, Commentaries 453. The first breach in the wall came in Blisset’s Case, 98 Eng. Rep. 899 (1773) where Lord Mansfield held that, “if the father is a bankrupt, if he contributed nothing for the child or family, and if he be improper . . . . the Court will not think it right that the child should be with him.” Id. This ruling was not expanded upon until the celebrated case of Shelley v. Westbrooke, 37 Eng. Rep. 850 (1817), in which the poet, Percy Blythe Shelley, sought custody of his two minor children after his wife had taken her own life. The Court refused to apply the paternal preference rule due to his “irreligious and immoral principles,” and awarded custody to the maternal grandparents. See also Norton Anthology of English Literature 504-06 (M. Abrams 3d ed. 1974). This led, ultimately to Justice Talfourd’s Act, 1839, 2 and 3 Vict., c. 54, which provided that Chancery Courts could award custody of children under the age of seven to the mother.

This article will examine the history of child custody law in West Virginia and other states, examine the basis for the primary caretaker doctrine and discuss the experience of West Virginia and other states with that doctrine. Finally, the article will suggest a rational scheme for the primary caretaker doctrine and its exceptions in West Virginia.\(^5\)

II. CHILD CUSTODY IN WEST VIRGINIA BEFORE GARSKA

In 1901, the West Virginia Supreme Court of Appeals had occasion to address, for the first time,\(^6\) issues of child custody and domestic relations law which it would revisit often in the succeeding years. In *Cariens v. Cariens*,\(^7\) the husband, a locomotive engineer became disenchanted with his wife because "she was bearing him children too rapidly."\(^8\) Obtaining the assistance of a lawyer, he had a separation agreement drawn up which he presented to her. In it, he released all claims for custody of their child if she would release him from all obligations for alimony and child support. He threatened that, if she did not sign it, he would "take from her the child already born and the one of which she was then pregnant when it should be born, and all the furniture in the house that he had furnished."\(^9\) Unwillingly, she yielded to this compulsion and signed the document.

The couple separated and, when they failed to reconcile, the wife filed her bill of divorcement and proved it in every particular. The husband petitioned for divorce, custody, and no alimony, charging adultery. He offered no proof. The circuit court, however, granted his petition giving him custody of the newborn male child.

---

5. In a recent opinion, Justice Richard Neely, the author of *Garska*, notes "that our very narrow exception to the primary caretaker rule has of late developed a voracious appetite which, if left unchecked, will allow it to eat the rule." David M. v. Margaret M., 385 S.E.2d 912, 915 (W. Va. 1989) (emphasis in original).

6. In an earlier case, the court briefly addressed the issue of a father seeking custody who had previously relinquished custody to a third party. The court held that to gain custody, he must show that it would materially benefit the child to have custody returned to him. Cunningham v. Barnes, 37 W. Va. 746, 17 S.E. 308 (1893).

7. 50 W. Va. 113, 40 S.E. 335 (1901).
8. *Id.* at 113, 40 S.E.2d at 335.
9. *Id.*
and giving her custody of the young female child. The court dis-
charged him from paying any alimony.

The West Virginia Supreme Court of Appeals reversed, granting
custody of both children to the mother. Stating that the father had
never visited the children since the separation and that they had
been cared for exclusively by their mother, the court reversed the
common law rule, which held that the father had legal ownership
of the children and was entitled to possession of them in the event
of divorce. Specifically, the court found that:

The law as to the custody of children has been greatly modified. Formerly, the
right of the father to its custody was almost an inflexible rule. That rule forgot
that a mother had a heart. The real owner of the child, be it even a baby, must
give it up. But civilization, advanced thought, and human kindness have bent
this iron rule and opened the ears of the courts to the pleading of the true
friend and owner of the child. The courts do not, these days inexorably take
from mothers their children of tender years, even for the father, if the mother
is a fit person and has a home for them, but look at all the circumstances. The
welfare of the child is the test. The welfare of a tender child is with the mother
generally.11

Thus in its first child custody decision, the court decided that,
for children of tender years, the trial judge must look at all the
circumstances and consider the welfare of the child as a primary
goal. Mothers, if they were fit and could provide a home, would
generally be given custody of such children.

The court next dealt with child custody law in 1905 in the case
of Dawson v. Dawson.12 The court determined that earlier decisions
on custody between the same parties were res judicata in a sub-
sequent proceeding to change custody. The new proceeding could
only be based on events occurring since the earlier proceedings,13
and a change should only be made “for the benefit of the chil-
dren.”14

10. Id. at 118, S.E.2d at 337-38.
11. Id. at 118, 140 S.E. at 337.
12. 57 W. Va. 520, 50 S.E. 613 (1905).
13. This, of course, presages the development of the “material change of circumstances” test
to justify a modification of custody petition.
In *Dawson*, the court also addressed a father's common law demand for possession of his children after the trial court granted custody to his wife. After citing *Cariens* with approval, the court adopted the following reasoning of the Virginia Supreme Court:\(^{15}\)

Ordinarily the father is entitled to the care and custody of his infant child, but when the father is claiming the custody of the child the Court will exercise its discretion according to the facts and what appears to be the best interest of the child. The welfare of the child is the controlling consideration.\(^{16}\)

In *Dawson*, for the first time, the West Virginia Supreme Court of Appeals enunciated the doctrine that, in matters of custody, the guiding principle would be "the best interest of the child."\(^{17}\)

In 1919, the court had a more difficult case to decide. *Buseman v. Buseman*\(^{18}\) arose when the wife abandoned the marital home in Morgantown and moved with her infant daughter to Cleveland, Ohio. There she placed the child in the Jones Home for Friendless Children, and later filed there for divorce. Still later she agreed to dismiss that suit and place the child, with her husband's written consent, with an unrelated Morgantown couple to raise as their own.\(^{19}\) The husband then sued for divorce which was granted. In the divorce decree, the trial court, over the husband's objection, granted the mother's request that the child remain in the custody of the third-party couple who had been caring for her.

The West Virginia Supreme Court of Appeals affirmed the custody order as being in the best interest of the child. The court stated that both parents had agreed in writing to give custody to the third party. Nothing had changed since then which, in the court's opinion, would justify a change of custody. While affirming the priority rights to custody of fit natural parents, the court held that the relinquishment of that right to a fit third party was valid and binding.\(^{20}\)

---

17. *Id*.
18. 83 W. Va. 496, 98 S.E. 574 (1919).
19. *Id* at 498, S.E. at 575.
20. *Id* at 502-03, 98 S.E. at 576.
In the succeeding decade, the West Virginia Supreme Court of Appeals began to modernize the law of child custody. In *Gates v. Gates*, the trial court awarded custody of the three children to their father and prohibited the wife from remarrying for five years. The father had physical custody of the two older children while the mother continued to care for the infant daughter. The father filed a *habeas corpus* petition to recover the third child and the constable executed on it and gave him the child without a court hearing. The mother later petitioned the court and received a modification allowing her to remarry and to regain custody of the third child. The father appealed, but the court held that the circumstances of her remarriage constituted a sufficient change of circumstances to modify the prior decree, particularly since there had been no hearing or adjudication of the father's *habeas corpus* petition.

In *Norman v. Norman*, the court was faced with the issue of whether a woman who had abandoned the marital home could be given custody of a child. The wife put on evidence of domestic violence which shocked the court even in 1921. The court held that the husband's cruel and inhumane treatment caused her abandonment, and upheld the award of custody to her.

