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Domestic Relations

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DOMESTIC RELATIONS

During the survey period, the Supreme Court of Appeals of West Virginia considered a number of cases in the area of domestic relations. Regarding child custody, the court reviewed cases involving the primary caretaker presumption, fitness of a parent, a parent's natural right to custody, and circumstances necessary to change custody. Most notably, in regard to a parent's natural right to custody, the court held that custody will be awarded to a fit parent as opposed to a third party, even though the child's best interests dictate an award to the third party. During the survey period, the court also reviewed a visitation rights case and established the welfare of the child as the principle guideline for courts to follow in such cases. However, the major development in West Virginia domestic relations law was the court's adoption of equitable distribution. By interpreting statutes governing alimony and restoration of property in divorce proceedings, the court found the power to equitably distribute marital property. The adoption of equitable distribution marked the culmination of a trend in case law towards more equitable allocations of wealth in divorce cases.

I. CHILD CUSTODY

A. Primary Caretaker Presumption


In 1980, the West Virginia Legislature mandated that the award of custody of children in a divorce proceeding shall be based upon the best interests of the children and that there can be no legal presumption as to whether the father or mother should be awarded custody.1 Subsequently, in Garska v. McCoy2 the Supreme Court of Appeals of West Virginia interpreted the statute as providing for "a sex-neutral standard for custody determination"3 and created the primary caretaker presumption.

To invoke the presumption, the party must fulfill the following requirements: he or she must be a natural or adoptive parent,4 the parent must have clearly taken primary responsibility for the care and nurturing of the child,5

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


3 Id. at 358 (syllabus point 1 by the court).


5 304 S.E.2d at 338 (quoting Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981) (syllabus point 5)).

The Supreme Court of Appeals of West Virginia has outlined ten caring and nurturing duties of a parent to be considered by the trial court in determining whether a parent is the primary caretaker. They are as follows:

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and the parent must qualify as a fit parent. Thus, when the child is of tender years and the primary caretaker has met the "minimum objective standard of behavior which qualifies her as a fit parent" the law presumes that it is in the child's best interest to be placed in the custody of the primary caretaker. The trial court must award custody to the primary caretaker.

The supreme court gave several justifications for the creation of the presumption: "to prevent the issue of custody from being used in an abusive way as a coercive weapon to affect the level of support payments," to provide a resolution to a judge's difficulties in determining the relative psychological fitness of each parent, and to protect the primary caretaker in out-of-court bargaining, thereby fashioning more equitable settlements. In theory, the primary caretaker has a stronger emotional bond to the children, which causes him or her to give up nearly everything to avoid loss of the children. Underlying the presumption is the court's belief that "the best interests of the children are best served in awarding them to the primary caretaker parent, regardless of sex."

During the survey period, the supreme court applied the primary caretaker presumption in Gibson v. Gibson. In Gibson, the trial court held that the best interests of the children required that they be placed in the

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1. preparing and planning of meals;
2. bathing, grooming and dressing;
3. purchasing, cleaning and care 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.; and
10. teaching elementary skills; i.e., reading, writing, arithmetic.

304 S.E.2d at 338 (quoting Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981)).

6 304 S.E.2d at 338 (quoting Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981) (syllabus point 2)).

7 The court in Garska defined "tender years" as follows: "The concept of 'tender years' is somewhat elastic; obviously an infant in the suckling stage is of tender years, while an adolescent fourteen years of age or older is not, as he has an absolute right under W. Va. Code § 44-10-4 (1923) to nominate his own guardian." 278 S.E.2d 357 (syllabus point 7).

6 278 S.E.2d at 360.

9 Id. at 358 (syllabus point 2).

10 In relation to children of tender years the presumption is absolute. Id. at 363.

11 Id. at 361.

12 Id.

13 Id. at 362.

14 Id.

15 Id. at 361.

custody of their father, even though a special divorce commissioner reported the mother to be the primary caretaker. The supreme court reversed the trial court with directions to award custody to the mother in accordance with the primary caretaker presumption. Not giving the mother the benefit of the presumption was clearly erroneous when the evidence showed beyond a preponderance that she was the primary caretaker. Thus, the judicially-created presumption takes precedence over the legislature's mandate to base an award of custody upon the child's best interests.

