Domestic Relations

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DOMESTIC RELATIONS

During the past year the West Virginia Supreme Court of Appeals examined for the first time the use of special commissioners in divorce proceedings and affirmed their use, but initiated guidelines under which a circuit court may refer divorce cases to them. In the same case, the court applied the constitutionally decreed right of free access to the courts to divorce cases in holding that a special commissioner cannot refuse to hear a case, prepare a report, or hold a report until his fee has been paid. In another decision, the court interpreted the West Virginia Code as allowing reimbursement of past support expenditures to the custodial parent when a divorce decree had been granted through constructive service of process and made no provision for support of the child. However, circumstances may exist in which the custodial parent is estopped from obtaining past support. Additionally, during the year the court determined the proper forum for child custody disputes and had the opportunity to examine cases concerning rehabilitative alimony, child support, and the primary caretaker presumption.

I. DIVORCE COMMISSIONERS


For the first time, the court had occasion to consider important issues concerning the appointment, use, and payment of special commissioners in divorce proceedings. Under West Virginia Constitution, article III, section 17, the court ruled that a commissioner of the circuit court, assigned to hear a divorce case, is prohibited from refusing to hear the case or file a report until his fee is paid, and that West Virginia Code section 59-1-8 is unconstitutional insofar as it authorizes such a practice in divorce cases. The supreme court stated that under West Virginia Code section 48-2-25 the circuit court may refer divorce cases to special commissioners but outlined the necessary conditions which must first be met.

In Nagy v. Oakley, the petitioner Helen Nagy filed for divorce in Logan County. Her husband, Alex Nagy, counterclaimed and made several preliminary motions. These motions were disposed of by the circuit court, which then referred the case to the respondent commissioner, Jerry R. White, directing him to take

1 W. Va. Const. art. I, § 17 states: "The courts of this state shall be open and every person, for an injury done to him, in his person, property, or reputation, shall have remedy by due course of law and justice shall be administered without sale, denial, or delay."
3 W. Va. Code § 59-1-8 (1966) states in pertinent part:
   A commissioner shall not be compelled to make out or return a report until his compensation therefore be paid or security given him to pay so much as may be adjudged right by the court to whom the report is to be returned, or if it is to be a circuit court or court of limited jurisdiction, by the judge thereof in vacation, unless the court or judge see cause to order it to be made out and returned without such payment or security and shall so order.
4 Nagy, 309 S.E.2d at 69.
6 Nagy, 309 S.E.2d at 73.
7 Nagy, 309 S.E.2d 68.
evidence and make a report to the court. Mrs. Nagy objected to this, and asserted that commissioner White had a pecuniary interest in the case's outcome, and further alleged that the respondent had refused to file his report with the circuit court until his fees were paid. Mrs. Nagy based her grounds for relief on the West Virginia Constitution article III, section 17, which guarantees that "justice shall be administered without sale, denial, or delay," and argued that commissioner White's refusal to file his report with the circuit court until after receiving his fees conditioned the rendering of justice upon the financial capacity of the litigants. She further contended that the practice of paying commissioners before the circuit court acts on their report encourages commissioners to decide cases in a way that enhances the likelihood of prompt payment. Based on these arguments, the court awarded a moulded writ of prohibition.

In formulating its decision, the supreme court found three countervailing forces which pull at the divorce courts. First, the court noted that West Virginia Constitution article III, section 17 makes it clear that the judicial process should not be affected by the financial condition of the litigants. Second, the supreme court found a time-honored use of special commissioners by courts for certain purposes both in law and in equity in addition to the specific statutory authorization for a commissioner to hold his report until his fees have been paid. Finally, the court recognized that without special commissioners, the delay in trying divorce cases might become even more extended, thus confounding the mandate of administration of justice without delay. Therefore, the court found it necessary to determine that West Virginia Code section 59-1-8, which authorizes a commissioner to withhold his report from the circuit court until his fees have been paid, was unconstitutional under West Virginia Constitution article III, section 17 when applied to divorce cases. The court reasoned that because a circuit court itself cannot condition a litigant's access to the judicial system upon the payment of fees, it follows that a court's commissioner cannot so condition such access either.