In *Boos v. Boos*, the West Virginia Supreme Court of Appeals held for the first time that the rights of the mother and father to the custody of their children in a divorce action was *equal*. Further, in upholding a custody award to the mother, the court clearly enunciated the standard that the welfare of the child was the controlling

---

21. 87 W. Va. 603, 105 S.E. 815 (1921).
22. *Id.* at 607, 105 S.E. at 816.
24. The evidence was as follows: Plaintiff's two hundred pound husband came home very late. His ninety-eight pound wife asked him to watch their sick child so she could go milk the cow. In a rage he assaulted and abused her. On another occasion, he lifted her by the throat and choked her into unconsciousness, then kicked her, breaking several ribs. While she was recuperating, he forced her to have intercourse. When she recovered, she left and sued for divorce on grounds of cruelty. Her petition was granted. *Id.* at 643-45, 107 S.E. at 409.
25. The court continued to recognize the paternal preference from the common law, but also recognized the judicial discretion of the trial court to ignore it. *Id.* at 648-49, 107 S.E. at 411.
consideration. Finally, the court held that the father’s refusal to contribute money to support the child was a factor to be considered in determining who had been looking out for the child’s best interest.27 Next, the court reversed and remanded a case in which the trial court took a five year old child from the mother who had been caring for her and awarded custody to the father without making any findings regarding the child’s best interest.28

Again in Odlasek v. Odlasek,29 the court held that when parents consent in writing to relinquish their child’s custody to a third-party, in this case the child’s paternal grandparents, they cannot regain that custody without a showing that it would materially promote the child’s welfare.30 The court also took notice of the fourteen year old child’s intelligence and her stated preference to live with her grandmother rather than her parents.31

But, when there has been no written relinquishment, and the custodial father had regularly paid the maternal grandmother to care for his eleven-year old son, he is entitled to regain custody, even against the intelligently stated wishes of the son.32

In the last case of the 1930’s the court held that, as a matter of law and policy, in divorce actions involving children of tender years, the mother would be given preference for custody where both parents are equally fit.33 This was required by the “best interest of the child” analysis announced in Norman v. Norman.34

Thus, as the Roaring Twenties drew to a close, the West Virginia Supreme Court of Appeals came full circle from Gates v. Gates.35 Gates, in 1921, recognized a paternal preference but al-

27. Id. at 735-36, 117 S.E. at 619.
28. Post v. Post, 95 W. Va. 155, 120 S.E. 385 (1923). The court also reaffirmed the equal right of each parent to seek custody. Id.
29. 98 W. Va. 357, 127 S.E. 59 (1925).
30. Id. at 361, 127 S.E. at 60. See also State v. Bonar, 75 W. Va. 332, 83 S.E. 991 (1914); Fletcher v. Hickman, 50 W. Va. 244, 40 S.E. 371 (1901); Green v. Campbell, 35 W. Va. 698, 14 S.E. 212 (1891).
34. 88 W. Va. at 648-49, 107 S.E. at 411.
35. 87 W. Va. 603, 105 S.E. at 815 (1921).
ollowed a mother to show sufficient circumstances to justify a modification of custody. In 1929, the Beaumont Court recognized a maternal preference, shifting the burden to the father to rebut it by showing circumstances pertaining to the child's best interest. This would mark the parameters of custody battles for more than five decades, until the court's 1981 decision in Garska.\textsuperscript{36}

The 1930's saw a further consolidation of the mother's preference in custody disputes, until the final case of the decade when the fitness issue began to be litigated in earnest.

The first case of the 1930's, Reynolds v. Reynolds,\textsuperscript{37} further defined the maternal preference for custody of children of tender years. The court held that taking such a child from its mother's custody could only be justified "where the most cogent reasons exist."\textsuperscript{38} The court was very tolerant of any behavioral lapses by the mother,

recognizing that in a normal mother, such as we believe this one to be, the deepseated impulse to care properly for her young child is the controlling thought of her life, the mantle of charity should be thrown around her to the end that mistakes may be forgotten and the good may be emphasized. Since none are without fault, charity should prevail.\textsuperscript{39}

The court went on in Arnold v. Arnold\textsuperscript{40} to hold that a mother who was granted a divorce on the grounds of cruel and inhuman treatment by her husband was, almost as a matter of law, entitled to custody of her children.\textsuperscript{41} This was taken further in the Suder v. Suder\textsuperscript{42} case where the court stated that even a fit father should not be given consideration as a custodial parent if he presents the

\begin{footnotes}
\item{36.} Later in 1929, the court announced that, all things being equal, the "innocent spouse" in a divorce would be given first consideration as custodian. Rierson v. Rierson, 107 W. Va. 321, 148 S. E. 203, 204 (1929).
\item{37.} 109 W. Va. 513, 155 S.E. 652 (1930).
\item{38.} Id. at 514, 155 S.E. at 653.
\item{39.} Id. at 514-15, 155 S.E. at 653.
\item{40.} 112 W. Va. 481, 164 S.E. 850 (1932).
\item{41.} The court stated that "[s]uch idiosyncrasy does not distinguish him as a desirable person to assume the responsibility of properly nurturing a small boy and rearing him to manhood under a guidance that would impart to him a fit conception of ordinary proprieties of life." Id. at 485, 164 S.E. at 852.
\item{42.} 112 W. Va. 664, 166 S.E. 385 (1932).
\end{footnotes}
trial court with no definite plans for how he would care for the children.\textsuperscript{43}

Only in the decade's last cases do we notice, for the first time, the issue of the mother's fitness to be the custodial parent being seriously litigated.\textsuperscript{44} In the case of \textit{Settle v. Settle},\textsuperscript{45} we see the outlines of the battle that would preoccupy domestic relations courts in our state until \textit{Garska}. Having established that a mother will be given preference for custody if she is fit, it was inevitable that the struggle would shift to this court-defined battleground.

In \textit{Settle}, the wife sued for divorce on the grounds of cruelty and the husband answered, denying cruelty and praying for custody on the grounds of the wife's "intimate contact"\textsuperscript{46} with another man. The circuit judge found that she had not proved cruelty and that her husband had not proved that she carried on intimate relations with another man. The judge denied her divorce and awarded her custody of the children with limited visitation to the father under a separate maintenance decree.\textsuperscript{47}

The West Virginia Supreme Court of Appeals held that the lower court was correct in finding no cruelty on his part, but incorrect in finding her behavior proper. Since her actions with another man were "inconsistent with circumspection and matronly propriety,"\textsuperscript{48} the court held, in effect, that the maternal preference would not apply. Since both parents had presented evidence showing they were able to provide good homes for their children, the court ordered custody to be shared by them. The mother was given custody of the children from September through May (their school year), while the father received custody for June, July and August (their summer vacation).\textsuperscript{49}

\textsuperscript{43} \textit{Id.} at 665, 166 S.E. at 385.
\textsuperscript{44} Straughan v. Straughan, 115 W. Va. 639, 177 S.E. 771 (1934) (where a husband was proved guilty of adultery and the wife proved innocent, she should get custody under a \textit{Rierson} analysis).
\textsuperscript{45} 117 W. Va. 476, 185 S.E. 859 (1936).
\textsuperscript{46} \textit{Id.} at 477, 185 S.E. at 860.
\textsuperscript{47} \textit{Id.} at 483, 185 S.E. at 862-63.
\textsuperscript{48} \textit{Id.} at 478, 185 S.E. at 860.
\textsuperscript{49} The court expressed a preference for giving each parent six months of custody per year but the practical consideration of the children's schooling prevented such a division. On balance, the mother was given the longer custody period because of the young age of the children. \textit{Id.} at 482-83, 185 S.E. at 862.
Thus, the decade ended with the first court-ordered joint custody decision, a standard for judging fitness, and a way to rebut the maternal preference. All these matters would be tested further in the years to come.

The court did not have occasion to visit this issue again until 1949.50 In the Pugh v. Pugh case,51 the court was faced with reversing a trial court judge who had apparently taken the court at its word in Settle v. Settle.52 In Pugh, a returning soldier had gone off and, without objection from his wife, obtained a Nevada divorce. That decree, naturally, did not address the issue of custody for their infant son. The mother moved to California and resided there for several years with her son. The father appeared one day, snatched the child and returned with him to West Virginia. The mother brought a writ of habeas corpus for the return of the child. The trial court, finding both parents equally bad, split custody of the four-year old boy between them every six months under the supervision of the Department of Public Assistance. The West Virginia Supreme Court of Appeals reversed, finding that this bi-coastal, semi-annual disruption of the child’s life was manifestly not in his best interest and that the mother had failed to meet her burden of showing that a change of the child’s current custody would be in his best interest. Therefore, custody remained with the father.53

The 1950's saw a further development of the fitness issue, with the court continuing to resolve difficult custody issues by examining the character of the parents.54

50. In 1946, the court ruled that a child custody hearing held without proper notice to the other party denied due process and was void. Harloe v. Harloe, 129 W. Va. 1, 38 S.E.2d 362 (1946). In 1947, the court refused to return a child from the paternal grandparents to the mother while the custodial father was serving overseas in the armed forces. Pukas v. Pukas, 129 W. Va. 765, 425 S.E.2d 11 (1947). Similarly, in 1948, the court reaffirmed its earlier ruling that a custodial parent who voluntarily relinquishes that custody must demonstrate that it would materially benefit the child to regain custody. State ex rel. Lipscomb v. Joplin, 131 W. Va. 302, 47 S.E.2d 221 (1948).