B. Sharing Primary Care


If parents have shared the custody and the child care in an equal way, then neither is entitled to the primary caretaker presumption. It must appear to the court that a parent is clearly the primary caretaker before the presumption is applied. The supreme court applied this principle in Dempsey v. Dempsey and affirmed the trial court's holding that neither parent was entitled to the primary caretaker presumption because they had shared the primary care.

In Dempsey, the mother cared for her son from 1974 until January of 1978 while the father worked outside the home. During this period, the family lived in Delaware. After January of 1978, the father left his wife and son and came to West Virginia. Between January of 1978 and October of 1980, the father paid less than $300 in child support to his wife, who was still living in Delaware. In October of 1980, the wife asked her husband to take custody of the child because she was unable to adequately care for him. From October of 1980 until September of 1981, the father maintained custody of his son. Because the father was unemployed much of the time, he was able to substantially participate in his son's care.

In April of 1981, the Dempseys were divorced. However, the trial judge withheld a decision regarding custody pending a hearing. This hearing was held in September of 1981. As a result of the custody hearing, the trial court found that neither parent was entitled to the primary caretaker presumption because they both had shared the primary care. The trial court awarded custody to the father in accordance with the child's best interests.

On appeal, the supreme court addressed the issue of whether the mother

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17 Id. at 339.
19 278 S.E.2d 357 (syllabus point 5).
21 Id. at 231.
22 Id.
should be entitled to the presumption because she had provided primary care for a longer period of time than the father. The court stated that "length of time alone is not determinative of whether the presumption should attach."23 Upon reviewing the facts, the supreme court affirmed the trial court's finding that neither parent was entitled to the presumption because both had provided primary care. The supreme court held that since the primary caretaker presumption was inapplicable, the child's best interests must be the court's guide in determining custody.24 The supreme court reviewed the facts and determined that the trial court's award of custody to the father was in the child's best interests.

Thus, the length of time during which a parent has provided child care is a factor to be considered in determining whether a parent is the primary caretaker. Length of time, however, is not the sole factor in determining who is the primary caretaker. In Dempsey, the supreme court examined the entire body of facts relating to the custody and care of the child to determine whether either of the parents was entitled to the presumption. Because both parents shared the primary care, the presumption did not attach, and custody was awarded according to the child's best interests.

C. Tender Years


Because the primary caretaker presumption is absolute regarding children of tender years, it is not unnatural to feel a compulsion to define the term. Unfortunately, criteria needed to discern whether a child is of tender years are elusive. Tender years is best understood from the following principle: "The concept of a 'child of tender years' is somewhat elastic; obviously an infant in the suckling stage is of tender years, while an adolescent fourteen (14) years of age or older is not as he has an absolute right under West Virginia Code section 44-10-4 (1923) to nominate his own guardian."25 Thus, the extent to which the presumption operates as an absolute presumption is somewhat elastic.26

One concrete definition of what tender years is not is articulated in Busch v. Busch,27 which concerns a child's right to nominate a guardian. In Busch, the trial court denied a fourteen year old's request to nominate his father as

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23 Id.
24 Id.
26 An indication of the meaning of "tender years" may be found in cases applying the primary caretaker presumption, which is absolute regarding children of tender years. For example, in Gibson v. Gibson, 304 S.E.2d 386 (W. Va. 1983), the presumption operated to give a mother custody of her children, ages two and seven. Thus, a child seven years of age may be of "tender years."
guardian and thereby change custody from his mother to his father. The supreme court reversed, reiterating that a child of fourteen or older has an absolute right to nominate his or her own guardian.\textsuperscript{28}

In September of 1979, the Buschs were granted a divorce under which the trial court gave the father custody of his eleven year old son, Michael, during the school year. The mother was given custody during the summer months. During the next three years, the parties sought to modify the final decree with respect to the custody of Michael.\textsuperscript{29} The court refused the requests to modify custody until October of 1982, when it awarded custody to the mother. By October of 1982, Michael had turned fourteen and requested to be in his mother's custody. Therefore, the court awarded custody to the mother based upon Michael's wishes. However, in December of 1982, Michael changed his mind and went to live with his father.\textsuperscript{30} As a result, in January of 1983, the father filed a petition asking the court to award him custody of Michael in accordance with his son's desire to nominate him as guardian. The trial court, however, dismissed the petition and held that the child's best interests require that he remain in the mother's custody.\textsuperscript{31} The father appealed from the dismissal of the petition to change custody.