In reviewing the role of special commissioners, the court found that although their use varies widely among the circuits, in busy circuits they played an important role in speeding the resolution of cases and in preventing clogged dockets. Special commissioners have traditionally been used to compensate for shortages in judicial
manpower. However, the court felt that, while judges have an incentive to expedite cases, special commissioners may not have a similar incentive because they are paid an hourly rate. In cases in which both parties wish to expedite the matter and are willing to pay reasonable commissioner's fees, the use of special commissioners should be allowed. The circuit court does, however, have an obligation to hear the case if the commissioner's fee is too burdensome. If an objection to an order of reference because of lack of money is combined with an objective showing of financial hardship, the circuit court should place the case on its own docket. A mere preference by the litigants that the circuit court hear the case to avoid additional costs is not sufficient.

The court stated that the ideal situation would be one in which there were sufficient numbers of full-time judges, but recognized this is a present impossibility and, therefore, explicitly approved the use of commissioners in divorce proceedings when three criteria are met: (1) the workload of the circuit court must justify the employment of commissioners to prevent undue delay in the dispatch of the civil docket; (2) the fees of commissioners must be reasonable and awarded only on the basis of work actually performed; and (3) the circumstances of the parties must be such that undue financial burden is not placed upon them as a result of paying a commissioner. This case illustrated that while the court had reservations about the extensive use of special commissioners, it also recognized their necessity in busy circuits.

II. ALIMONY AND CHILD SUPPORT


Rehabilitative alimony generally connotes the "attempt to encourage a dependent spouse to become self supporting by providing alimony for a limited time during which gainful employment can be obtained." A number of jurisdictions by statute now allow trial courts to award rehabilitative alimony by permitting them to consider the employment potential of a dependent spouse along with other factors such as the financial resources of the parties. Courts have also permitted rehabilitative alimony under general statutes similar to West Virginia Code sections 11

11 Id. at 72.
12 Id.
13 Id. at 73.
14 Id. at 72-73.
15 Id. at 73.
17 Id. at 76.
18 W. VA. CODE § 48-2-15 (1980 & Supp. 1984) provides in pertinent part that "upon ordering a divorce, the court may make such further order as it shall deem expedient concerning the maintenance of the parties."
48-2-15 and 48-2-16 which confer broad discretion upon courts in granting alimony. In *Molnar v. Molnar*, the court examined the issue of rehabilitative alimony in some detail.

In the earlier case of *Dyer v. Tsapis*, the court stated that alimony might be provided only for a limited predetermined time if the wife is young and has no occupational skills. The court thus has previously recognized rehabilitative alimony without naming it as such. The supreme court in *Molnar* reviewed the general trend of its past decisions and concluded that a circuit court does have the authority to award rehabilitative alimony in appropriate cases. The court then held that, in determining whether to award rehabilitative alimony, a key ingredient must be a realistic assessment of the dependant spouse's potential work skills and the availability of jobs that require those skills. The court then outlined the following three broad inquiries which must be made: (1) if, in view of the length of the marriage and the age, health, and skills of the dependent spouse, alimony should be granted; (2) if alimony is feasible, the amount and duration which should be properly ordered; and (3) whether there should be continued jurisdiction of the court to consider the amount and duration of rehabilitative alimony.

In *Molnar*, the parties were married for twenty-five years and had three children. At the time of the appeal, Mrs. Molnar was fifty-three, and living with two of her children in the marital residence. She was working as an application processor at an insurance company for a net monthly income of $438.00. Mrs. Molnar had attempted to obtain a better paying job, but potential employers had shown little interest due to her age. She therefore investigated the possibility of obtaining a computer science degree, but because she had to work full time, she estimated that it would take her ten and one-half years to graduate. She would be sixty-three years of age upon graduation. The trial judge awarded a divorce based on irreconcilable differences and gave an award of rehabilitative alimony for seven years which Mrs. Molnar contended was unjust and inequitable in light of her financial needs, advancing age, and limited earning power.

The court found no indication in the record whether Mrs. Molnar could realistically obtain a college degree in view of her long absence from academia,