52. 117 W. Va. 476, 185 S.E. at 859 (1936).
53. Pugh, 133 W. Va. at 507-10, 56 S.E.2d 904-906.
54. There were also two technical procedural decisions. State ex rel. Warren v. Roberts, 144 W. Va. 741, 110 S.E.2d 909 (1959), held that an oral motion did not constitute a petition to modify
In Finnegan v. Finnegan, the court held that a wife who obtains a divorce based on cruelty was generally entitled to custody as the innocent spouse. The court went on, however, in language that presaged the later reasoning in Garska, to urge the trial courts to consider which parent had devoted "more time and attention . . . to the care, the moral training, and the education of the child." The court went on to emphasize that the wishes of a twelve-year old son to remain with his father, while entitled to consideration, were not controlling on the matter of custody.

In the final two important cases of the decade, Rohrbaugh v. Rohrbaugh and Witt v. Witt, the court more firmly established the Rierson doctrine that an innocent spouse will generally be granted custody.

The decade of the 1960's turned out to be one in which the court addressed repeatedly the issue of a parent's right to custody as against that of a third party.

In Whiteman v. Robinson the mother of the children disappeared and the father placed the children temporarily with various relatives until she could be found. The mother's body was later under the statutory provisions. Springer v. Springer, 144 W. Va. 697, 110 S.E.2d 912 (1959) (a companion case to Warren) held that an answer and counterclaim filed in response to a rule to show cause was properly treated as a petition to modify custody under statutory provisions.

56. Id. at 104, 58 S.E.2d at 599.
57. Id. at 105, 58 S.E.2d at 600.
58. Id.
62. In Rohrbagh, the husband proved adultery and was granted custody. Rohrbagh, 136 W. Va. at 719-22, 68 S.E.2d at 369-70. In Witt, the wife proved cruelty and received custody. Witt, 141 W. Va. at 54-55, 87 S.E.2d at 530.
discovered and, after a year, the husband remarried and sought to regain custody of his children. The court held that a fit parent has an absolute right to custody of his children as against third parties unless he has manifested a clear intent, in writing or otherwise, to relinquish that custody. Here, the father had not manifested such an intent, and so regained custody.64

In Holstein v. Holstein,65 the court declared that a mother who had been granted custody of her children in a divorce decree, but who subsequently had that custody modified because of her indiscretions, had to show that it would be in the children’s material best interest for her to regain their custody.66

And finally, in State ex rel. Kiger v. Hancock,67 the court held that, after a custodial father has died, a fit mother has an absolute right to custody as against all third parties.68 Further, the court found that the express preference of a ten and eleven year old child, while entitled to due consideration, would not control the result.69

In the last decade before Garska, there was continuing litigation of custody issues,70 but only one important case. In J. B. v. A. B.,71 the West Virginia Supreme Court of Appeals finally came to grips with the issue that many other high courts had been struggling with: the constitutionality of the maternal preference.

64. Id. at 695-96, 116 S.E.2d at 696-97.
68. Id. at 412-13, 168 S.E.2d at 803.
69. Id. at 413, 168 S.E.2d at 803.
70. In Hammack v. Wise, 158 W. Va. 343, 211 S.E.2d 118 (1975), the court held that fathers have absolute custody rights as against maternal grandparents following the death of the custodial mother. In Funkhouser v. Funkhouser, 158 W. Va. 964, 216 S.E.2d 570 (1975), the maternal preference was affirmed. In Murredu v. Murredu, 160 W. Va. 610, 236 S.E.2d 452 (1977), the court allowed the preference of children of non-tender years (eleven and twelve) to support the trial court’s award of custody to the father where parents were equally fit and divorce was granted based on the parties’ two-year separation. In Cloud v. Cloud, 161 W. Va. 45, 239 S.E.2d 669 (1977), the court reaffirmed the maternal preference in custody matters involving children of tender years, thus setting the stage for the constitutional challenge in J. B. v. A. B., 161 W. Va. 332, 242 S.E.2d 248 (1978). Finally, in McKinney v. Kindon, 162 W. Va. 319, 251 S.E.2d 216 (1978) the court held that the trial court’s power in divorce cases was purely statutory and not equitable.
In this case, the court turned back the constitutional challenge and set more detailed standards for rebutting the maternal preference. It held that, since the rights of the parents were subordinate to the rights of the child, the maternal preference promotes that legitimate state interest in a rational way. It based that conclusion on the biology of a suckling child, as well as on various sociological analyses.\(^72\)

The court stated that a child of fourteen years or more may rebut the preference by stating his or her own preference.\(^73\) It also held that a single act of sexual misconduct by the mother would have to "be so outrageous that reasonable men [could] not differ about its deleterious affect [sic] upon the child."\(^74\)

Thus, the stage was set for *Garska* and its progeny.\(^75\)

### III. Child Custody in Other States

The West Virginia Supreme Court of Appeals may have been sanguine about the constitutional questions raised by the maternal preference,\(^76\) but this was certainly not true elsewhere in the nation. Beginning in the early 1970's, the gender-based preference was being subjected to a growing tide of scholarly criticism.\(^77\) In 1972,
the United States Supreme Court ruled that an Illinois law which presumed that the fathers of illegitimate children were unfit to raise them violated the equal protection clause.\textsuperscript{78} Subsequently, the maternal preference for custody of children of tender years, which had been adopted in most states,\textsuperscript{79} came under increasingly critical scrutiny.\textsuperscript{80}

Two courts finally declared the maternal preference to be unconstitutional gender-based discrimination,\textsuperscript{81} finding no rational basis for using it to support the legitimate state interest in protecting children of tender years.\textsuperscript{82} This also caused twenty-one states to abolish the tender years presumption.\textsuperscript{83}

\textsuperscript{78} Stanley v. Illinois, 405 U.S. 645 (1972).


\textsuperscript{80} Stanley, 405 U.S. at 656-57. Justice White noted that while "[p]rocedure by presumption is always cheaper and easier than individualized determination[s]," such a procedure "needlessly risks running roughshod over the important interests of both parent and child," and therefore cannot stand. Id.


\textsuperscript{82} The Devine court held that creating a presumption of fitness for only one gender without any consideration of the actual capabilities of the parties violated the equal protection clause. Devine, 398 So. 2d at 695-96. The Watts court found that "in addition to its other faults, [the tender years presumption] works an unconstitutional discrimination against the [father]." Watts, 77 Misc. 2d at 183, 350 N.Y.S.2d at 291.

\textsuperscript{83} See Jones, supra note 79, at 524 n.74.
As the line of gender-based discrimination cases from the United States Supreme Court and the scholarly criticism continued unabated, it must have become increasingly clear to the West Virginia Supreme Court of Appeals that the gender-based standard approved of in J. B. v. A. B. would continue to come under such criticism, as well as legal and legislative challenge, until a gender-neutral standard was adopted. This led, eventually, to the court’s decision in Garska v. McCoy.

IV. THE GARSKA DECISION

A. The Holding

The case arose when the trial court awarded custody of a child born out of wedlock to the putative father. The mother appealed, and the West Virginia Supreme Court of Appeals took the opportunity to enunciate a new, gender-neutral standard for determining custody disputes: the “primary caretaker” presumption.