On appeal, the supreme court stated that pursuant to West Virginia Code section 44-10-4, a child of fourteen or older has an absolute right to nominate his or her own guardian.\textsuperscript{32} The court also noted that a fourteen year old is not a child of tender years, and that the primary caretaker presumption has no application when a fourteen year old requests a change of custody.\textsuperscript{33} In addition, the court emphasized that the trial judge should not always comply with a fourteen year old's request. If the nominated guardian is unfit\textsuperscript{34} to serve in that capacity, the court may refuse to grant him or her custody of the child.\textsuperscript{35} As to Michael, the court held that the dismissal of the petition was improper absent a finding that the father was unfit. The case was remanded with directions to award the father custody of his child.

\textit{Busch} established a clear limitation on the concept of "tender years." A child of fourteen is not of tender years. Similarly, a passage from \textit{Garska v. McCoy}\textsuperscript{36} articulates what "tender years" is not: "When in the opinion of the trial court, a child old enough to formulate an opinion but under the age of 14 has indicated a justified desire to live with the parent who is not the primary

\textsuperscript{28} \textit{Id.} (syllabus point 1).
\textsuperscript{29} \textit{Id.} at 684.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.} (quoting \textit{Garska v. McCoy}, 278 S.E.2d 357 (W. Va. 1981) (syllabus point 7)).
\textsuperscript{33} \textit{Id.} at 684 (quoting \textit{Garska v. McCoy}, 278 S.E.2d 357 (W. Va. 1981) (syllabus point 7)).
\textsuperscript{34} "Fitness" is defined and discussed at a later point in the survey of domestic relations.
\textsuperscript{35} 304 S.E.2d at 684.
\textsuperscript{36} 278 S.E.2d 357 (W. Va. 1981).
caretaker, the court may award the child to such parent.” In theory, between tender years and age fourteen the primary caretaker presumption is not an absolute presumption. At some point beyond tender years the presumption ceases to function altogether.

Further cases may supply criteria to more precisely define the scope of “tender years.” Because the primary caretaker presumption is absolute in relation to a child of tender years, the application of the presumption is directly dependent upon the court’s definition of “tender years.” As the law now stands, whether a child is of “tender years” is left largely to the trial court’s discretion.

D. Fitness


The law concerning the fitness of a parent appears to be well settled. In order for a parent to obtain custody, whether by nomination as a guardian or by operation of the primary caretaker presumption, the court must find the parent to be fit. Factors indicating that a parent is not fit include “misconduct, neglect, immorality, abandonment, or other dereliction of duty.” This well-established rule was applied in Collins v. Collins, in which the trial court found both parents to be unfit and, therefore, denied them custody. The supreme court affirmed this finding.

In July of 1980 Robert Collins filed for divorce. His wife, Ada, did not contest the divorce, but sought custody of her infant son. Robert resisted her request for custody. As a result, the trial court held several evidentiary hearings on the issue of custody and, in its final order, awarded custody of the infant to the paternal grandparents after finding both parents to be unfit. The factors constituting the unfitness of the mother, the undisputed primary caretaker, consisted of her repeated failure to adequately clean and organize her home, unsafe conditions in the house, and her violent tendencies. The father was found to be unfit because he lacked the requisite skills to care for his infant son, showed no intention to develop those skills, had no child rearing experience, and worked a considerable distance away from his home.