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26 W. VA. CODE § 48-2-16 (1980 & Supp. 1984) sets forth the pecuniary factors to be considered by the court in determining alimony, child support, or separate maintenance.
27 *Molnar*, 314 S.E.2d at 76. These courts reason that unless the statute specifically prohibits rehabilitative alimony, the breadth of the statute encompasses the right to award such alimony. *Id.* at 77.
28 *Molnar*, 314 S.E.2d 73.
30 *Id.* at 513.
31 *Molnar*, 314 S.E.2d 73.
32 *Id.* at 75.
33 *Id.* at 77.
34 *Id.* at 78.
35 *Id.* at 75.
and whether upon graduation she would be able to find employment. The court found that without evidence of these facts, rehabilitative alimony could not be awarded, and that the trial court had abused its discretion. In cases where there is an older dependent spouse who has a full-time job commensurate with her educational background and skills, a circuit court should consider an alimony award to supplement the dependent spouse's income based upon the traditional factors including the financial needs and earning power of the parties, and the extent of their estate, both real and personal. In Molnar, the court recognized the need to provide reasonable and equitable solutions to the increasingly common problem of divorce settlements. Previously, "all divorces, like all tort actions, were predicated on a legal wrong; alimony, like tort damages served both punitive and compensatory purposes." Now, increasingly, divorces are awarded on no-fault grounds, and awards of alimony, especially rehabilitative alimony, in these situations emphasize restitution to the exclusion of punishment.

In Grijalva v. Grijalva, the court determined when property settlement agreements between divorced parties can be modified. In 1981, the West Virginia Supreme Court of Appeals had ruled that for all divorce decrees and property settlement agreements entered into after February 1, 1979, the parties may do anything they wish by their property settlement agreement as long as it is approved by the circuit court as having terms that are fair and reasonable. Only child support is subject to continued judicial modification. In Grijalva, the court followed this decision and in an issue of first impression, determined that a trial court should not disturb agreements concerning child support when those agreements are part of an overall settlement of the parties unless a modification is necessary for the welfare of the child.

In Grijalva, the parties were divorced in 1981. The terms of their divorce were controlled by an earlier separation agreement that was incorporated by the circuit court in its final divorce order. The agreement was skillfully drafted and both comprehensive and specific in its provisions. Under the agreement, Dr. Grijalva was required to pay his wife $500.00 per month child support until the youngest child attained the age of eighteen, to provide his wife with a major oil company credit card, and to transfer to her his 1979 Oldsmobile automobile or purchase for her

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36 Id. at 78. The court noted that Mrs. Molnar could be 63 before obtaining her degree.
37 Id.
38 Id. at 79.
41 Id. at 511.
44 Id. at 47.
45 Grijalva, 310 S.E.2d 193.
46 Id. at 196.
a car of similar quality every five years. Dr. Grijalva did not fulfill his obligations under the agreement and Mrs. Grijalva petitioned the circuit court for money owed to her under the settlement agreement. Dr. Grijalva replied and filed a counterpetition asking for modification of his alimony and child support obligations. The circuit court relied on language in In Re Estate of Hereford which stated that "child support of course, is always subject to judicial modification" and upon consideration, determined that the provisions regarding the automobile were indeed child support, and therefore both the provisions concerning the automobile and the $500.00 per month child support were within the continuing jurisdiction of the court. The circuit court then modified the agreement by reducing child support from $500.00 to $400.00 per month and ordering that Dr. Grijalva no longer be required to provide new vehicles. Mrs. Grijalva then appealed on the grounds that under Hereford, the contractual agreement of the parties precluded the subsequent court modification.

On appeal, Justice Neely, writing for the court, found that Hereford controlled and reversed the trial court's ruling that:

In all domestic relations cases where the final order is entered after 1 February 1979, if at the time of entry of the final order, the court finds the terms of a property settlement agreement fair and reasonable, such property settlement agreement may specifically provide that periodic payments (alimony) shall never be changed by the circuit court; that the remedy for failure to make such periodic payments shall be by contract action and not by contempt; that the periodic payments shall be enforceable by contempt if the payor is able to pay, but that the court shall not have power to increase or decrease the award; that no periodic payment shall ever be paid, but that a lump sum settlement in lieu of such payments shall constitute a final settlement of the rights of the parties; or any other terms acceptable to the court to which the parties may agree. However, in order to have a periodic payment treated as anything but alimony or alimony and child support, the parties must express themselves in clear, unambiguous language in the property settlement agreement and the agreement must be confirmed by the court in some obvious way.

