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Volume 89 | Issue 2 Article 18

January 1987

Domestic Relations

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Recommended Citation

Patricia L. Rush, *Domestic Relations*, 89 W. Va. L. Rev. (1987).
Available at: https://researchrepository.wvu.edu/wvlr/vol89/iss2/18

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DOMESTIC RELATIONS

BERGER v. BERGER, 350 S.E.2d 685 (W. Va. 1986).

Child Custody—Jurisdiction

In this case, the appellant filed for divorce in Virginia and North Carolina. The Virginia court granted the divorce and awarded custody of the children to the appellant, but it could not adjudicate property matters since it lacked jurisdiction over the appellee. The issue of the appellee's residency was raised in North Carolina and was apparently decided adversely to the appellee. The appellee was in contempt of court for refusing to pay alimony and child support ordered pendente lite in North Carolina, and both suits were pending when the appellee filed for divorce in Kanawha County. The appellant moved to dismiss on the grounds that there were other pending lawsuits, and the motion was denied. The case was referred to a divorce commissioner who made findings to which both parties object.

The issue was whether a case may be dismissed when there is a pending proceeding in another jurisdiction between the same parties and concerning the same subject matter.

The court held that West Virginia Code section 56-6-10 requires the court to order a stay of the proceedings when it is apparent that a stay should be had until the decision of some other action, and under this section a case may be dismissed when the same parties are involved in a proceeding concerning the same subject matter in another jurisdiction.

BICKLER v. BICKLER, 344 S.E.2d 630 (W. Va. 1986).

Child Custody—Unfitness of Parent

After separation from the appellee, the appellant and her daughter began sharing living quarters with another man. In the divorce proceeding, the trial court found that the appellant was the child's primary caretaker, but ruled that the child's best interests required removing her from a home in which her mother maintained an adulterous relationship. That relationship was the only evidence of the appellant's unfitness.

The issue was whether there was a sufficient showing of unfitness to support removing the child from the custody of the primary caretaker.

The court held that, in general, a finding of parental unfitness may not be based solely on the ground of sexual misconduct, and there was no other evidence of unfitness that would justify removing the child from the custody of the appellant as primary caretaker.

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BURGER v. BURGER, 345 S.E.2d 18 (W. Va. 1986).

Attorneys Fees—Custody—Divorce

In this divorce proceeding, the court awarded custody of the parties' minor children to the appellee as well as exclusive use of the marital home. The *pro se* appellant was ordered to pay child support and the appellee's attorney's fees. The record showed no consideration of the factors that the court is required to consider in awarding custody and calculating child support and attorney's fees. The appellant appealed, and citing undue financial burdens if required to pay reprinting costs, he requested free transcripts of the evidentiary hearings. The request was denied.

The issues were: (1) Whether the trial court erred in failing to consider the factors necessary in determining custody, child support, and attorney's fees; and (2) whether an indigent is entitled to free transcripts in a civil case.

The court held: (1) The trial court's failure to make findings of fact concerning custody, child support, and attorney's fees was reversible error. The trial court must determine custody under the primary caretaker guidelines and must consider relevant factors such as the parental preferences of the children. In determining child support, the court must consider the factors listed in West Virginia Code section 48-2-16. In determining attorney's fees, the court must consider the factors found in syllabus point 4 of *Aetna Casualty & Surety Company v. Pitrolo*, 342 S.E.2d 156 (W. Va. 1986); and (2) upon satisfactory proof of indigency, an indigent is entitled to free transcripts in a civil case.

CALDWELL v. CALDWELL, 350 S.E.2d 688 (W. Va. 1986).