The issue raised on appeal was whether the trial court abused its discretion in awarding custody of the infant to persons other than the primary caretaker. The supreme court held that the trial court did not abuse its

37 Id. at 363.
39 Id.
40 Ada Collins threatened her husband by firing two rifle shots in his general direction. Id. at 902.
41 Id.
42 Id.
discretion in ruling that the mother—the primary caretaker—and the father were unfit to have permanent custody of their infant son. Sub The primary caretaker had no right to custody when she did not qualify as a fit parent. In upholding the trial court, the supreme court stated that a parent may be unfit due to "misconduct, neglect, immorality, abandonment, or other dereliction of duty." When the court applied this standard of fitness to the facts of Collins, it concluded that the trial court's finding of the parents as unfit was not an abuse of discretion. Therefore, the award of custody to the paternal grandparents was proper.

E. Parents' Natural Right to Custody

Hatfield v. Hatfield, 300 S.E.2d 104 (W. Va. 1983).

As the law concerning parental fitness appears to be well settled, the law relating to a parent's natural right to custody looks as if it, too, will endure. The following principle is a recurrent theme in recent case law: as to third parties, the parent has a natural and paramount right to custody if the parent is fit. Sub At the core of the principle is a tension between awarding custody according to the child's best interests and awarding custody according to the parent's natural right. Where a parent seeks custody according to his or her natural right and a third party seeks custody according to the child's best interest, the parent will be awarded custody. The supreme court has made it clear that a fit parent's natural right prevails over the best interests of the child. However, the parent's natural right is not absolute. If custody is waived or permanently transferred, relinquished, or surrendered by agreement or otherwise, courts will not enforce the right.

In Ford v. Ford, the supreme court applied the natural right principle when the natural mother petitioned to modify an order that had awarded custody of her daughter to the child's grandparents. The supreme court af-
firmed the trial court's award of custody to the mother. In September of 1976, the Fords were divorced. The trial court awarded custody of the three year old son to the mother but made no award regarding the custody of the eight month old daughter, Michelle. Since Michelle's birth the mother and the two children had been living with the mother's father and stepmother until the mother moved out to live with her paramour in February of 1977. The two subsequently married in March of 1978. In August of 1978, the father petitioned for a change of custody. In response the mother filed a counterpetition. As a result, the court awarded custody of the son to the mother and custody of Michelle to the grandparents.

In January of 1980, the mother petitioned the court to modify its previous order and award her permanent custody of Michelle. The court, however, denied the mother's petition. Significantly, the circuit court in 1980 "indicated that custody of Michelle would eventually be returned to her mother at the proper time." In 1981, the mother again petitioned the circuit court to modify the custody order. The 1981 custody hearing revealed that Michelle had been in the custody of her grandparents since her birth in 1975. In addition, the step-grandmother testified that during the first two years and seven months of Michelle's life the mother took no interest in her daughter. The grandparents then introduced evidence from expert witnesses "that a change in custody would not be in Michelle's best interests." During the hearing, there was no evidence produced that either the mother or grandparents were unfit to care for Michelle. Finally, in March of 1982, the trial court awarded custody of Michelle to her natural mother. It is from this custody award that the grandparents appealed.

The issue addressed by the supreme court was whether the fit and natural mother should be awarded custody of her daughter when the child's best interests indicate that the child should remain in the custody of the grandparents. The court applied the rule that, as to third parties, a fit parent has a natural and paramount right to custody. Since there was no evidence that the mother was unfit or intended to permanently abandon or relinquish her rights as a parent, the supreme court upheld the custody award. The supreme court specifically rejected the argument made by the grandparents that the court should be guided by the child's best interests in making its decision. Thus, it appears that a parent's natural right to custody is a con-

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49 Id. at 254.
50 Id. at 255.
51 Id.
52 Id.
53 Id.
54 Id.
55 Id. The grandparents argued that the welfare of the child was the "polar star" by which the discretion of the court is guided. The court stated that the "polar star" concept would not be
consideration paramount to the touchstone of child custody cases—the child’s best interests. The natural right principle places a limit on the extent to which custody is awarded in the best interests of the child.

