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Domestic Relations

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DOMESTIC RELATIONS

During the survey period, developments in domestic relations law reflected national trends as well as the public's changing view of the permanency of marriage, the equity of traditional property distribution, and a growing concern for the victims of child abuse and custody battles.

I. PROPERTY DISTRIBUTION

Gant v. Gant, 329 S.E.2d 106 (W. Va. 1985).

Conner v. Conner, 334 S.E.2d 650 (W. Va. 1985).

The West Virginia Supreme Court of Appeals held in *Gant v. Gant*¹ that prenuptial agreements establishing property distribution and support obligations at the time of divorce are presumptively valid and the burden of demonstrating the invalidity of such agreements is upon the party attempting to invalidate it.² Prenuptial agreements are statutorily recognized in West Virginia,³ but older established case law throughout America had held the agreements valid only in the event of death⁴ and either presumptively invalid or totally void as against public policy in the event of divorce.⁵

Larry and Elana Gant were married in Reno, Nevada on December 21, 1979. The day before their marriage they entered into a prenuptial agreement in which Mrs. Gant waived all rights to alimony if they divorced.⁶ In September 1982, Mrs. Gant brought a divorce action against her husband.⁷ The circuit court ordered Mr. Gant to pay his wife's rent, temporary support payments, a one-percent-per-day penalty on all payments in arrears, and Mrs. Gant's attorneys' fees. Mr. Gant appealed the circuit court's decisions and asserted that the court erred in finding the prenuptial agreement void and unenforceable.⁸

In an opinion written by Justice Neely, the West Virginia Supreme Court of Appeals set forth the reasoning behind the older policy governing prenuptial agreements. Justice Neely discussed the changing social mores and found that the public was better served by a new law granting contract validity to prenuptial agreements that are validly procured and ostensibly fair in their terms. Prior law had been based upon a public policy which favored lifetime marriage. Such a policy

¹ *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985).

² *Id.* at 116.

³ *Id.* at 111-12 (citing W. VA. CODE 48-2-1(b) (1984)).

⁴ See *Picket v. Chilton*, 5 Munf. 467 (1817); *Charles v. Charles*, 49 Va. (8 Gratt.) 486, 56 Am. Dec. 155 (1852); *Mitchell v. Moore & als.*, 57 Va. (16 Gratt.) 275 (1861); Syl. pt. 1, *Beard v. Beard*, 22 W. Va. 130 (1883); Syl. pt. 1, *Hinkle v. Hinkle*, 34 W. Va. 142, 11 S.E. 993 (1890); Syl. pt. 2 *Bramer v. Bramer*, 84 W. Va. 168, 99 S.E. 329 (1919); *Williamson v. First National Bank of Williamson*, 111 W. Va. 720, 164 S.E. 77 (1931); *Gieseler v. Remeke*, 117 W. Va. 430, 185 S.E. 847 (1936).

⁵ *Gant*, 329 S.E.2d at 112.

⁶ *Id.* at 109.

⁷ *Id.* at 110.

⁸ *Id.* at 111.

also ensured economic security for women who generally did not work outside the home. Prenuptial agreements, which limited support obligations, encouraged divorce and increased the probability that former wives would become wards of the state.⁹

Today, the court noted 58.7¹⁰ percent of all married women work outside the home. In addition, these women are statutorily protected by Title VII of the Civil Rights Act of 1964 in their efforts to enter the labor force.¹¹ Society no longer disfavors divorce, with approximately 1,200,000 per year¹² being granted in the United States. Therefore, modern divorce law places the assets and income of a financially secure individual in jeopardy.¹³ Furthermore, society no longer ostracizes couples who live together without the benefit of marriage.¹⁴ Social security benefits, retirement and health benefits, inheritance rights, and property rights are not available to unmarried, cohabiting couples due to the difficulty in projecting or proving such relationships.¹⁵ All of these factors, the court found, have helped create an environment in which the presumptive validity of prenuptial agreements actually encourages, rather than discourages, marriage. The court reasoned that the legal system should honor such agreements to help promote the institution of marriage, which benefits both individuals and society.¹⁶

The court also stated that general contract law governs prenuptial agreements.¹⁷ However, courts reserve more authority to review the substantive terms of prenuptial agreements than commercial contracts because the state is a third party to any marriage contract.¹⁸ Nationally, the developing trend holds prenuptial agreements valid if procured without fraud, duress, or misrepresentation and voluntarily executed with knowledge of their content and legal effect.¹⁹ As in general contract law, there is no requirement that a party be advised by independent counsel for the agreement to be enforceable, so long as both parties have had the opportunity for consultation and the agreement's terms are understandable to a reasonably intelligent adult.²⁰

The basic requirement of a valid prenuptial contract is fundamental fairness. However, the court in *Gant* declined to apply a subjective standard of "fairness," pointing out that disparity in bargaining power is not grounds for invalidating con-

⁹ *Id.* at 112.