In a well-reasoned opinion, the court responded to the West Virginia Legislature’s adoption of Chapter 48, Article 2, Section 1 of the West Virginia Code in 1980 which purported to mandate the application of gender-neutral principles to child custody determin-
nation. This legislative enactment had been prompted by strong criticism of the court's earlier decision in *J. B. v. A. B.* and the *Garska* case had been litigated and decided in the trial court on the theory that the gender-neutral amendment had superseded the gender-based standard approved by the court in *J. B. v. A. B.*

In adopting the primary caretaker presumption, the court made it clear that it was promulgating a standard which met the gender-neutral requirements of the legislative provision and, at the same time, reached basically the same result as would have been reached under the standard approved in *J. B. v. A. B.* In other words, in the vast majority of custody cases, the mother would retain custody. What, then, was the advantage of the new standard?

The answer to that question is two-fold. First, the court wished to make certain that, in the proper instance, a father who had, in fact, been the primary caretaker, would receive custody if he were fit. Secondly, and certainly most importantly, the court wished to

90. The 1980 amendment read, in relevant part:

In making any such order respecting custody of minor children, there shall be no legal presumption that, as between the natural parents, either the father or the mother should be awarded custody of said children, but the Court shall make an award of custody solely for the best interest of the children based upon the merits.


92. *Id.*

93. In *David M. v. Margaret M.*, Justice Neely provides us with further scholarly underpinnings and support for placing the child with the primary caretaker:

At the earliest stage, [the attachment to a primary caretaker] is critical to the child's learning to place trust in others and to have confidence in her own capacities. Later, it plays a central role in the child's capacity to establish emotional bonds with other persons. The sense of trust in others and in self that the attachment provides may also affect the child's development of intellectual and social skills. The growing child passes through many developmental stages, each requiring her to acquire critical skills and capacities . . . . The original bond of the child with the primary caretaker is believed to have an important continuing effect on the child's ability to pass through each stage with success.


94. This, of course, might have occurred under a *J.B. v. A.B.* type of analysis since the court there held that the failure of the mother to provide the children with emotional support, routine cleanliness, or nourishing food would rebut the maternal preference. *J.B. v. A.B.*, 161 W. Va. at 339, 242 S.E.2d at 253.
provide courts, lawyers and litigants with some degree of certainty in making custody determinations.\textsuperscript{95}

B. The Rationale

The opinion itself is very critical of the fact that husbands often used the threat of protracted and emotionally damaging custody battles to extract monetary concessions from their wives in divorce settlements.\textsuperscript{96} While the court was able to cite very little "hard evidence" to support this proposition,\textsuperscript{97} the author of the opinion, Justice Neely, went on to author a law review article and a book dealing with the same issue.\textsuperscript{98} In these works, Justice Neely marshals anecdotes from his own career along with some more impressive statistics regarding the economics of being a woman in contemporary America to support his premise in \textit{Garska}.

Justice Neely, in the opinion\textsuperscript{99} and especially in his article,\textsuperscript{100} articulates a strong antipathy to determining custody through "trial by expert." This he states is expensive, intellectually dishonest and emotionally destructive of the very children we are purporting to protect.\textsuperscript{101}

For these reasons, the court thought that the primary caretaker rule, by its very simplicity, would provide courts with a simple test for determining custody. It would also allow lawyers to reassure

\begin{itemize}
\item \textsuperscript{95} \textit{Garska}, 167 W. Va. at 68, 278 S.E.2d at 362.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} See id. at 68 n.7, 278 S.E.2d at 362 n.7. The court notes that the only evidence is supporting this proposition is an anecdotal interview with an assistant court clerk and a Note in the Yale Law Journal based on similar speculation. In a recent opinion, although discussing the entire rationale of the primary caretaker doctrine, Justice Neely can still provide no scientific or statistical support for this proposition. In fact, he candidly admits that the adoption of mandatory guidelines for setting child support along with strengthened means of collecting that support tends to undercut one of the primary reasons for the doctrine. David M. v. Margaret M., 385 S.E.2d at 921-22.
\item \textsuperscript{98} Neely, \textit{The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed}, 3 \textit{Yale L. and Pol'y Rev.} 168 (1984); Neely, \textit{The Divorce Decisions}, 50 (McGraw Hill 1984) (essentially restating the law review article). In David M. v. Margaret M., much of these two works is adopted verbatim.
\item \textsuperscript{99} \textit{Garska}, 167 W. Va. at 67, 278 S.E.2d at 362.
\item \textsuperscript{100} Neely, \textit{The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed}, supra note 98, at 173-74.
\item \textsuperscript{101} Id.
\end{itemize}
female primary caretakers that they were certain to gain custody, and thus had no reason to bargain away important economic benefits for themselves and their children. As a final bonus, it would provide for shorter, more economical, less acrimonious divorce and custody proceedings, thus leaving more dollars in the marital estate to be divided.102

C. Impact

The primary caretaker doctrine, which holds that the parent who has taken primary responsibility for taking care of the child’s physical, social and educational needs will be given custody, if fit, set the stage for future custody battles. Since there was generally no question regarding who had been primarily responsible for taking care of these needs for the child, the non-primary parent had only the elusive “fitness” question to litigate. Time alone would tell whether the court was willing to apply this strict rule on various fitness issues in order to uphold the rationale of the primary caretaker doctrine.

In the meantime, other States began to consider and adopt the primary caretaker presumption. We turn next to their experience with the doctrine.

V. THE PRIMARY CARETAKER DOCTRINE

A. Other States

When Garska was decided, only one other state supreme court had considered the primary caretaker role when determining custody, and then only when the evidence was “undisputed.”103

102. Justice Neely later summarized the benefits as follows:

When properly applied, the primary caretaker parent presumption reduces sharp practices in custody negotiation, prevents fathers and mothers from being penalized on account of their gender, and avoids custody battles that are so unwieldy and intrusive that they make the lives of a divorcing couple and their children even more miserable than they otherwise would be.

David M. v. Margaret M., 385 S.E.2d at 915.

103. Oregon adopted the “primary caretaker” doctrine before West Virginia, as is evident from
In the nine years since Garska, only six other states have considered the adoption of the primary caretaker presumption enunciated therein.104 Of these, only Minnesota chose to adopt it.105

The states which considered and rejected the primary caretaker presumption generally did so because they already had a gender-neutral statute106 or court-ordered standard specifying the factors to be considered when awarding custody. The Pennsylvania Superior Court, citing Garska with approval, nevertheless held that the role of the primary caretaker was entitled to only "positive consideration" as a "substantial factor the trial judge must weigh in adjudicating a custody matter" and was neither presumptive nor conclusive.107

the following footnote in the Garska decision:
The Oregon Supreme Court has also relied upon a determination of the primary caretaker parent in reaching custody decisions. That Court awarded custody to a mother when: "The undisputed evidence in this case was that the wife was not merely the mother but was also the primary parent. During the marriage she was not working and performed the traditional and honorable role of homemaker. She cleaned the house, cared for the children, fed the family, nursed them when sick and spent those countless hours disciplining, counseling and chatting with the children that every homemaker should. For some families the husband may perform this role and be the primary parent. In other families the parents evenly divide the role and there is no primary parent. In this family the husband played the traditional role of breadwinner, working eight to ten hours a day. In his off-hours he dedicated much time and attention to the children, but the lion's share of the child raising was performed by the wife. It is undisputed that the children were happy and well-adjusted and that the relationship between the wife and children was close, loving and successful. Although the same relationship unquestionably existed to a degree with the husband, the close and successful emotional relationship between the primary parent and the children coupled with the age of the children dictate the continuance of that relationship."