The natural right principle is not without creative applications. The holding of Hatfield v. Hatfield\(^{26}\) revealed that the principle could be applied with the child’s best interest in mind. In Hatfield the trial court found the mother to be unfit because of abandonment\(^5\) and awarded custody to the grandmother. The child had been living with the grandmother for over two and one-half years during which time the father visited daily and actively participated in the child’s care. The trial court awarded custody to the grandmother in accordance with the child’s best interests. The mother appealed, and the supreme court reversed and remanded with directions to award custody to the father.

The award to the grandmother was improper because the father was not found to be unfit\(^5\) and, therefore, had a paramount right to custody. Significantly, the father had expressed his intention to have the child remain with the grandmother if he was awarded custody. As a result, the supreme court remanded the case with directions to award custody to the father provided the child continued to live with the grandmother. If the father removed the child from the grandmother’s home, the change in circumstances would warrant a review of custody.\(^6\)

In essence, the court awarded “legal” custody of the child to the father though, in effect, the child remained in the physical custody of the grandmother. The father’s intention to leave the child with the grandmother enabled the court to award custody of the child to him in accordance with the child’s best interests. However, if the father’s custody plans did not contemplate the child’s living with the grandmother, and if the father qualified as a fit parent, the court, following the parent’s natural right principle, would have to award custody to the father, even though the child’s best interests would require the child to be in the grandmother’s custody. Clearly, the holding in Ford would require such a result.

In the most recent case during the survey period, Cyphers v. Cyphers,\(^6\) the supreme court recognized the “parent’s natural right principle” as one of the sacred axioms of West Virginia domestic relations law.\(^6\) In Cyphers, the supreme court reversed the trial court, which had awarded custody of a child

\(^{26}\) 300 S.E.2d 104 (W. Va. 1983).
\(^{27}\) Id. at 107.
\(^{25}\) Id.
\(^{27}\) Id.
\(^{6}\) 304 S.E.2d 866 (W. Va. 1983).
\(^{61}\) Id. at 868.
to the paternal grandparents, even though the mother was found to be fit and
had not abandoned her child.\textsuperscript{52}

In October of 1968, the Cyphers were married, and within the next seven
years had two children. However, in July of 1977, they were divorced. Pursu-\n\textit{ant to an agreement between the parents, the father received custody of
the youngest child and the mother received custody of the eldest. In October
of 1980, the father died, and the mother subsequently petitioned for a writ of
\textit{habeas corpus ad subjiciendum} to obtain custody of the youngest child who
was living with her paternal grandparents, the adverse party in this action.

The circuit judge conducted two lengthy hearings in which psychological
evaluations and welfare department investigations were introduced.\textsuperscript{63} After
reviewing the evidence, the trial court concluded that the mother "was a fit
parent who had not abandoned her child."\textsuperscript{64} The trial judge awarded perma-
nent custody to the fit natural parent, the mother, "though the actual
transfer of custody would be deferred until the end of the 1981 school year, in
the interest of maintaining as much as possible the continuity of the child's
schooling."\textsuperscript{65} However, the grandparents filed a motion to reconsider. As a
result, the trial judge held a second hearing and in a later order found, again,
that the mother was a fit natural parent but "held that he was carving out an
exception in this case to the rule that a fit natural parent has the right to
custody of his or her child as against a third party."\textsuperscript{66}

On appeal, the supreme court did not consider the nature of the trial
court's exception, which is left undefined in the opinion, but applied the
"parent's natural right principle" and concluded that the mother as a fit
natural parent had a paramount right to custody of her child as against any
rights claimed by the grandparents. As a result, the court reversed and
remanded the case with directions that the trial court grant the mother's
petition for a writ of \textit{habeas corpus ad subjiciendum} and award permanent
custody of the child to the mother.\textsuperscript{67} Thus, as the holdings of \textit{Cyphers} and
\textit{Ford} indicate, the supreme court has firmly established the "parent's natural
right principle" in West Virginia domestic relations law.

II. CHANGES IN CUSTODY


No dramatic changes occurred in regard to changing child custody during

\textsuperscript{52} Id. at 867.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 868.
\textsuperscript{58} Id.
the survey period. The law in this area is still anchored to the following principle: "To justify a change in custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child." The principle, however, does not have universal application. The holding of Hatfield v. Hatfield indicates that a parent's natural right to custody, as opposed to that of a third party, justifies a change of custody when no change of circumstances has occurred and the child's best interests require no change of custody. Generally, however, the principle quoted above is the guideline which courts follow in change of custody cases.