After reviewing the separation agreement in its entirety, Justice Neely found no basis for the trial court's conclusion that the provisions concerning the automobile were child support. Under Hereford, the circuit court was not allowed to modify

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47 Id. at 195.
48 Id.
49 Hereford, 250 S.E.2d 45.
50 Id. at 47.
51 Grijalva, 310 S.E.2d at 195.
52 Id.
53 Id.
54 Id. at 194 (syllabus point one) (quoting Hereford, 250 S.E.2d 45 (syllabus point four).
55 310 S.E.2d at 196.
the agreement after it was confirmed by the court at the time the divorce was awarded.\textsuperscript{56}

The issue of first impression in this case concerns the extent of the court's right to modify contractually determined child support when the reasons for modification do not concern the welfare of the child.\textsuperscript{57} \textit{Hereford} was explicit in establishing a policy favoring the literal enforcement of contractual settlements in domestic matters.\textsuperscript{58} The court found \textit{Hereford} to clearly intimate that agreements concerning child support, when they are part of an overall settlement of the affairs of the parties, should not be disturbed by the trial court unless a modification is necessary for the welfare of the child.\textsuperscript{59} Since the continued jurisdiction of the circuit court is based on the proposition that parents cannot contract away the rights of their children, a logical corollary is that parents cannot modify a child support award in the face of explicit contractual provisions to the contrary when the motivation for seeking a modification concerns the financial status of the parent seeking modification and not the welfare of the child.\textsuperscript{60} Here, Dr. Grijalva, by the execution of the divorce settlement agreement, had waived his right to seek modification of child support\textsuperscript{61} and was estopped from petitioning for a decrease in such award. Therefore, the provisions concerning child support, because they had long been confirmed by the trial court, could not be modified.\textsuperscript{62}

Consistent with the widely held view that parents have a duty to support their unemancipated children throughout their minority,\textsuperscript{63} the West Virginia Supreme Court of Appeals in \textit{Hartley v. Ungvari}\textsuperscript{64} held that the custodial parent may receive reimbursement for reasonable past child support expenditures from the noncustodial parent although the divorce decree made no provision for child support of any type.\textsuperscript{65} However, the court qualified this holding by stating that once a party is aware of this right, and does not take steps to enforce it within a reasonable time and the other party has in good faith changed his position, the party seeking to enforce his right may be estopped and relief denied.\textsuperscript{66}

In \textit{Hartley},\textsuperscript{67} the parties were married on November 25, 1967. In 1972, Mrs. 

\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 197.
\textsuperscript{61} \textit{Id.} at 196-97. In the separation agreement under the section entitled "child support," Dr. Grijalva agreed to pay $500.00 per month child support. Under "general provisions," he agreed not to "attempt to enforce any decree or judgment which is contrary to, or at variance with, the provisions of this agreement."
\textsuperscript{62} \textit{Id.} at 197.
\textsuperscript{63} This view is taken in West Virginia. \textit{See} W. VA. CODE § 48-7-1 (Supp. 1984).
\textsuperscript{64} \textit{Hartley v. Ungvari}, 318 S.E.2d 634 (W. Va. 1984).
\textsuperscript{65} \textit{Id.} at 635.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.} at 634.
Hartley, the appellee, left her home in New York and moved with the couple's three year old daughter to Ravenswood, West Virginia. On July 3, 1973, the appellee obtained a divorce in Jackson County upon constructive service of process. In the final divorce, the circuit court expressly reserved jurisdiction to award alimony, child support, and attorney fees, if the court could subsequently obtain personal jurisdiction over the appellant. 68

Over the next nine years the appellant frequently came to West Virginia to visit his daughter. During his visits, he often brought clothes and other necessities for her and frequently gave the appellee money for the child's support. 69 The appellant estimated that he contributed approximately $12,000.00 to the support of his daughter during this time. 70 It was not until December 29, 1981, however, that the circuit court of Jackson County obtained personal jurisdiction over the appellant while he was in West Virginia visiting his child. He was served with a petition for support payments. On March 5, 1982, the court, applying a five year statute of limitations, awarded the appellee $10,731.25, plus interest, as reimbursement for past child support expenditures and $325.00 reimbursement for past attorney's fees. The court also awarded the appellee permanent child support of $300.00 per month until their daughter reached eighteen or was otherwise emancipated. 71 On appeal, the issue decided by the court was whether the trial court had the authority to award reimbursement of past child support expenditures, and whether it did so properly.