105. Pikula, 374 N.W.2d at 712.


The Ohio Appeals Court, calling the *Garska* opinion "eloquent" and quoting from it extensively,\(^*\) nonetheless held that their custody statute "would preclude our placing a presumptive quality on the factor of who is the primary caretaker."\(^{109}\) The court emphasized, however, that it was "a factor which must be given strong consideration."\(^{110}\)

The Iowa Court of Appeals also felt that the primary caretaker role was an important factor in determining custody, but felt it was precluded from adopting it as a conclusive presumption.\(^{111}\)

The North Dakota Supreme Court rejected making the primary caretaker factor into a presumptive rule, stating that "in North Dakota the concept inheres in the statutory factors and has not yet been accorded elevated status."\(^{112}\)

A later Ohio Appeals Court decision backed off even further from adopting the primary caretaker analysis.\(^{113}\) While recognizing the analysis of a previous case discussing the doctrine,\(^{114}\) the court found "nothing magical about the words 'primary caregiver,'" and warned trial courts against "the use of any rule as a 'substitute for a searching factual analysis of the relative parental capabilities of the parties.'"\(^{115}\)

The Vermont Supreme Court likewise rejected the primary caretaker presumption,\(^{116}\) stating that "such a presumption would be inconsistent with the statutory scheme as it is presently written."\(^{117}\)

---

109. *Id.* at 306, 456 N.E.2d at 1222.
110. *Id.*
111. *Grandinetti*, 342 N.W.2d at 878.
112. *Gravning*, 389 N.W.2d at 622. It should be noted that there was a vigorous dissent in this case, quoting extensively from *Garska* and applying much of Justice Neely's later analysis. *Id.* at 624-26.
115. *Thompson*, 511 N.E.2d at 415 (quoting *Ex parte Devine*, 398 So. 2d 686, 696 (Ala. 1981)). This is, of course, the very thing that *Garska* sought to avoid.
117. *Id.* at 214. The court went on to elaborate that, "the statute requires the Court to 'consider' each factor, a duty that would not be fulfilled in a case involving two 'fit' parents if custody were determined solely on the basis of which was the primary custodian." *Id. See* VT. STAT. ANN. tit. 15, § 665(b) (1986).
Justice Neely, in the recent West Virginia case of *David M. v. Margaret M.*, lists several other states which have discussed the notion of primary caretaker in custody decisions. None, however, have gone on to adopt it.

As discussed earlier, the Supreme Court of Minnesota is the only other state high court to adopt the primary caretaker presumption. The court not only cited *Garska* with approval, and quoted from it extensively, it specifically adopted "the indicia of primary parenthood set forth in *Garska* to aid trial courts in determining which, if either [sic] parent is the primary caretaker." The analysis discussed in the opinion mirrors Justice Neely's realistic approach in both *Garska* and his articles.

Because Minnesota has had an opportunity to test the various legal issues raised by the primary caretaker presumption, it provides us with the only other legal precedent which may help us to avoid any legal or practical pitfalls inherent in the rule.

First of all, in adopting the doctrine, the Supreme Court of Minnesota recognized that the primary caretaker presumption will only

---

118. The following also have recognized the role of the primary caretaker as relevant to custody, as illustrated in the *David M. v. Margaret M.* decision:

- Smith v. Smith, 294 S.C. 194, 363 S.E.2d 404, 406 (S.C. App. 1987) (upholding custody award to the primary caretaker who had custody of the children since the separation; "latter factor alone supports the trial court's decision");
- Gordon v. Gordon, 577 P.2d 1271 (Okla. 1978), cert. denied 439 U.S. 863 (reversing custody award to the father when the mother was shown to be the primary caretaker); Burleigh v. Burleigh, 200 Mont. 1, 650 P.2d 753 (1982) (affirmed custody of two minor children with the mother based on evidence that she was the primary person involved in their care, education and rearing); Leach v. Leach, 660 S.W.2d 761 (Mo. App. 1983) (upholding custody award to the primary caretaker father although contrary to the tender years presumption); Marlatt v. Marlatt, 427 So. 2d 1285 (La. App. 1983) (awarded custody to the father who was the primary 'nurturing parent').


119. *Pikula*, 374 N.W.2d at 705.

120. *Id.* at 713. It should be noted that the Minnesota Supreme Court was not deterred by the fact that their legislature had adopted a statute specifically listing the factors to be considered by a Court when awarding custody. *See, Minn. Stat. Ann. § 518.17(1) (West 1984).*
apply to children of tender years who are too young to state a preference for a particular parent.\textsuperscript{121} This would seem to indicate that a child old enough to express a parental preference and articulate a rational basis for it would rebut the primary caretaker presumption.

The intermediate Court of Appeals in Minnesota had occasion, over the ensuing few years, to confront several of the issues raised by the primary caretaker presumption.\textsuperscript{122} In \textit{Jorschumb v. Jorschumb},\textsuperscript{123} the court of appeals reviewed the first case to determine that neither parent had been the child’s primary parent. Here, the father had been primarily responsible for the child’s toilet training, bedtime preparations and discipline, but had also often left the child alone with the mother for long periods during which she took over those duties. The court felt that the trial court’s finding that neither parent had been the child’s primary caretaker at the time of separation was not clearly erroneous. Thus, the primary caretaker presumption was rebutted and the court returned to a “best interest of the child” analysis.\textsuperscript{124}

The Minnesota Court of Appeals reached an identical conclusion in \textit{Regenscheid v. Regenscheid}.\textsuperscript{125} There the court upheld a trial court’s finding that a mother providing the primary physical care while the father provided the primary emotional and intellectual care rebutted the primary caretaker presumption,\textsuperscript{126} and required a return to the traditional “best interest of the child” analysis.

The court of appeals has also ruled that a very strong case of unfitness would have to be made in order to deny custody to the primary caretaker.\textsuperscript{127}

\begin{itemize}
\item \textsuperscript{121} Pikula, 374 N.W.2d at 713.
\item \textsuperscript{122} In Kennedy v. Kennedy, 376 N.W.2d 702 (Minn. Ct. App. 1985) the Court of Appeals merely remanded the case for reconsideration in light of \textit{Pikula}, which the Minnesota Supreme Court had issued just four days earlier. The same result occurred in Ozenna v. Parmelee, 377 N.W.2d 483 (Minn. Ct. App. 1985) decided just two weeks after \textit{Pikula}.
\item \textsuperscript{123} 390 N.W.2d 806 (Minn. Ct. App. 1986).
\item \textsuperscript{124} \textit{Id.} at 812. This result was also recommended in \textit{Pikula}, 374 N.W.2d at 713-14.
\item \textsuperscript{125} 395 N.W.2d 375 (Minn. Ct. App. 1986).
\item \textsuperscript{126} \textit{Id.} at 379.
\item \textsuperscript{127} Tanghe v. Tanghe, 400 N.W.2d 389 (Minn. Ct. App. 1987).
\end{itemize}
Finally, the Minnesota Supreme Court itself revisited the issue in *Sefkon v. Sefkon*\(^{128}\) and reversed a trial court that applied the primary caretaker presumption in a hearing on a petition to modify custody brought three years after the initial divorce. First, the court held that the child was in the third grade and was thus old enough to state a rational preference which would rebut the primary caretaker presumption.\(^{129}\) Next, the litigation had taken so long\(^{130}\) that the primary caretaker presumption no longer applied. Finally, the court ruled that the determination of the primary caretaker for one child was not conclusive as to who had been the primary caretaker for another child of the same marriage.\(^{131}\)

Thus in Minnesota several decisions mirror the results of the West Virginia Supreme Court of Appeals when faced with similar issues.\(^{132}\) We also have a valuable source of legal analysis and precedent for issues which have not yet been raised in West Virginia.