A recent application of the principles governing changes of custody is found in Porter v. Porter. The trial court had declared the mother, who had custody of three minor children, to be unfit because she was living with a man. The supreme court reversed and found no change in circumstances justifying a change of custody and, further, that the proposed change would not materially benefit the children. The fact that the mother's new partner lived with her and the children did constitute a change in circumstances warranting a review of the custody, but such a relationship did not raise any presumption that custody should be changed. The party seeking custody had the burden of showing that the relationship had a deleterious effect on the children and that the children would materially benefit from the change of custody.

The Porters were divorced in May of 1981. Pursuant to the final order, the mother was granted custody of three children, the youngest of whom was handicapped and required special care. In July of 1981, the father petitioned the circuit court to modify the final order to obtain custody of the children.

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69 300 S.E.2d 104 (W. Va. 1983).
70 298 S.E.2d 130 (W. Va. 1982).
71 The trial court probably based its findings upon antiquated notions of unfitness due to immorality.
72 The court stated the following regarding the effect of remarriage and extra-marital relationships on child custody:
Where one parent has been awarded custody of minor children by the court and that parent either remarries or undertakes a relationship with another adult who is either a permanent resident or regular overnight visitor in the house, the remarriage or existence of such extra-marital relationships constitutes a sufficient change of circumstances to warrant a reexamination of child placement, however, neither remarriage nor an extra-marital relationship per se raises any presumption against continued custody in the parent originally awarded such custody.
298 S.E.2d at 132.
73 Id.
74 Id. at 131.
and use of the marital home. After a hearing, the trial court awarded the father custody of the children and use of the home because the mother "had been living with a man without the benefit of marriage in the marital home." The mother then petitioned the supreme court for a stay of execution, which was granted. The mother appealed, and in January of 1982, a hearing was held to supplement the record.

On appeal, the supreme court reviewed the facts to determine the propriety of the trial court's decision. Prior to the first custody hearing, both the mother and father had been living with members of the opposite sex. While the parents were cohabitating with their new partners, no sexual activity took place in the presence of the children. The father, however, remarried after he had filed the petition to change custody but before the first custody hearing.

Significantly, the father and his new wife were not familiar with the needs and care problems of the handicapped child. The evidence showed that on weekends when the children visited the father, the handicapped child's sisters primarily cared for the child. The father's new wife also had five children by a previous marriage. Her former husband testified that he was granted custody of the children after filing a petition alleging abandonment. The evidence in the instant case also showed that the mother was a good caretaker of the handicapped child. In addition, the children expressed a desire to live with their mother.

Upon consideration of the evidence, the supreme court reversed the trial court and concluded that the trial court had abused its discretion in awarding the father custody of the children and use of the marital home. The court stated that because the mother was involved in an extramarital relationship, a review of the circumstances of custody was in order, but no presumption arose that custody should be changed. The supreme court concluded that the father failed to show that the children would materially benefit from the change in custody and to show that the mother's cohabitation had a deleterious effect upon the children. Thus, no change in custody was warranted.

### III. Visitation Rights


Since West Virginia has very few cases on visitation rights, any new case

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75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.* at 132.
80 *Id.*
provides a development in the law. *Ledsome v. Ledsome* is the most recent ground-breaking decision that lays the foundation for cases concerning a parent's right to visitation. In *Ledsome*, the mother had custody of three children and refused to allow the father to visit the children even though the divorce order granted him visitation rights. As a result, the father instituted a contempt action to enforce his visitation privileges. The trial court dismissed the action because the father had failed to make a sufficient effort to support the children. However, pursuant to the divorce order the father's obligation to make child support payments was contingent upon his obtaining regular employment, which he had not done.