¹⁰ U.S. Bureau of the Census, *Statistical Abstract of the United States: 1985* (105th edition) Washington, D.C. (1984) at 398.

¹¹ Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000(e)-2 (1972).

¹² Wall St. J., 23 Dec. 1982, at 1, col. 1.

¹³ *Gant*, 329 S.E.2d at 114.

¹⁴ The last census showed 1,988,000 cohabiting unmarried couples in America. *Statistical Abstract of the United States*, *supra* note 10, at 40.

¹⁵ *Gant*, 329 S.E.2d at 113.

¹⁶ *Id.*

¹⁷ *Id.* at 112.

¹⁸ *Id.* at 114. (citing *Frey v. Frey*, 298 Md. 552, 471 A.2d 705 (1984)).

¹⁹ *Id.*

²⁰ *Id.* at 116.

tracts in general and should not affect the validity of prenuptial contracts.²¹ The court then defined "fairness" in prenuptial agreements more specifically as "foreseeability."²² Prenuptial agreements are enforceable so long as circumstances at the time of divorce are essentially the same as those foreseen by the parties at the time the agreement was executed. Passage of time, detrimental reliance upon the permanence of the marriage, and the birth of children are among the factors considered by the court in evaluating the "fairness" of the agreement.²³ Of course, if the prenuptial contract is so outrageous as to come within the unconscionability principles as developed in commercial contract law,²⁴ West Virginia courts have authority to evaluate its substantive terms.²⁵ Using this standard, the court held the agreement made by the Gants valid, finding that circumstances between the parties had not changed since the execution of the agreement.²⁶

The court next considered whether the award of \$650 per month to Mrs. Gant for eighteen months was proper. This amount was granted despite Mrs. Gant's waiver of alimony in the prenuptial agreement. The court held the \$650 monthly payment was not traditional alimony as contemplated in the waiver in the agreement, but was instead a means of equitably distributing the marital property, such as furniture, cash, and other assets brought into the marriage by Mrs. Gant.²⁷

Finally, the court held that the circuit court did not have the authority to place a one-percent-per-day penalty, payable to Mrs. Gant, on unpaid *pendite lite* support. The court stated that such a penalty amounted to a criminal contempt fine, which is payable only to the state to ensure that procedural safeguards surrounding criminal contempt are followed. Rather than a fine, the court stated the better alternative would be incarceration of Mr. Gant until arrangement for payment could be made.²⁸

These developments in the area of prenuptial agreements reflect the general trends of modern divorce law, as does the award of alimony in no fault divorce and the equitable distribution of property jointly acquired during marriage. In *Conner v. Conner*²⁹ the West Virginia Supreme Court of Appeals, in an opinion written by Justice Miller, addressed questions concerning equitable property distribution and the award of support payments and attorney fees in a divorce action.³⁰

In *Conner*, Marion Sue Conner appealed to the supreme court from a final judgment in a divorce action entered January 17, 1984 by the Circuit Court of

²¹ *Id.* at 114.

²² *Id.* at 115.

²³ *Id.* at 116.

²⁴ *Id. See*, W. VA. CODE § 46-2-302 (1966).

²⁵ *Gant*, 329 S.E.2d at 116.

²⁶ *Id.* at 115.

²⁷ *Id.* at 117.

²⁸ *Id.*

²⁹ *Connor v. Conner*, 334 S.E.2d 650 (W. Va. 1985).

³⁰ *Id.* at 652.

Mingo County.³¹ Mrs. Connor appealed to the supreme court based on three assignments of error.