### B. Scholarly Analysis

Late in 1985, the scholarly community began to analyze and react to the primary caretaker doctrine.\(^{133}\) Professor Cochran of Pepperdine University School of Law was very critical of the notion of utilizing the primary caretaker role on a case-by-case basis as merely one factor among many to be weighed in a custody decision. Citing, among other things, Justice Neely's law review article,\(^{134}\) Professor Cochran basically accepts the argument put forward by Justice Neely that a case-by-case approach not only increases the uncertainty of the custody decision, it also necessarily decreases the bargaining power

---

128. 427 N.W.2d 203 (Minn. 1988).
129. *Id.* at 212.
130. The couple separated in September, 1983; the trial court used this date in determining which parent was the primary caretaker, although the child had been in her mother's sole custody for almost three years when the trial court finally awarded custody in August, 1986. *Id.* at 205, 212.
131. *Id.* at 213.
132. See Section VI infra.
of the primary caretaker.\textsuperscript{135} Thus, Professor Cochran dismissed this approach in making rational custody decisions.\textsuperscript{136}

Professor Cochran looks with much greater favor on the primary caretaker presumption enunciated in \textit{Garska}:

A primary caretaker preference reduces some of the dangers that exist under the case-by-case rule. For example, if there is a primary caretaker, under such a preference, the parents will know that that parent will get custody unless the other parent can overcome the preference. The dangers of the non-primary caretaker threatening a custody fight in order to gain a bargaining advantage and of parental conflict and litigation are reduced.\textsuperscript{137}

However, while generally praising the \textit{Garska} doctrine, Professor Cochran is quite critical of the limitation of that decision to children of tender years:

In \textit{Garska v. McCoy}, the leading primary caretaker preference case, the West Virginia Supreme Court of Appeals justified the primary caretaker preference entirely on the basis of the need for a reliable rule, and yet the court limited the applicability of the rule to children of tender years. The court cited as advantages of a reliable rule that it discourages unfair bargaining and encourages settlement. Both are worthwhile goals yet both are unrelated to the age of the child. As children get older, the primary caretaker’s ties to them are likely to continue to be strong, leaving the primary caretaker open to the danger of custody litigation threats if the primary caretaker preference expires. Parental conflict and litigation do not become less of a danger as a child gets older.\textsuperscript{138}

Thus, Professor Cochran goes on to advocate a joint custody presumption with physical custody to the primary caretaker and no age limitation on the presumption.\textsuperscript{139}

The next law review article to advocate the issue was a student note in the Minnesota Law Review which was extremely critical of the Minnesota Supreme Court for adopting the primary caretaker presumption.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{135} And, as Justice Neely freely acknowledges, although it is a gender-neutral doctrine, the primary caretaker presumption is normally spelled M-O-T-H-E-R.
\item \textsuperscript{136} Cochran, \textit{supra} note 133, at 15.
\item \textsuperscript{137} \textit{Id.} at 34 (footnotes omitted).
\item \textsuperscript{138} \textit{Id.} at 63 (footnotes omitted).
\item \textsuperscript{139} \textit{Id.} at 64.
\item \textsuperscript{140} Note, \textit{A Step Backward: The Minnesota Supreme Court Adopts a “Primary Caretaker” Presumption in Child Custody Cases: Pikula v. Pikula}, 70 MINN. L. REV. 1344 (1986).
\end{itemize}
The first criticism is based on the legislative history of the Minnesota child custody statute.\(^1\) The second criticism is more substantial. It is based on a claim that the primary caretaker presumption overlooks several statutory factors which are important for the best interest of the child.\(^2\)

Because it felt that stability for the child was the paramount legislative concern, the Minnesota Supreme Court explicitly rejected having trial courts consider other statutory factors such as the "cultural factors" and "guidance potential." The court stated that, while these factors are "plainly relevant to a child's wellbeing [sic] and security," such factors are "inherently resistant of evaluation and difficult to apply in any particular case."\(^3\)

While acknowledging that these individualized custody determinations are very difficult to make and had even been shown in the past to have discriminated against both racial minorities and women,\(^4\) the author nevertheless argued for a return to a consideration of all the statutory factors.\(^5\) Other than the argument that the court had no right to ignore portions of a legislative enactment, the author presents no compelling theoretical arguments against the primary caretaker presumption.

The final scholarly analysis of the primary caretaker doctrine was done in a provocative article by Professor Marcia O'Kelly of the North Dakota Law School faculty.\(^6\) In the article, Professor O'Kelly examines the major custody decisions of the North Dakota Supreme Court\(^7\) to determine if the primary caretaker preference would have

---

142. Note, supra note 140, at 1359.
143. Pikula, 374 N.W.2d at 712.
144. Note, supra note 140, at 1364 n.95.
145. Id. The author attributed the acknowledged poor quality of "expert" evaluations in custody cases to "inadequate training, overworked staff and insufficient funding" and hoped to solve those problems in the future. But see Note, Is there Gender Neutrality in Minnesota Custody Disputes?, 9 HAMLIN L. REV. 411 (1986).
146. O’Kelly, Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian, 63 N.D.L. REV. 481 (1987) In spite of Professor O’Kelly’s cogent analysis, the North Dakota Supreme Court recently discussed, but rejected, her suggestion that North Dakota adopt the primary caretaker presumption. VonBank v. VonBank, 443 N.W.2d 518 (N.D. 1989).
147. The reader will recall that the North Dakota Supreme Court rejected the primary caretaker presumption in Gravning v. Gravning, 389 N.W.2d 621 (N.D. 1986). See supra note 112 and Section V-B.
resulted in a different outcome. Her ultimate conclusion is that the results would have been the same except in two areas.

In the first area, it was clear that the sexual conduct of the mother had an impact on North Dakota custody decisions, even where there was no showing of a detrimental impact on the child.148 In the second area, she argues that the failure of the primary caretaker doctrine to allow a showing that the non-primary parent was the “psychological parent” to whom the child turned for emotional support and nurturance, and to have this factor rebut the presumption, caused a different result in a North Dakota case.149

Professor O’Kelly argues eloquently for the adoption of such a “psychological parent” exception as well as for the primary caretaker doctrine’s ability to shield women from custodial decisions based on morality having no impact on the children.150

Thus, the bulk of persuasive scholarly opinion clearly favors the primary caretaker presumption, with some useful changes, as a helpful rule in resolving custody disputes.151 We can turn now to the West Virginia experience with the primary caretaker presumption.

VI. THE WEST VIRGINIA EXPERIENCE WITH THE PRIMARY CARETAKER PRESUMPTION

West Virginia has accumulated a great deal of jurisprudence in the area of the primary caretaker doctrine, since we have applied it longer than any other state. The cases fall into nine different categories and, taken as a whole, form a rational scheme which allows lawyers to advise their clients, and judges and family law masters to predict whether a novel factual situation will fall within

148. O’Kelly, supra note 146, at 558.
149. Id. at 559.
150. Id. at 560. Even the Vermont Supreme Court while rejecting the presumption, noted that: “To some degree, it will direct the evidence away from the spousal misconduct focus that too often pervades custody hearing and onto the needs of the child.” Harris v. Harris, 546 A.2d at 214 (Vt. 1988).
151. The reader is also directed to the discussion of cases in Annotation, Child’s Wishes as Factoring Awarding Custody, 4 A.L.R.3d 1346 (1965); and the particularly thorough discussion found in Annotation, Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child, 41 A.L.R. 4th 1129 (1988).
or without the primary caretaker presumption. Let us now turn to the various cases and their categories.

A. Failure to Find Primary Caretaker

The first wave of custody cases to reach the court after Garska predictably involved the failure of trial court judges to make findings regarding the primary caretaker. This, of course, prevented the appellate court from making an informed review of whether the custodial arrangement ordered by the lower court comported with the requirements of Garska.152 Three cases were remanded with instruction153 regarding the primary caretaker issue and four were remanded for further findings of fact and law.154

B. Sexual Conduct or Misconduct as Affecting Fitness

The court was then faced with the inevitable fitness issues, the only real battleground left to a non-primary parent after Garska. It must have been clear to the court that, should it establish a liberal standard for determining that the primary caretaker was unfit, and thus not entitled to custody, that one of the important theoretical underpinnings of the primary caretaker doctrine155 would be seriously undetermined. The West Virginia Supreme Court of Appeals thus consistently refused to deny custody to primary caretakers as a result of their sexual conduct or misconduct, so long as the misconduct did not involve the children and was not so aggravated as to violate contemporary moral standards.156

153. In Lounsbury v. Lounsbury, 296 S.E.2d 686 (W. Va. 1982), Heck v. Heck, 301 S.E.2d 158 (W. Va. 1983), and Gibson v. Gibson, 304 S.E.2d 336 (W. Va. 1983), the court had enough evidence in the record to determine that the mother had been the undisputed primary caretaker. In all of these cases, the court remanded with instruction to award custody.
155. That being the certainty that, if you were the primary caretaker, you would receive custody and would not have to negotiate away important economic benefits for yourself and your child in order to ensure custody.
156. It should be noted that the court has taken the same hard line against finding unfitness for non-sexual misconduct, in this case, marijuana use. Mormanis, 296 S.E.2d at 680.
The court reversed and remanded a trial court’s denial of custody to a mother because of an incident of adultery. The court went on to overrule a trial court’s refusal to award custody to a primary caretaker because an ongoing adulterous relationship rendered her unfit. Next, the court reversed the denial of custody to a primary caretaker because the trial court found the “moral atmosphere” in her home rendered her unfit. The same result was reached in a case where the primary caretaker’s sexual misconduct was found by the court to have not been “egregious” and not to have been shown to have affected the child adversely. Finally, the court again reversed the trial court’s denial of custody to the primary caretaker because she had “abused and neglected” the children, thus rendering her unfit.