In determining the primary issue, the court first considered West Virginia Code section 48-2-15, 72 which provided in pertinent part:

In any case where a divorce is granted in this State upon constructive service of process, and personal jurisdiction is thereafter obtained of the defendant in such case, the court may make such further order as it shall deem expedient, concerning the maintenance of the parties, or either of them, or concerning the case, custody, education and maintenance of the minor children. . . . 73

Both parties felt the statute supported their respective positions. The appellant asserted that the word "further" indicated an intent by the legislature to provide only a prospective remedy. The appellee contended that the inclusion of the word "expedient" authorized the trial court to award whatever support it deemed necessary, including reimbursement of past child support expenditures. 74

Many courts have held that where a divorce decree grants custody of a child

68 Id. at 635.
69 Id. at 636.
70 Id.
71 Id.
74 Hartley, 318 S.E.2d at 636.
to a parent without making provision for the support of the child, the support obligation of the noncustodial parent is not terminated and the noncustodial parent may be liable for reimbursement of support furnished to the child after the divorce.73

Having found no pertinent West Virginia case law, the supreme court relied on a factually similar Illinois case76 in which the plaintiff mother had received a divorce from the defendant father by constructive service of process. The court granted the mother custody of their son but reserved the question of child support, alimony, and attorney's fees. Fifteen years later, the plaintiff obtained personal jurisdiction over the defendant and sought reimbursement for support expenditures furnished to the child since the divorce. The trial court awarded the plaintiff $13,500.00 as reimbursement.77 The supreme court also noted that in a past case, it held that a wife's attachment of her ex-husband's partial interest in real estate for purposes of reimbursement of support furnished to their children was valid.78

In view of these cases, the supreme court held that under the provisions of West Virginia Code section 48-2-15,79 where a divorce is granted upon constructive service of process and the divorce order grants custody of a child but makes no provision for the support of that child, the custodial parent, upon obtaining personal jurisdiction thereof, may maintain an action against the noncustodial parent for reasonable past child support expenditures. If the custodial parent was aware of the right to child support and has taken no steps to enforce this right, the custodial parent may be estopped from asserting the action.80

The court next determined whether circumstances existed which would estop the appellee from receiving child support payments. The court relied upon Laurie v. Thomas,81 where it had set forth the general rules with regard to the equitable defense of laches. In Laurie, the court stated that "the general rule in equity is that mere lapse of time, accompanied by circumstances which create a presumption that the right has been abandoned, does not constitute laches."82 However, in this case, the appellee knew of her right to child support but did not attempt to obtain personal jurisdiction over the appellant on one of his many trips to West Virginia in the nine years following their divorce.

The court found that the appellant had been prejudiced by his ex-wife's inaction in seeking reimbursement of past support expenditures.83 In December 1980,

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73 Id. at 637 (citing 91 A.L.R.3d 530, 535 (1979)). Other courts however, have taken the opposite position. See generally, 91 A.L.R.3d 530, 544 (1979).
77 Id.
80 Hartley, 318 S.E.2d at 637-38.
81 Laurie v. Thomas, 294 S.E.2d 78 (W. Va. 1982).
82 Id. at 82 (syllabus point four) (quoting Suart v. Lake Washington Realty Corp. 141 W. Va. 627, 92 S.E.2d 891 (1956) (syllabus point four)).
83 Hartley, 318 S.E.2d at 639.
he purchased a house and in 1981 he remarried. The court believed that, under the circumstances, it would be unfair to saddle the appellant with this additional financial burden. Therefore, the court reversed the trial court's award of past child support and attorney fees but affirmed the award of prospective child support.

III. CHILD CUSTODY


The primary caretaker presumption, as defined by the court in **Garska v. McCoy,** will be invoked when it is shown that one parent has clearly taken primary responsibility for the care and nurturing of the child. Under these circumstances, the law presumes that it is in the best interests of the child to be placed in the custody of the primary caretaker parent provided that he or she meets minimum standards of fitness. In situations where both parents share equally in the care of the child, neither parent may be given the benefit of the primary caretaker presumption, and the court must then inquire into the individual fitness of both parents before making a determination on the custody issue. Unfortunately, however, one parent's role is not always easily defined, as in **J.E.I. v. L.M.I.,** where the supreme court was faced with a situation in which the mental illness of the mother, which she alleged was caused by the father, caused her to lose her position as the primary caretaker parent. The court in this case articulated standards to be used in cases where the circumstances are complicated and exceptional.