Mrs. Conner first contended her mother's income was improperly considered by the court in determining the amount of her alimony and child support payments. Upon reviewing the record, the court dismissed this contention, noting that the appellant's mother was living in her home and making contributions towards boarding expenses. Therefore, it was proper to consider this as rental income received by Mrs. Conner. In addition, Mrs. Conner never contended the amount of the support awarded was inadequate.³²

In the second ground of error, the court found that the appellant's request for attorney's fees should have been considered by the trial court. After the Connors' first evidentiary hearing, the trial judge granted a divorce and awarded the appellant \$1000 in attorney's fees. However, no attorney's fees were provided in the decree entered a few days following the hearing. Subsequently, Mrs. Conner's counsel again requested an award of attorney's fees. At this time the trial judge stated he could not award the fees because the appellant's pleadings had not contained a specific request for them. Although counsel argued that attorney's fees could be awarded under the general prayer for such further and general relief as the court deemed proper, the judge refused to grant them on this general request. Counsel also requested leave to file a verified petition seeking attorney's fees. The judge made no ruling on this request. At a later hearing, Mrs. Conner's attorney requested a reasonable fee for petitioning the supreme court for a writ of error. The request was again denied because it was not a part of the original pleadings.³³

In considering the action of the trial court, the supreme court held it was error to refuse consideration of an attorney's fee award because the original pleadings lacked a specific demand for such relief. Traditionally in West Virginia, the wife in a divorce proceeding was awarded a sum for attorney fees and costs in an amount sufficient to see the suit to its conclusion. This was handled as an interlocutory matter and additional sums could be awarded as the court deemed necessary.³⁴ To obtain the allowance, the wife served written notice on the husband after attainment of personal jurisdiction and commencement of the divorce action.³⁵

The court then reviewed the statutory and case law³⁶ history of "suit money"³⁷

³¹ *Id.*

³² *Id.*

³³ *Id.* at 653.

³⁴ *Id.* at 654.

³⁵ *Id.* (citing *Coger v. Coger*, 48 W. Va. 135, 35 S.E. 823 (1900)).

³⁶ *Coger*, 48 W. Va. at 137, 35 S.E.2d at 824 stating:

Section 9 of Chapter 64 of the Code, provides that, 'The court in term or the judge in vacation may, at any time pending the suit, make any order that may be proper to compel the man to pay any sum necessary for the maintenance of the woman, or to enable her to carry on the suit.'

³⁷ "Suit money" is a general term that has been held to include attorney's fees, costs of deposi-

to determine if Mrs. Conner should be granted her request. The original statute³⁸ provided for "reasonable notice to the man" and expanded the right to suit money "on appeal." The statute was amended in 1969,³⁹ indicating that a husband was eligible for suit money in an appropriate case.⁴⁰ Also, notice could be served directly upon the husband's attorney rather than the husband himself.⁴¹

The supreme court found no conflict between West Virginia Code section 48-2-13 and the West Virginia Rules of Civil Procedure. Under Rule 7(b) of the West Virginia Rules of Civil Procedure,⁴² if a motion is not included in the original pleading and is not made orally during a hearing or trial, it can be requested by written motion. All written motions, except those heard *ex parte*, must be served on opposing parties. In the *Conner* case, the court found that, where the attorney requested permission to file a written motion for attorney's fees, service of notice on the husband's attorney would have been adequate under Rule 5(b). In addition, where the issue has been heard by the circuit court and an award made, the award could not be attacked for lack of reasonable notice pursuant to Rule 15(b) of the West Virginia Rules of Civil Procedure. Therefore, the trial court erred in denying the appellant's right to seek attorney's fees.⁴³

Finally, the supreme court held it was an error for the trial court to award Mr. Conner all of approximately \$18,500 deposited in a joint savings account.⁴⁴ West Virginia Code section 31A-4-33,⁴⁵ provides a rebuttable presumption that this money is jointly owned.⁴⁶ In *Conner*, no evidence was introduced to rebut the presumption, and therefore the entire joint savings account should not have been awarded to the appellee.⁴⁷

However, the supreme court held the trial court correctly refused to award

tions, costs of investigation, travel expenses, living expenses at the place of trial, travel to the attorney's office, transcribing the record, and the like.

³⁸ *Conner*, 334 S.E.2d at 654 n.4, discussed an earlier version of W. VA. CODE § 48-2-13 that provided in pertinent part:

The court in term, or the judge in vacation, may at any time after commencement of the suit *and reasonable notice to the man*, make any order that may be proper to compel the man to pay any sum necessary for the maintenance of the woman, and to enable her to carry on or defend the suit in the trial court and on appeal should one be taken. . . .

³⁹ W. VA. CODE § 48-2-13 (1980).

⁴⁰ *Connor*, 334 S.E.2d at 654.

⁴¹ *Id.* at 655.

⁴² W. VA. R. Civ. P. 7(b) provides in pertinent part:

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

⁴³ *Conner*, 334 S.E.2d at 655.

⁴⁴ *Id.* at 652.

⁴⁵ W. VA. CODE § 31A-4-33 (1982).