Divorce—Property Settlement

The parties were married in 1970, and the appellant brought $25,000 into the marriage which was used for the purchase of a house. That house was sold and the proceeds used to buy a new home. The parties divorced after purchasing the new home, and their property settlement provided that if the home were sold, the proceeds would be divided equally between the parties. Before the house was sold, the parties remarried. In a second divorce action, Judge Meredith ruled that the previous property settlement had no effect since the contingency of the settlement (the sale of the house) never occurred. The judge awarded the appellant the $25,000 she had brought into the first marriage and ordered that the remaining proceeds from the sale of the house were to be divided between the parties. The appellee's counsel never signed the divorce order, and the order was never entered. Judge Meredith died, and the appellee requested that the new circuit judge reconsider the case. The new judge rescinded the order and directed that the proceeds from the sale of the house be divided equally.

The issues were: (1) Whether the new circuit judge erred in rescinding Judge Meredith's divorce order; and (2) whether a property settlement in a second di-

vorce action may alter a property settlement from a previous divorce decree.

The court held: (1) Since the divorce was interlocutory rather than final, the circuit judge did not err in rescinding the order, even in the absence of any showing of mistake, newly discovered evidence, or other factors listed in Rule 60(b) of the West Virginia Rules of Civil Procedure; and (2) the property that was divided in the first divorce became the separate property of the parties and must be distributed as separate property in the second divorce, and the court cannot alter the first divorce decree.

COTTRILL, In re *CUSTODY OF*, 346 S.E.2d 47 (W. Va. 1986).

Child Custody—Relinquishment

Heidi's parents were divorced shortly after her birth, and her father was given temporary custody. After her second birthday, she lived with her paternal grandparents and was supported solely by them. Her mother made no contact with her until her fourth birthday, and afterward she made only an occasional visit. Heidi and her grandparents moved to West Virginia in 1982. Her father died in 1984, and shortly afterward her mother was granted custody by an Ohio court. Her mother moved for and was awarded custody in West Virginia despite the court's finding that the child's welfare would be promoted by awarding custody to the grandparents and that the child preferred to remain with her grandparents. The court found that the mother was a fit parent and had not abandoned the child.

The issue was whether the mother relinquished custody of the child so as to support an award of custody to the grandparents.

The court held that the evidence indicated that although she did not abandon the child, the mother did relinquish custody, and when a parent relinquishes custody and later demands the return of the child, the child will not be returned to the parent unless the parent shows that a change in custody would materially promote the welfare of the child.

FIRST NAT. BANK IN FAIRMONT v. PHILLIPS, 344 S.E.2d 201 (W. Va. 1985).

Equitable Adoption—Inheritance

Betty Shamblin, a first cousin to the deceased, claimed to have been equitably adopted by the decedent's parents and was therefore next of kin as the sister of the deceased. Four other first cousins also claimed the estate as next of kin.

The issue was whether an equitably adopted child may inherit from another child of the adoptive parent.

The court held that under West Virginia Code section 48-4-11(b), an equitably adopted child may inherit from other children of the adoptive parent if the eq-

uitable adoption is established by clear, cogent, and convincing evidence.

GODDARD v. GODDARD, 346 S.E.2d 55 (W. Va. 1986).

Alimony—Divorce

In a divorce action, the trial court found that the wife was not entitled to alimony because she was at fault in causing the separation. One of the causes suggested by the court was the wife's hysterectomy, and some of the other possible causes that were cited actually took place after the parties had separated. In its opinion the court stated: " 'As to why the marriage deteriorated . . . we can only guess. Perhaps it stems back to the hysterectomy.' "

The issue was whether the trial court abused its discretion in denying the wife's request for alimony.

The court held that the husband failed to demonstrate that his wife was substantially responsible for the breakup of the marriage, and the trial court abused its discretion in denying the wife's alimony based on its own speculations of the cause of the breakup.

HARFORD v. HARFORD, 341 S.E.2d 847 (W. Va. 1986).

Divorce—Property Rights

In this case, the appellant filed a complaint seeking divorce, and the appellee filed a counterclaim requesting adjudication of property rights. The court granted the divorce but did not adjudicate any property rights. The appellee's counsel prepared a court order that not only granted the divorce but also granted the appellee's request for relief in his counterclaim and stated that neither party owed a duty of support to the other. The court signed and entered the order.