In **J.E.I.,** the husband and wife were married in December 1977, and had a son in 1979. There was no question that after the child was born, the wife assumed primary responsibility for his care. However, about eighteen months later, she began to suffer severe emotional problems that impaired her daily functioning and she began a gradual process of withdrawal. The deterioration of her mental state became progressively worse and over the next few months she provided less and less physical care for her child, and found it difficult to provide appropriate emo-

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84 *Id.*
85 *Id.*
87 *Id.* at 363. The Supreme Court of Appeals of West Virginia has outlined the caring and nurturing duties to include the following: (1) preparing and planning of meals; (2) bathing, grooming, and dressing; (3) purchasing, cleaning, and caring of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e., transporting to friends houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e., babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e., teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; (10) teaching elementary skills, i.e., reading, writing, and arithmetic.
88 *Id.* at 360.
89 *Id.* at 363.
91 *Id.* at 69.
tional responses. The only attention the wife gave to her son was to feed the child prepared baby food. As the appellant withdrew, her husband gradually took over the responsibility of providing for his son's needs and by May or June of 1981, the husband was providing all the care of his son.92 During this period of time, the wife exhibited bizarre and inappropriate behaviors,93 and broke down completely on August 14, 1981. Her husband had her admitted to a psychiatric ward where she was diagnosed as having a hysterical conversion disorder of the dissociative type.94 After her discharge a month later, she sought outpatient psychological care for a period of time but quit when her therapist left. In November 1981, she attempted suicide. The couple was divorced a month later, at which time the parties agreed that the father would have custody of the child. Later, however, the wife changed her mind and petitioned for custody.95

The circuit court found that the best interests of the child would be served by leaving the child in the custody of his father. The mother appealed, contending that the primary caretaker presumption had been inappropriately applied. She maintained that her mental illness was precipitated by her former husband's inconsiderate, emotionally unsupportive and abusive behavior. She argued that because she lost her position as primary caretaker as a result of mental illness, the court should not consider the fact that the father was the primary caretaker immediately before the divorce complaint was filed.96

Upon review, the supreme court agreed with the circuit court, finding that under circumstances where the status of the primary caretaker parent has been lost temporarily as a result of circumstances that are beyond the control of that parent, it is inappropriate for a court to look to who the primary caretaker parent was immediately before the divorce.97 When the parent who had previously borne the bulk of parental responsibility for many years is temporarily disabled by an automobile accident, for example, it would be unfair to apply this presumption and look only at who was acting as primary caretaker for the short period immediately before the divorce complaint was filed.98

92 Id.
93 Id. at 70. This behavior included an imaginary future husband for whom she was found waiting in a parking lot. The appellant at one time was found lying in a bathtub in the fetal position. The appellant offered her son some Parmesan cheese and when he held out his hand she threw it at him.
94 Id. Hysterical conversion disorder dissociative type is a sudden, temporary alteration in the normally integrative functions of consciousness, identity, or motor behavior. If the alteration occurs in consciousness, important personal events cannot be recalled. It if occurs in identity, either the individual's customary identity is temporarily forgotten and a new identity is assumed, or the customary feeling of one's own reality is lost and replaced by a feeling of unreality. THE AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 253 (3d ed. 1980).
95 J.E.I., 314 S.E.2d at 70.
96 Id. at 71.
97 Id.
98 Id.
However, in this case, upon review, the court found that the circuit court’s decision was not based on the primary caretaker parent rule, but was based on a factual finding that the father was the primary caretaker parent from spring of 1981 until the time of the hearing. The mother was not capable of taking care of the child at the time of the divorce. Furthermore, the evidence did not show that a change in circumstances had occurred which would have warranted a change of custody, nor was it shown that the best interests of the child would be served by a change in custody.\textsuperscript{99}

The court agreed that the trial court had adopted a sensible approach and held that in cases where a parent who had formerly acted as the primary caretaker parent is, for reasons beyond his or her control, unable to continue in that role immediately before the initiation of divorce proceedings, temporary custody should be awarded to the parent who is currently acting as primary caretaker. However, the court should allow a \textit{de novo} hearing on the issue of child custody when and if the parent recovers from the disabling condition. The standard that should govern the child custody decision at such a hearing is the best interests of the child. If the disabled parent does not move for a hearing within a reasonable time, it is within the discretion of the trial court to grant permanent custody to the custodial parent.\textsuperscript{100}

Some of the factors the court should consider in reaching its determination concerning the best interests of the child include (1) the comparative fitness of the two parents; (2) the length of time during which the parent who had not been disabled at the time of divorce had retained temporary custody; and (3) the likelihood of the disability that afflicted the parent at the time of divorce will recur and again leave that parent unable to be the primary caretaker.\textsuperscript{101} Here, the supreme court found evidence that the mental illness of the mother produced symptoms that would be life threatening to the child if they recurred. The court concluded that the interests of the child would be best served by keeping him in the custody of his father.\textsuperscript{102} In an attempt to foster as much stability as is possible in a family undergoing a divorce, the court held that in cases where the court is unable to determine that one parent is more fit than the other, custody should be left with the parent who had temporary custody.\textsuperscript{103}