⁴⁶ *Conner*, 334 S.E.2d at 652 (citing *Dorsey v. Short*, 157 W. Va. 866, 205 S.E.2d 687 (1974)).

⁴⁷ *Conner*, 334 S.E.2d at 652-53.

other personal property to the appellant.⁴⁸ Mrs. Conner contended that the holding of *LaRue v. LaRue*⁴⁹ entitled her to one-half of the disputed property under the homemaker services theory of equitable distribution.⁵⁰ But *LaRue* held that divorce cases filed prior to that decision and not on appeal when it was decided on May 25, 1983 were foreclosed from asserting a claim for equitable distribution under the homemaker services theory.⁵¹ Therefore, Mrs. Conner's claim to one-half of the personal property could not be asserted.

II. CHILD CUSTODY

McAtee v. McAtee, 323 S.E.2d 611 (W. Va. 1984).

Stacy v. Stacy, 332 S.E.2d 260 (W. Va. 1985).

Each year thousands of children are caught in the middle of custody battles staged by parents or other persons in the courts of various states. The children can be victims of child snatching, unstable home lives, and disruptive emotional environments. The harm done cannot be overestimated and may cripple these children for life.⁵²

The West Virginia Supreme Court of Appeals in *McAtee v. McAtee*,⁵³ considered whether a West Virginia circuit court can award custody of a child to one parent without obtaining personal jurisdiction over the other parent.⁵⁴

Paul and Edith McAtee were married in Randolph County, West Virginia on November 29, 1981. A child was born on August 5, 1982. On November 8, 1982, Mrs. McAtee left her home in Randolph County with the child and moved to her mother's home in Wyoming County. Mr. McAtee filed a complaint in Randolph County on November 9, 1982 seeking a divorce and asking for custody of the infant. The summons and complaint were mailed to Wyoming County for personal service upon Mrs. McAtee, but the record was conflicting as to whether service was properly completed. On December 27, 1982, Mrs. McAtee's attorney made a special appearance to contest the court's jurisdiction over Mrs. McAtee on the grounds of insufficient service of process. The circuit court determined that service had been properly made and entered a divorce decree, awarding custody of the child to Mr. McAtee. On February 1, 1983, Mrs. McAtee filed a motion to vacate the divorce decree, once again based upon lack of personal jurisdiction. In her motion, Mrs. McAtee asserted she and the child had been living in Florida at the time personal

⁴⁸ *Id.*

⁴⁹ *LaRue v. LaRue*, 304 S.E.2d 312 (W. Va. 1983).

⁵⁰ *Conner*, 334 S.E.2d at 653.

⁵¹ *Id.*

⁵² UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A., Commissioner's Prefatory Note at 111-12.

⁵³ *McAtee v. McAtee*, 323 S.E.2d 611 (W. Va. 1984).

⁵⁴ *Id.* at 612.

service was supposedly made. Because the documentation of service was conflicting, the divorce decree was set aside. Mr. McAtee then filed an affidavit stating Mrs. McAtee was a nonresident of West Virginia and obtained constructive service by publication. Mrs. McAtee again failed to appear or answer the complaint. A second divorce decree was then entered by the circuit court and Mr. McAtee was again awarded custody of the child. The circuit court determined it had jurisdiction to adjudicate custody rights of the parties since Mrs. McAtee and the child had been living in West Virginia at the time the divorce action was instituted. The court ruled Mrs. McAtee's move to Florida at a later date had no effect on the propriety of its jurisdiction.⁵⁵

Mrs. McAtee filed a motion to have the second judgment set aside in regard to the award of custody. The motion was denied and Mrs. McAtee appealed to the West Virginia Supreme Court of Appeals, contending the circuit court failed to acquire in personam jurisdiction over her.⁵⁶ In an opinion written by Justice Neely, the court held otherwise.

On March 31, 1981, the West Virginia Legislature passed the Uniform Child Custody Jurisdiction Act (hereinafter UCCJA).⁵⁷ The Act, designed by the National Conference of Commissioners on Uniform State Laws, was intended to avoid jurisdictional competition and confusion between states and to deter the removal of children from a state in order to obtain custody.⁵⁸

In *McAtee*, the West Virginia Supreme Court of Appeals directed its attention to section 3 of the UCCJA, West Virginia Code section 48-10-3,⁵⁹ to determine if jurisdiction of the circuit court was proper. This section provides two major tests for determining the correct state of jurisdiction: the "home state" test and the "significant connection" test.⁶⁰ In the home state test, jurisdiction is proper if the court is located in the state where the child resided immediately prior to the custody action.⁶¹ Alternatively, under the significant connection test, if the child has no clearly defined home state or the child and family have equal or stronger ties with another state, jurisdiction is proper in a court in that state.