The issues were whether the final order was correctly entered, and whether it could be reversed once entered.

The court held that a recital in a final order, although presumptively correct, will be disregarded and modified if it is shown to be without support in the record.

JONES v. JONES, 345 S.E.2d 313 (W. Va. 1986).

Alimony—Attorney's Fees—Deposit—Divorce

This divorce action was referred to a special commissioner who required the husband to pay a deposit to ensure payment of the commissioner's fees before the commissioner would give further attention to the divorce proceedings. The special commissioner's report showed that the husband's income from the year prior to the divorce action was $8,160 while the wife's income that same year was $8,320. The husband's net worth was at most $11,000 more than the wife's. The special commissioner recommended a lump sum alimony award of $5,000

and permanent alimony of $100 per month. The trial court made no specific findings regarding the incomes, expenses, or net worth of the parties and awarded the wife $1,500 per month alimony. In additon, the court ordered the husband to pay the wife's attorney's fees with no discussion or evidence as to whether the fees were reasonable.

The issues were: (1) Whether the commissioner's action in requiring a deposit was constitutional, (2) whether the trial court's award of alimony was excessive, and (3) whether the court properly assessed attorney's fees against the husband.

The court held: (1) Requiring a deposit before considering the divorce proceedings violates article III, section 17 of the West Virginia Constitution which provides that "justice shall be administered without sale, denial, or delay"; (2) the award was more than double the husband's actual yearly income and was excessive without any explanation or rationale to justify the award; and (3) the award of attorney's fees was improper without any determination of whether the fees were reasonable in light of the work performed.

KIMBLE v. KIMBLE, 341 S.E.2d 420 (W. Va. 1986).

Adoption—Child Support

The appellant requested the appellee's consent to the adoption of their daughter by the appellant and her present husband. The appellee executed formal consent to the adoption that provided that the appellee was released from his obligation to pay child support. The adoption was never completed, and one year later the appellee was served a petition for delinquent child support and a request to increase the amount of support.

The issue was whether a parent who consents to the adoption of his child may be released from his obligation to pay child support even though the adoption is never finalized.

The court held that a parent who consents to the adoption of his child may be released from the obligation of child support if (1) the welfare of the child would not be adversely affected by the release from either past or future support obligation, (2) the adoption was not consumated due to inaction on the part of the custodial parent, and (3) the failure to consummate the adoption has operated to the detriment or disadvantage of the parent who gave consent to the adoption.

The court held that a recital in a final order, although presumptively correct, will be disregarded and modified if it is shown to be without support in the record.

LOVEJOY v. HALSTEAD, 342 S.E.2d 227 (W. Va. 1986).

Child Support—Modification

In 1975, the appellee pleaded guilty to fathering the appellant's illegitimate child. He was ordered to pay child support of $45 per month based on his annual

income of $14,000. In 1984, the appellant filed for an increase in child support, alleging a change in circumstances. The appellee's annual income had increased to $25,000, although his position at his place of employment had not changed. No evidence was admitted concerning the increase in the child's needs, as the court felt such evidence would not be relevant in determining a change in circumstances. The request for increased child support was denied on the grounds that the appellant's occupation had not changed.

The issue was whether the increased needs of the child and the increased income of the appellant are relevant factors in determining a modification of child support.

The court held that "a material change in any circumstances relevant to the support or amount of support" under West Virginia Code section 48-7-5 includes material changes in the parent's income and the child's needs, and these factors should be considered when determining the modification of child support.

McKINNEY v. McKINNEY, 337 S.E.2d 9 (W. Va. 1985).