The court then dismissed as irrelevant the appellant’s claim that her husband had caused her mental illness.\textsuperscript{104} The court stated that the focus should be the best interests of the child and not the relative degrees of fault between former spouses. The fact that the parent receiving temporary child custody may have been respon-

\textsuperscript{99} Id.
\textsuperscript{100} Id. at 71-72.
\textsuperscript{101} Id. at 72.
\textsuperscript{102} Id. at 73.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 72.
sible for the other parent’s disability should not be considered unless the fault is relevant to the individual’s fitness as a parent.\textsuperscript{105}

In \textit{Brockman v. Hegner},\textsuperscript{106} the West Virginia Supreme Court of Appeals was asked to determine the proper forum for the modification of child custody when the child’s legal custodian resides in another state and the courts in that state are willing to consider modification. Mr. Brockman and Mrs. Hegner were divorced in Wisconsin on June 22, 1977. Since their divorce, Mrs. Hegner continued to reside in Wisconsin, while Mr. Brockman resided in Charleston, West Virginia.\textsuperscript{107} The Wisconsin divorce decree granted custody of the couple’s only child to Mrs. Hegner; however, the parents agreed to take turns having custody for rotating two-year periods.\textsuperscript{108} At the end of the two-year period in which Mr. Brockman had custody of the child, he did not return him to his mother in Wisconsin, but instead, brought an action in the circuit court for Kanawha County for modification of the custody decree.\textsuperscript{109} Subsequently, Mrs. Hegner filed a motion to dismiss in the Kanawha County court on the ground that the court lacked jurisdiction. She further charged her ex-husband with contempt in an action brought in Madison, Wisconsin. Mr. Brockman appeared specially by counsel in the second action and moved to dismiss on the ground that the case was already pending in Kanawha County, and that Wisconsin lacked subject matter and personal jurisdiction.\textsuperscript{110} The judge in Wisconsin sent a letter to Judge Margaret Workman in Kanawha County indicating that it was his tentative opinion that West Virginia was the proper forum for adjudication. In response to the letter, the two judges then discussed the matter by telephone.\textsuperscript{111} Judge Workman subsequently held a hearing on the jurisdictional issue and issued a final order dismissing the petition on the ground that the court lacked jurisdiction; Mr. Brockman appealed this order.\textsuperscript{112}

In affirming the lower court’s ruling, the supreme court based its decision on its reading of the Uniform Child Custody Act.\textsuperscript{113} The court commended both judges on their ability to work together in their efforts to resolve the issues.\textsuperscript{114} The court then affirmed the lower court’s ruling basing its opinion on West Virginia Code section 48-10-8(b).\textsuperscript{115} Because Mr. Brockman had retained physical custody of the

\textsuperscript{105} Id.
\textsuperscript{107} Id. at 517.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 518.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 518. \textbf{W. VA. CODE} §§ 48-10-1 to 26 (Supp. 1984). The court noted that one of the explicit purposes of the act was to “avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.”
\textsuperscript{114} Brockman, 317 S.E.2d at 518.
\textsuperscript{115} W. VA. CODE § 48-10-8(b) (Supp. 1984) states in its entirety:
child beyond the two-year period, under the Act, his request for modification of the custody decree may be declined by the court. The court then noted that under West Virginia Code section 48-10-14, West Virginia will recognize and enforce custody agreements of other states if those agreements are in substantial compliance with the statutory guidelines set out in the Act, and since the Wisconsin courts had indicated a willingness to consider the petitioner's motion, the court found no reason for usurping jurisdiction. Therefore, the court upheld Judge Workman's decision to decline jurisdiction. The majority opinion strictly adhered to statutory guidelines and did not address the best interests of the child and whether they would be best served by this outcome.

Mary Ellen Guy

Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state, the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

16 Brockman, 317 S.E.2d at 518.
17 W. VA. CODE § 48-10-14 (Supp. 1984) provides in its entirety:
The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this article or which was made under factual circumstances meeting the jurisdictional standard of this article, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this article.

18 Brockman, 317 S.E.2d at 518.
19 Id. at 519.
20 Id.