Thus the court consistently sought to avoid undercutting the Garska rationale. In the following areas, however, they were faced with even more difficult theoretical questions.

157. Stacy v. Stacy, 332 S.E.2d 260 (W. Va. 1985). The court here applied the standard of J.B. v. A.B., 161 W. Va. 332, 242 S.E.2d 248 (1978), which held that acts of misconduct cannot be considered as evidence of unfitness unless it is so aggravated, given contemporary moral standards, that reasonable people would consider her immoral and unfit to raise children. There, a mother’s single act of fellatio on a third party in a dark parking lot was insufficient.

158. Bickler v. Bickler, 344 S.E.2d 630 (W. Va. 1986). It should be noted, however, that Justice Brotherton filed a dissent, joined in by Justice McHugh, in which he argued that the court had adopted a moral standard that might well harm the child. Id. at 633. The court, however, has recently unanimously reversed a trial court which found a primary caretaker unfit due to two acts of adultery over a two year period. David M. v. Margaret M., 385 S.E.2d 912, 927-28 (W. Va. 1989).

159. M.S.P. v. P.E.P., 358 S.E.2d 442 (W. Va. 1987). Here, the mother was alleged to be having an affair with a man who had previously been a homosexual.

160. Isaacs v. Isaacs, 358 S.E.2d 833 (W. Va. 1987). This was another case involving a mother who had been guilty of an act of adultery prior to the separation.

161. Goetz v. Carpenter, 367 S.E.2d, 782 (W. Va. 1988). In this case, the children were exposed to their mother’s boyfriend in his underwear, and also sleeping in a non-sexual manner in the same bed as their mother at a motel while on a trip. There was no evidence that this adversely affected the children in any way. The mother later married this man.

162. It should be noted that, in Rowsey v. Rowsey, 329 S.E.2d 57 (W. Va. 1985), the court reversed a change of custody by the trial court where the primary caretaker had violated a court order preventing her from seeing a reputed lesbian friend and from traveling outside the state with the children. It should also be noted that the visitation rights of a non-custodial spouse cannot be diminished because of misconduct, including failure to pay child support, unless it can be demonstrated that the misconduct affects the welfare of the child. Ledsome v. Ledsome, 301 S.E.2d 475 (W. Va. 1983). It was also held insufficient to change custody because of visitation problems. Kinney v. Kinney, 304 S.E.2d 872 (W. Va. 1983). Finally, it should be acknowledged that the court has applied the same standard for petitions to modify custody. In Legg v. Legg, 169 W. Va. 753, 289 S.E.2d 504
C. Primary Caretaker and the Petition to Modify

The traditional rule in West Virginia, in petitions to modify, has always been that there must have been a material change of circumstances since the last custody order, and that the petitioner must demonstrate that a change of custody would be in the material best interest of the child.\(^{163}\)

The court, after *Garska*, was faced with the issue of how the primary caretaker presumption impacted upon a petition to modify custody. Since the intellectual underpinnings of the doctrine\(^ {164}\) did not apply to a petition to modify, the court in *Garska* itself, and in every case that has followed, has held that the primary caretaker doctrine has no application in a petition to modify custody.\(^ {165}\)

D. Custodial Parent Voluntarily Relinquishes Custody Temporarily

The West Virginia Supreme Court of Appeals, perhaps because of a long cultural tradition of large, extended families in the State, has had many occasions to rule on situations where the custodial...
parent has voluntarily relinquished temporary custody to a third party,\textsuperscript{166} then later sought to regain that custody.\textsuperscript{167}

The court has, since \textit{Garska}, consistently ruled that the primary caretaker presumption does not apply in such circumstances, and that the same standard will apply as in a petition to change custody.\textsuperscript{168}

There must, in these cases, be a showing that the child's custodial parent intended to relinquish custody.\textsuperscript{169} And the person to whom custody was voluntarily relinquished may be the non-custodial spouse.\textsuperscript{170} The child's current custodian has standing to intervene in an abuse and neglect proceeding to terminate the natural parents' rights.\textsuperscript{171} A father having temporary custody of children while their custodial mother was hospitalized for a mastoidectomy was entitled to require the mother to prove it would be in the children's material best interest to return to her custody.\textsuperscript{172} Where there is substantial evidence that the custodial mother relinquished custody to the paternal grandparents, she would be required to show that it would be in their material best interest in order to regain custody.\textsuperscript{173} The trial court's award of temporary custody to the child's paternal aunt and uncle was upheld where the evidence demonstrated a history of long voluntary absences by the mother and previous attempts by her to relinquish custody of her son.\textsuperscript{174} Where the primary caretaker

\textsuperscript{166} Often a family member, usually a grandparent of the child.

\textsuperscript{167} \textit{See}, e.g., Odalsek v. Odalsek, 98 W. Va. 357, 127 S.E. 59 (1925); State \textit{ex rel.} Palmer \textit{v. Postlethwaite}, 106 W. Va. 838, 145 S.E. 738 (1928); Whiteman \textit{v. Robinson}, 145 W. Va. 685, 116 S.E.2d 691 (1960); and, perhaps the strangest case in this line, Blake \textit{v. Blake}, 310 S.E.2d 207 (W. Va. 1983) where the grandparents, having previously been granted custody, divorced each other and fought a bitter custody battle over their grandchildren (the grandfather won!).

\textsuperscript{168} That is, that the change of custody would be in the material best interest of the child. \textit{See infra} Section VI-C.


\textsuperscript{170} Dempsey \textit{v. Dempsey}, 306 S.E.2d 230 (W. Va. 1985). Intent to relinquish must be shown even, as here, where the relinquishment was caused by the father's failure to provide support money.


\textsuperscript{172} Rozas \textit{v. Rozas}, 342 S.E.2d 201 (W. Va. 1986). In fairness, it should be pointed out that the father presented evidence that the child had been physically abused while in the mother's custody.

\textsuperscript{173} \textit{In re Custody of Cotrill}, 346 S.E.2d 47 (W. Va. 1986). Here the mother had failed to provide any support and had only rarely visited the children during the seven years they resided with their grandparents, although she was always welcome when she did visit.

\textsuperscript{174} \textit{In re Livesay}, 364 S.E.2d 267 (W. Va. 1987).
custodial mother indicated in writing her intent to voluntarily relinquish custody temporarily to their father, the presumption is rebutted and the trial court may consider the child's best interest in awarding custody.\textsuperscript{175}

\textbf{E. Voluntarily Relinquished Permanent Custody}

The line of cases that has given the court the most difficulty has been the attempted revocation of an adoption, where there has been a strong bonding between the young child and the new custodians. These are similar to the cases discussed previously regarding temporary relinquishment of custody, but involve the additional issue of the termination of parental rights.

In the two cases thus far decided, the court has recognized the best interests of the child may outweigh the rights of the child's natural parent, but have not applied a primary caretaker presumption.