Child Support

In a 1975 divorce decree, custody of the minor son was awarded to the appellee, and the appellant was ordered to pay support until the son reached the age of emancipation. The appellee was awarded exclusive use of the marital home until either she remarried or the son reached the age of emancipation. When the son turned eighteen, the court ordered the appellant to continue paying child support until the son turned twenty-one, extended the appellee's exclusive use of the house until then, and ordered the appellant to continue to pay one-half of the house mortgage payments.

The issue was whether the trial court had the authority to extend the appellant's child support payments and the appellee's exclusive use of the house beyond the son's eighteenth birthday.

The court held that because a parent is not legally obligated to care for a child beyond the age of emancipation, the court did not have the authority to extend the child support payments beyond the son's eighteenth birthday, nor did it have the authority to extend the appellee's use of the home since it was not necessary to accommodate the rearing of minor children.

MARTIN v. MARTIN, 346 S.E.2d 61 (W. Va. 1986).

Child Support—Modification of Agreement

The parties in this case were divorced in 1971 when the legal age of majority was twenty-one. The agreement provided that the appellee pay child support and medical care until the children reached twenty-one or were otherwise emancipated. In 1972, the age of majority was lowered to eighteen. When the children reached

eighteen, the appellee filed for a modification of the agreement to terminate his duty to pay support. The circuit court terminated the duty of support on the grounds that the children had reached the statutory age of majority and that the appellee was not required to support them beyond that age.

The issues were: (1) Whether the parent's duty of support extends beyond the age of majority if the extension is part of a child support agreement, and (2) whether the circuit court erred in modifying the support agreement on the ground that there was no duty of support beyond the age of majority.

The court held: (1) Although a parent is not obligated to support a child beyond the age of majority, he or she may contract in the child support agreement to extend the support beyond that age; and (2) the court erred in modifying the support agreement without determining its effect on the welfare of the children since modification as such can be made only on a showing that the modification is necessary for the child's welfare.

RALEY v. RALEY, 338 S.E.2d 171 (W. Va. 1985).

Divorce—Equitable Distribution

During the parties' marriage, the husband had purchased stock through an employee investment account in his name only. Contributions to the account were matched by the employer. In her divorce complaint, the wife claimed one-half of the stock. The husband retired after the complaint was filed and chose a plan for distribution of the stock in which he relinquished all control of the stock to the administrator of the account and received monthly payments scheduled to deplete the account in ten years. These payments were classified as income to be considered in determining the wife's award of alimony.

The issue was whether the investment account constituted marital property subject to equitable distribution.

The court held that contributions to an investment account made during marriage are marital property subject to equitable distribution in the same manner as contributions to a savings account, and the right to claim such equitable relief is not affected by the findings of fault in the divorce action itself.

RIDDLE v. MacQUEEN, No. 17068, slip op. (W. Va. Apr. 3, 1986).

Child Custody—Failure to Rule

In this case, the petitioner was awarded custody, child support, and alimony in a 1980 divorce proceeding. Her former husband filed for a change of custody in 1983, and the petitioner counterclaimed for accrued alimony payments. The matter was submitted for a decision in January 1984, and when the court failed to rule within a year, hearings to update the situation were held in January 1985. After these hearings, the parties requested a ruling on the matters on numerous occasions. No ruling was ever made.

The issue was whether the delay in ruling justified a writ of mandamus to compel the respondants to issue a decision.

The court held that the delay was so unreasonable that it rose to the level of violating article III, section 17 of the West Virginia Constitution, which provides in part that "justice shall be administered without...delay." A trial court or other inferior tribunal may be compelled to act in a case if it unreasonably neglects or refuses to do so.

ROSE v. ROSE, 340 S.E.2d 176 (W. Va. 1985).

Child Custody—Voluntary Preference

The parties filed for divorce and agreed that their ten year old son could choose the parent with whom he wanted to live. At first he chose to live with his mother, but after his father told him his mother was leaving for another man, the boy decided to stay with his father. At the hearing, the judged listened to the son's testimony with only the court reporter present. Joint custody was awarded to both parties with actual custody to the father, despite the court's finding that the mother was the primary caretaker. The court awarded exclusive use of the marital home to the father.