The court held that West Virginia clearly qualified as the child's home state at the time the divorce action commenced. Therefore, it was unnecessary to determine jurisdiction under the significant connection test. But because of the precedential nature of the *McAtee* case, the court chose to discuss this alternative test's application.

⁵⁵ *Id.* at 612-13.

⁵⁶ *Id.* at 613.

⁵⁷ W. VA. CODE § 48-10-1 to -26 (Supp. 1985).

⁵⁸ *McAtee*, 323 S.E.2d at 613 (citing *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1247 (1980)).

⁵⁹ See, W. VA. CODE § 48-10-3.

⁶⁰ *McAtee*, 323 S.E.2d at 615. See also, UCCJA, 9 U.L.A., Commissioner's Prefatory Note at 123.

⁶¹ *McAtee*, 323 S.E.2d at 615. See, W. VA. CODE § 48-10-2(5) for a definition of "home state."

The significant connection test was drafted to guide courts when a child was removed from his or her home state immediately prior to the custody action.⁶² It was designed to place the issue of custody in the forum most protective of the child's best interests.⁶³ The UCCJA was specifically enacted to discourage "child-snatching," the action Mrs. McAtee engaged in which she unilaterally removed the infant to Florida. The court stated that evidence regarding present and future care, protection, training, and personal relationships of the child would clearly come from persons residing in West Virginia and not in Florida, where Mrs. McAtee had recently relocated. Therefore, the court concluded that jurisdiction could also have been justified under the significant connection test.

The UCCJA has withstood various constitutional challenges by parties alleging due process violations by courts adjudicating the issue of child custody without attaining personal jurisdiction over the parties.⁶⁴ The UCCJA was based on a concurring opinion written by United States Supreme Court Justice Frankfurter in *May v. Anderson*.⁶⁵ The concurrence stated that obtaining *in personam* jurisdiction over both parties in a custody action was not a necessary prerequisite to rendering a custody decision.⁶⁶

The basis for upholding the jurisdictional provisions of the UCCJA, however, are found in *Shaffer v. Heitner*.⁶⁷ In *Shaffer*, the United States Supreme Court abolished the distinctions between *in rem* and *in personam* actions and held that the *International Shoe Co. v. Washington*⁶⁸ standard of "minimum contacts" applied to both types of actions.⁶⁹ *Shaffer*, however, distinguished general jurisdictional doctrine to which the "minimum contact" standard applied, and excepted the specific rules governing the jurisdictional doctrine of status.⁷⁰ Status, which includes child custody proceedings, has been interpreted under *Shaffer* as a *res*. In *McAtee*, the West Virginia Supreme Court of Appeals agreed with this interpretation and stated that child custody proceedings under the UCCJA fall within the definition of status in *Shaffer*. Therefore, custody proceedings may be adjudicated without acquiring

⁶² *McAtee*, 323 S.E.2d at 615.

⁶³ *Id.* (citing Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969)).

⁶⁴ *Id.* at 616. See, e.g., *Goldfarb v. Goldfarb*, 246 Ga. 24, 268 S.E.2d 648 (1980); *Pratt v. Pratt*, 431 A.2d 405 (R.I. 1981); *Hudson v. Hudson*, 35 Wash. App. 822, 670 P.2d 287 (1983).

⁶⁵ *May v. Anderson*, 345 U.S. 528 (1953).

⁶⁶ *Id.* at 535-36.

⁶⁷ *Shaffer v. Heitner*, 433 U.S. 286 (1977).

⁶⁸ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) held that a state may subject foreign corporations and other nonresidents to judgments *in personam* only if the nonresident has certain minimum contacts with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

⁶⁹ *Shaffer*, 433 U.S. at 212.

⁷⁰ *Id.* at 208 n.30.

personal jurisdiction over the absent parent⁷¹ as long as notice provisions are followed.⁷²

The *McAtee* decision questions the authority of the court's previous holding in *Cogar v. Cogar*,⁷³ where it held that, before a West Virginia circuit court can adjudicate a child's custody, personal service of process on the party having custody of the child and living in another state was necessary. It appears the holding of *Cogar* is now of questionable precedential value.