In \textit{West Virginia Dept. of Human Services v. La Rea Ann C.L.},\textsuperscript{176} the court ruled that although a minor had an absolute statutory right to revoke a consent to adoption at any time before the final order was signed,\textsuperscript{177} where a substantial period of time had elapsed, that right would be moderated by the child's best interests. In the celebrated case of \textit{Lemley v. Barr},\textsuperscript{178} the court determined that where a consent to adoption was technically deficient,\textsuperscript{179} and a long period of time had passed with the child in the custody of the adoptive family, the child's custody should not be disturbed unless there was "a clear showing of significant benefit to him."\textsuperscript{180}

\textbf{F. Both Parents Equally Primary Caretakers}

Just as the Minnesota Court of Appeals had confronted in \textit{Jorschumb v. Jorschumb},\textsuperscript{181} the issue of what to do when neither parent

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{175} Mills v. Gorrick, 381 S.E.2d 273 (W. Va. 1989).
  \item \textsuperscript{176} 332 S.E.2d 632 (W. Va. 1985).
  \item \textsuperscript{177} W. Va. Code § 49-3-1(a) (1977, 1984) and W. Va. Code § 48-4-1(a) (1965) (currently W. Va. Code § 48-4-5(a) (1984)).
  \item \textsuperscript{178} 343 S.E.2d 101 (W. Va. 1986).
  \item \textsuperscript{179} The consent was deficient since it was notarized by a notary from an adjoining state where the birth mother resided.
  \item \textsuperscript{180} Lemley, 343 S.E.2d at 102-03.
  \item \textsuperscript{181} 390 N.W.2d 806 (Minn. Ct. App. 1986).
\end{itemize}
\end{footnotesize}
was clearly the primary caretaker, or when both parents were equally the primary caretaker, finally arose in West Virginia. The West Virginia Supreme Court of Appeals, having already addressed the theoretical possibility in *Garska* itself, did the same thing the Minnesota Courts had done: the court found the primary caretaker presumption to have been rebutted and looked to the child’s best interest.

**G. Both Parents Unfit**

In *Collins v. Collins*, the court upheld a finding that the mother, although the primary caretaker, was unfit because of her neglect of the children. The father being found equally unfit to care for children, the court upheld an award of custody to the grandparents.

**H. Child Under Fourteen States a Preference**

The court has also had to face the question of what effect a stated preference by the child will have on the primary caretaker presumption. It first faced the issue in *Graham v. Graham*, where the trial court had found both parents to have taken equal primary responsibility for raising the child. There, with the presumption rebutted, the six-year old child’s stated preference was found to be a proper basis for awarding custody to the father.

182. In Wagoner v. Wagoner, 310 S.E.2d 204 (W. Va. 1983), the court held that evidence of who primarily cared for the children when the whole family was together was entitled to more weight than what either spouse did when alone with the children. Nevertheless, the fact that the father occasionally hired a babysitter for the children when he had physical care of them was a basis for denying him custody.


184. *See T.C.B. v. H.A.B.*, 317 S.E.2d 174 (W. Va. 1984). The lower court was upheld after finding both parents to have been equally primary caretakers. The court then awarded custody to the father, finding that the mother frequently left the child alone to go smoke marijuana with a neighbor. This the court held to not be in the child’s best interest.

185. *J.E.I. v. L.M.I.*, 314 S.E.2d 67 (W. Va. 1984). The court held that where the primary caretaker was disabled at the time of the final divorce hearing, the court should give temporary custody to the other parent and, when the disability ended, hold a *de novo* hearing on custody using the "best interest of the child" standard. *Id.* at 72.

186. 297 S.E.2d 901 (W. Va. 1982).


188. *Id.* at 191.
The court next held that the voluntary, intelligently-expressed preference of a ten-year old child for the non-primary parent rebuts the presumption and requires the trial court to consider the child's best interest. It should be noted here, however, that the stated preference of a child under fourteen for a change in custody has been held not to constitute a sufficient change of circumstances, standing alone, to justify a modification of custody.

Finally, the court faced a situation where the mother had moved out of the home and the father had been the children’s primary caretaker for the two years preceding the divorce. The older child refused to state a preference. The younger child expressed a preference to live with his mother. This was held to rebut the presumption and both children were awarded to the wife.

I. Child Over Fourteen States a Preference

Because West Virginia had a statute allowing a child of fourteen or older to nominate his or her own guardian, the court in Garska recognized that the concept of a child of “tender years” would have to end at that age, and the primary caretaker presumption would not apply. Thus, it came as no surprise when the court held that a child of fourteen has an absolute right to state a preference for

189. Rose v. Rose, 340 S.E.2d 176 (W. Va. 1986). This case also allows for an in camera interview with the child, on the record, but outside the presence of the parties or their counsel. This exception to the primary caretaker presumption is perhaps the most dangerous and the one most likely to be abused. Justice Neely certainly seems to understand this when he writes in David M. v. Margaret M., 385 S.E.2d 912, 920 (W. Va. 1989) (footnotes omitted):

Children over the age of six might seem to be the best available experts on the subject of how the parents and children get along. Usually, however, children do not want what is best for them; they want what is pleasant. If children are permitted to influence decisions about custody simply by stating a preference, the parents are placed in the position of being competitive bidders in a counterfeit currency. For the children the results are seldom positive. Strangely, however, in a case replete with citation, he fails to reconcile this excellent critique with the current case law in West Virginia. He does, however, without citing either Rose, or T.S.K. v. K.B.K., 371 S.E.2d 362 (W. Va. 1988), state that the trial court should only solicit the child's preference “in exceptional cases when the trial judge is unsure about the wisdom of awarding the children to the primary caretaker.” David M. v. Margaret M., 385 S.E.2d at 924.


a custodial parent.\textsuperscript{194} The primary caretaker presumption would not apply and the preferred parent, if fit, must be given custody.\textsuperscript{195}

VII. CONCLUSION

From a review of the foregoing, it should be apparent that the primary caretaker presumption is still alive and well in West Virginia, that it has worked well in other states, and that it has survived scholarly scrutiny. Like the famous quote about democracy, it is the worst system for determining custody . . . except for all the others!

The exceptions to the primary caretaker rule are both rational and valuable. They include petitions to modify, situations where the custodial parent voluntarily relinquishes custody (permanently or temporarily), and situations where children old enough to voluntarily state an intelligent preference do so.

It is suggested that an additional exception be considered, such as the one recommended by Professor O'Kelly,\textsuperscript{196} when the non-primary parent is, in fact, the psychological parent to whom the child turns for emotional support. It is also suggested, since the court's recent restriction of joint custody arrangements,\textsuperscript{197} that Professor Cochran's idea of joint custody with physical custody to the primary caretaker is not something that would be likely to add much to a trial court or practicing attorney's consideration of custody issues in this jurisdiction.\textsuperscript{198}

\textsuperscript{194} Justice Neely recently summed up the rational basis for the three categories of children: In the child custody context, children fall into one of three groups, depending on their age. Children under six years of age are called "children of tender years": they are the most dependent on their parents, but they usually cannot articulate an intelligent opinion about their custody. Children between six and fourteen are also dependent on their parents, but they can usually articulate a preference regarding custody arrangements and explain their reasons. By the age of fourteen a child takes on many of the qualities of an adult; in most cases, unless geography interferes, a child over fourteen will decide for himself or herself the parent with whom he or she wants to live, regardless of what a Court says.

David M. v. Margaret M., 385 S.E.2d at 912-20.


\textsuperscript{196} O'Kelly, \textit{supra} note 146.

\textsuperscript{197} Lowe v. Lowe, 370 S.E.2d 731 (W. Va. 1988).

\textsuperscript{198} Cochran, \textit{supra} note 133. It should be noted that one impediment to this proposal is the court's recent ruling that joint custody could only be considered in cases where both parties consent to it. Michael R. v. Sandra E., 378 S.E.2d 840 (W. Va. 1989). \textit{See also}, David M. v. Margaret M., 385 S.E.2d 912 (W. Va. 1989).
The authors hope that this review will provide the reader with a comprehensive overview of the history of child custody jurisprudence in West Virginia; an appreciation of the current status of the primary caretaker preference in our state, other states, and in the literature; a rational basis for categorizing the exceptions to the primary caretaker doctrine; and, finally, some useful ideas from other states' jurisprudence as well as from scholarly research for further areas in which the doctrine might be modified or improved.