The issues were: (1) Whether the trial court erred in examining the boy outside the presence of the parties and counsel, (2) whether the trial court erred in awarding custody to the parent who was not the primary caretaker, and (3) whether the trial court erred in awarding exclusive use of the marital home to the father.

The court held: (1) The court may privately examine a child concerning his preference of custody to reduce the trauma of having to choose between his parents, and in this case the court made provisions for a transcript of the child's examination to support the court's determination of custody; (2) the primary caretaker presumption may be overcome by the voluntary preference of a child who is sufficiently mature enough to express his preference, and the trial court did not err in awarding custody based on that preference; and (3) the trial court did not err in awarding exclusive use of the marital home to the father as the custodial parent.

ROZAS v. ROZAS, 342 S.E.2d 201 (W. Va. 1986).

Child Custody—Expert Opinion

In a child custody hearing, the court concluded that the mother had physically abused her child and posed a significant risk to the child's health and welfare. The court ordered a psychological examination of the mother, but the report was not admitted into evidence, and the father was not permitted to inspect the report nor cross-examine the report's preparer. While the court made no finding as to the mother's fitness, it held that there was no evidence that the father was an

unfit parent. Custody of the child was awarded to the mother on the condition that the child and the mother live with the mother's parents.

The issues were: (1) Whether the trial court erred in refusing to allow the father to cross-examine the report's preparer, (2) whether the court erred in refusing to permit inspection of the report, and (3) whether the court erred in awarding custody to the mother and her parents without a specific finding of the mother's fitness.

The court held: (1) The trial court did not err in refusing to allow the father to cross-examine the report's preparer since there is no right to cross-examination when an expert's report is not admitted as evidence; (2) the trial court erred in refusing to allow inspection of the report since the father retained discovery rights to a court-appointed expert's report, even if the report was not admitted into the record; and (3) the court erred in awarding custody without a specific finding of the mother's fitness. Absent a showing of unfitness, the father's right to custody outweighs that of the grandparents, and the court cannot award custody to the mother and the grandparents over the father's right to custody if the mother is unfit.

STATE ex rel. *BRITTON v. WORKMAN*, 346 S.E.2d 562 (W. Va. 1986).

Child Support—Contempt—Sanctions

The relator was delinquent in paying child support in the amount of over $12,000. He was found in contempt and placed in a work-release program under which he was to pay $300 per month current support and $200 per month toward the arrearage until it was paid. Under the work-release program, the relator was to be released from jail only to go to work each day. In his habeas corpus appeal, the relator claimed inability to purge the contempt, which was therefore criminal contempt and illegal without a jury trial.

The issues were: (1) Whether the contempt was criminal, (2) whether incarceration is proper in a civil contempt proceeding in which the defendant is unable to pay, and (3) whether the relator could be held under the work-release program until the child support was paid.

The court held: (1) (Citing *State* ex rel. *Robinson v. Michael*, 276 S.E.2d 812 (W. Va. 1981))

> Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of the party under the order, the contempt is civil.
>
> . . . .
>
> The appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged.

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The contempt was civil rather than criminal since the relator was incarcerated to compel compliance with the child support order for the benefit of his child and since he had the opportunity to purge the contempt by paying the child support; (2) West Virginia Code section 48-2-22(c) precludes incarceration of a defendant who is unable to pay. However, the court was unable to determine whether the relator had the ability to pay the child support since the record was not before the court; and (3) under West Virginia Code section 48-2-22, the time period for confinement for contempt is limited to six months. The schedule for payment of child support set by the trial court would require over five years for the relator to fulfill his obligations. The relator cannot be held for the entire five year period necessary for payment since the sentence is limited to six months.

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See also,

CIVIL PROCEDURE:
Moore v. Hall, 341 S.E.2d 703 (W. Va. 1986).