In *Stacy v. Stacy*,⁷⁴ the West Virginia Supreme Court of Appeals restated the holding of *Garska v. McCoy*:⁷⁵ "[w]ith reference to the custody of very young children, the law presumes that it is in the best interest of such children to be placed in the custody of their primary caretaker,⁷⁶ if he or she is fit."⁷⁷

In 1983, Juanita Stacy filed suit for divorce alleging mental and physical cruelty and irreconcilable differences. Her husband, Earl Stacy, admitted irreconcilable differences but denied the alleged cruelty. He counter-claimed alleging adultery and cruelty. Both parties sought custody of their two infant children.

In 1984, the circuit court awarded a divorce to Mr. Stacy on the grounds of adultery and granted him custody of the children. It found Mrs. Stacy was not a fit and proper person to have custody. Mrs. Stacy appealed the custody decision, alleging the primary caretaker standard should have applied.

The supreme court found the trial court failed to apply the primary caretaker standard to the facts of the *Stacy* case. There was no finding in the court below of which parent was the primary caretaker and, in fact, the bulk of the evidence in the final hearing considered only the alleged adultery of Mrs. Stacy.⁷⁸

The court, reiterating its standard⁷⁹ for determining when sexual misconduct should be considered in making a custody award, stated that to qualify as an unfit parent a person must engage in grossly immoral behavior under circumstances that would affect the child.

Because the trial court denied custody to Mrs. Stacy solely on the grounds of her alleged adultery without determining if the adultery had any deleterious affect upon the children, the court reversed the lower court's decision and remanded the

⁷¹ *McAtee*, 323 S.E.2d at 617.

⁷² *Id.* at 617. See also W. VA. CODE 48-10-5 (1980).

⁷³ *Cogar v. Cogar*, 272 S.E.2d 58 (W. Va. 1980).

⁷⁴ *Stacy v. Stacy*, 332 S.E.2d 160 (W. Va. 1985).

⁷⁵ *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981).

⁷⁶ *Id.* (defines primary caretaker as "that natural or adoptive parent who, until the initiation of divorce proceedings, has been primarily responsible for the caring and nurturing of the child").

⁷⁷ *Id.*

⁷⁸ *Stacy*, 332 S.E.2d at 261.

⁷⁹ *Id.* at 262 (citing *J.B. v. A.B.*, 161 W. Va. 332, 242 S.E.2d 248 (1978)).

case for application of the primary caretaker rule of *Garska*. If Mrs. Stacy was found to be the primary caretaker, but determined to be unfit to have custody of the children for other reasons, the lower court was instructed to state those reasons clearly and separately.⁸⁰

III. TERMINATION OF PARENTAL RIGHTS

In re *Darla B.*, 331 S.E.2d 868 (W. Va. 1985).

West Virginia Department of Human Services v. La Rea Ann C.L., 332 S.E.2d 632 (W. Va. 1985).

The West Virginia Supreme Court of Appeals also handed down two decisions which qualified the right of a natural parent to custody of his or her child and placed increased emphasis on the child's best interests.

In *In re Darla B.*,⁸¹ the court addressed the question of whether a trial court in a child abuse action correctly terminated the parental rights while denying the application of the parents for an improvement period.⁸²

Darla B., an infant approximately five weeks old, was hospitalized suffering from a skull fracture, a brain contusion, fractures of the leg, arm and collarbone, and swelling of the mouth and eye. Evidence indicated the infant had also received a prior brain contusion. The parents' testimony as to the cause of these injuries conflicted with all the medical evidence. The Department of Human Services filed a petition to have *Darla B.* adjudicated an abused child. The trial court terminated the parental rights, stating there was no reasonable likelihood the abuse could be substantially corrected in the near future. The parents appealed the circuit court's decision. In an opinion by Justice McHugh, the supreme court upheld the lower court.⁸³

The appellants contended on appeal that the trial court erred by failing to use a less restrictive remedy than termination of their parental rights and by denying them an improvement period prior to termination.⁸⁴ The appellants based their argument for an improvement period on West Virginia Code section 49-6-2(b)⁸⁵ which provides for the granting of an improvement period which parents may use to rectify the conditions of abuse or neglect. The court responded by pointing out that West Virginia Code section 49-6-2(b) also states "the court shall allow such an improvement period unless it finds compelling circumstances to justify a denial

⁸⁰ *Id.*

⁸¹ *In re Darla B.*, 331 S.E.2d 868 (W. Va. 1985).

⁸² *Id.* at 870.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ W. VA. CODE § 49-6-2(b) (1980).

thereof. . . ." The trial court found "compelling circumstances" to justify the denial of the improvement period.⁸⁶

The parents also argued that West Virginia Code section 49-6-5⁸⁷ mandates the court to use the least restrictive means of remedying the abuse situation. Termination of parental rights is the severest remedy.⁸⁸ The court answered that termination of parental rights was the only appropriate remedy under the circumstances since there was "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected." The above phrase has been defined as including any instance where "the parent or parents have repeatedly or seriously physically abused the child."⁸⁹ Upon such a finding, the court stated that the circumstances of *Darla B.* required termination of parental rights.⁹⁰

In addition, the appellants cited as an error the initial abuse petition filed in circuit court. They contended the petition did not comply with West Virginia Code section 49-6-1(a)⁹¹ which states the manner in which the petition shall be set out. The court dismissed this procedural argument, as the appellants were not hindered or prejudiced in their case preparation.⁹²

Finally, the child's father asserted his rights should not have been terminated because he was not a direct participant in the abuse. However, the court noted that the father supported the mother's testimony of how the injuries occurred, despite its inconsistencies with medical evidence. In addition, he had taken no action to protect the child. The court concluded that termination of the father's rights was proper.⁹³ The court stated the decision of the circuit court to terminate parental rights without granting an improvement period would not be reversed, given the specific facts and circumstances of *Darla B.*⁹⁴

In another decision, the West Virginia Supreme Court of Appeals held that a minor who has relinquished his or her child for adoption does not have an absolute right to revoke this relinquishment if the best interests of the child would not be served. This conclusion was reached in *West Virginia Department of Human Services v. La Rea Ann C.L.*⁹⁵

In 1980, the appellee was sixteen years old, unmarried, and pregnant. She voluntarily placed herself in temporary custody of the Department of Human Services.

⁸⁶ *Darla B.*, 331 S.E.2d at 871.

⁸⁷ W. VA. CODE § 49-6-5 (1980).

⁸⁸ *Darla B.*, 331 S.E.2d at 871.

⁸⁹ *Id.* at 872.

⁹⁰ *Id.*

⁹¹ W. VA. CODE § 49-6-1(a) (1980).

⁹² *Darla B.*, 331 S.E.2d at 872.

⁹³ *Id.* at 873.

⁹⁴ *Id.* at 872.

⁹⁵ *West Virginia Dep't of Human Serv. v. La Rea Ann. C.L.*, 332 S.E.2d 632 (W. Va. 1985).

After her daughter was born, the appellee placed the infant in foster care so the child would be financially supported. Mother and daughter were living in the same home. The appellee later decided to relinquish her child for adoption and signed a consent to adopt form. She was informed of the ramifications of her action but not of her right to an attorney. The infant was placed in a new foster home where it remained for four years. Several days after the appellee signed the consent to adopt form, her natural mother contacted the Department of Human Services in an attempt to have the relinquishment revoked. The Department petitioned the trial court to approve the relinquishment. Evidentiary hearings were held, but no decision was reached. Three years later the appellee filed a habeas corpus petition and the trial court refused to approve her relinquishment. A consolidated action joining the original petition to approve relinquishment of parental rights and the habeas corpus proceeding by the appellee was brought before the West Virginia Supreme Court of Appeals.⁹⁶

In an opinion written by Justice McHugh, the supreme court noted the unusual circumstances of this case. First, the Department of Human Services failed to seek a timely ruling on its petition for approval of the relinquishment of parental rights. The appellee had waited three years before attempting to regain custody of her child. Finally, the trial court failed to rule on the matter promptly. As a result, the infant spent its first four years in a temporary foster home. The question before the court was whether the trial court's refusal to approve the appellee's relinquishment of parental rights was correct.⁹⁷

The Department of Human Services asserted that, under the language of West Virginia Code section 48-4-1(a)⁹⁸ and the holdings of *Lane v. Pippin*⁹⁹ and *In re Adoption of Truslow*,¹⁰⁰ the appellee had no right to revoke her relinquishment of parental rights in the absence of fraud or duress. The supreme court found that *Lane* and *Truslow* were distinguishable from *La Rea Ann* because unlike those cases, the natural mother here was a minor and, in addition, the relinquishment was made to the Department of Human Services, not to individuals.¹⁰¹

The court also found that additional statutory language was controlling in this case. West Virginia Code section 49-3-1(a)¹⁰² provides that relinquishment of parental rights by a minor must be approved by a court with proper jurisdiction. A proviso in West Virginia Code section 48-4-1(a)¹⁰³ states that relinquishment by a minor parent to a private child welfare agency or the Department of Human Services

⁹⁶ *Id.* at 633-34.

⁹⁷ *Id.* at 634.

⁹⁸ W. VA. CODE § 48-4-1a (1980) (as amended W. VA. CODE § 48-4-5 (Supp. 1985)).

⁹⁹ *Lane v. Pippin*, 110 W. Va. 357, 158 S.E. 673 (1931).

¹⁰⁰ *In re Adoption of Truslow*, 280 S.E.2d 312 (W. Va. 1981).

¹⁰¹ *La Rea Ann C.L.*, 332 S.E.2d at 635.

¹⁰² W. VA. CODE § 49-3-1(a) (Supp. 1985).

¹⁰³ W. VA. CODE § 48-4-1(a) (1980).

must be in compliance with West Virginia Code section 49-3-1(a).¹⁰⁴ The court stated that the effect of these statutes was to make relinquishment of parental rights by a minor to an agency revokable until approved by a court of competent jurisdiction. Therefore the trial court was correct in holding that appellee had the right to revoke her relinquishment.¹⁰⁵

The court then examined the Department's contention that removing the child from the foster home was not in the child's best interests. The court acknowledged the best interest standard as a widely accepted method of determining child custody and referred to several cases¹⁰⁶ in other jurisdictions, each holding that a child's best interests are not necessarily served by removing him from an environment in which he has lived for a substantial period of time in order to return him to the custody of his natural parent.¹⁰⁷

The court stated that while the best interest standard had not been previously used in relinquishment approval cases, it had been repeatedly applied to child custody cases in West Virginia and the two situations were closely analogous. In child custody cases, the welfare of the child is of paramount, controlling importance within the limitation of the "unoffending parent" concept.¹⁰⁸ The court cited *Ford v. Ford*¹⁰⁹ as representative of an "unoffending parent."

While acknowledging that traditionally state statutes and case law have protected the parent-child relationship,¹¹⁰ the court held that, when a child has spent substantial time in a foster home pending a trial court's ruling on a minor parent's relinquishment of parental rights, extraordinary circumstances exist which demand that the best interest of the child be given primary importance. The natural parent's right to revoke the relinquishment ceases to be absolute because of the passage of an unreasonable period of time.¹¹¹

The court discussed a Pennsylvania case, *Commonwealth ex rel. Martino v. Blough*,¹¹² in which, as a result of judicial delay, the Pennsylvania court deter-

¹⁰⁴ *La Rea Ann C.L.*, 332 S.E.2d at 635.

¹⁰⁵ *Id.*

¹⁰⁶ *In re Baby Boy Reyma*, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976) (court refused to return illegitimate infant to its natural father after five years); *Revocation of Appointment of a Guardian*, 360 Mass. 81, 271 N.E.2d 621 (1971) (court refused to return infant to natural mother after a year and a half); *In re DiMatteo*, 62 N.C. App. 571, 303 S.E.2d 84 (1983) (court refused to return a child to his natural father without a finding on the child's best interest).

¹⁰⁷ *La Rea Ann C.L.*, 332 S.E.2d at 635-36.

¹⁰⁸ *Id.* at 636.

¹⁰⁹ *Ford v. Ford*, 303 S.E.2d 253 (W. Va. 1983). In *Ford*, a mother left her child in its grandparents' care under a temporary arrangement. The court held that because the grandparents had not been misled into believing they had permanent custody of the child and because the natural mother was deemed a fit parent, the mother was an "unoffending parent" entitled to custody of her child, regardless of the child's best interests.

¹¹⁰ *Id.* at 634.

¹¹¹ *Id.* at 636.

¹¹² *Commonwealth ex rel. Martino v. Blough*, 201 Pa. Super. 346, 191 A.2d 918 (1963).

mined custody of a child based on circumstances as they had existed two years before. Declining to follow the Pennsylvania case, the supreme court refused to make a decision on a "stale" record and remanded *La Rea Ann* for development of a record on the current state of facts. Among the factors to be considered on remand were the resulting unhappiness and physical injury that might befall the child upon its removal from its foster home of four years.¹¹³ Secondarily, the trial court was instructed to consider the interests and fitness of the natural and foster parents.¹¹⁴

The supreme court observed that the natural mother clearly did not intend to leave her child with the Department of Human Services for a temporary time. In addition, she had waited three years to file a habeas corpus petition to obtain a decision on the issue of the infant's custody. However, the court left final determination of these issues to the trial court, reversing the final order of the court below and remanding the case with instructions to receive new evidence and make a finding based on the child's present best interests.¹¹⁵

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¹¹³ *La Rea Ann C.L.*, 332 S.E.2d at 637.

¹¹⁴ *Id.* at 638.

¹¹⁵ *Id.*