On appeal, the supreme court addressed the issue of whether an innocent parent's failure to pay child support should act as a forfeiture of his or her visitation rights. After extensive research, the court concluded that "ordinarily, a father's visitation rights may not be denied merely for non-payment of child support." The court then reversed the trial court's final order denying the father visitation rights and held "that a court, in defining a parent's right to visitation, is charged with giving paramount consideration to the welfare of the child involved." Therefore, a parent's visitation rights "may not ordinarily be made dependent upon the payment of child support by that parent." However, if the parent willfully, intentionally, or contumaciously refused to make child support payments, the parent's visitation rights may be reduced or denied, if the welfare of the child so requires.

One aspect of the *Ledsome* decision is the intimation that a parent has a natural right to visit his or her child, and that such a right may be forfeited by misconduct. In one sense the holding protects the innocent parent unable to pay child support due to unemployment or other financial crises. However, the paramount concern in visitation rights cases is the welfare of the child. An innocent parent's nonpayment of child support does not justify inflicting harm upon the child by denying visitation rights. The denial of visitation rights is proper only when the child's welfare so requires. This aspect of the *Ledsome* opinion suggests that where alternatives to the denial of visitation rights are available to sanction the parent who intentionally and contumaciously withholds child support payments, a court may use such alternatives if they promote the welfare of the child.

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81 301 S.E.2d 475 (W. Va. 1983).
82 Id. at 476.
83 Id.
84 Id. at 477.
85 Id. at 479.
86 Id.
88 301 S.E.2d at 578.
89 Id. at 477.
90 Id. at 479.
IV. ALIMONY


West Virginia law concerning awards of alimony has undergone a needed expansion. The trend in the case law is to eliminate the finding of fault as the condition for awarding alimony. Instead, alimony may be awarded when principles of justice so require. Elimination of fault requirements expand the nature and function of alimony. Awards conditioned upon fault are inexorably tied to notions of punishing the wrongdoer and maintaining the party in need of financial support. However, the judicial system is expanding the concept of alimony to protect the party who may otherwise be financially devastated by divorce. Thus, courts, guided by principles of fairness and equity, may use alimony in a limited fashion to allocate wealth between divorcing parties.

The expansion of alimony appears to be limited to specific cases interpreting different aspects of the statutory law governing divorce. In Crutchfield v. Crutchfield, the supreme court interpreted West Virginia Code section 48-2-4(a)(7) as permitting an award of alimony against a faultless party when justice so requires. In Crutchfield, the trial court denied a request for alimony because the opposing party was not at fault. The supreme court reversed and held that the concrete financial realities of the parties indicated that an award of alimony was appropriate.

The Crutchfields were married in 1951 and lived together until October of 1979, when Mrs. Crutchfield filed for a divorce and requested alimony. In July of 1981, a hearing took place concerning the alimony request. At the time of the hearing, the husband was sixty-six years of age and the wife was

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93 304 S.E.2d 76 (W. Va. 1983).
94 W. Va. Code § 48-2-4(a)(7) (Supp. 1983) provides as follows: A divorce may be ordered:
Where parties have lived separate and apart in separate places of abode without any cohabitation and without interruption for one year, whether such separation was the voluntary act of one of the parties or by mutual consent of the parties: Provided that a plea of res judicata or of recrimination with respect to any other provision of this section shall not be a bar to either party's obtaining a divorce on this ground; Provided, however, that if alimony is sought under the provision of Section fifteen [§ 48-3-15] of this article, the court may inquire into the question of who is the party at fault and may award alimony according to the right of the matter: Provided further, that this determination shall not affect the right of either party to obtain a divorce on this ground.
95 302 S.E.2d at 77.
96 Id.
fifty-six years of age. The facts showed that the husband worked as a school teacher and had acquired real property valued at a minimum of $52,000, certificates of deposit worth $11,000, and mutual stocks worth $6,500. He also received nontaxable social security payments and veteran's benefits of $5,500 per year, as well as approximately $11,500 of taxable income from rental property, interest, and his pension. In contrast, during Mrs. Crutchfield's twenty-seven years of marriage, she lived as a housewife, owned no real property, "and was substantially without assets." At the time of the hearing "her sole income, other than pendente lite alimony of $300 per month, was from social security payments, for which her divorce rendered her ineligible."

The facts of Crutchfield illustrate the gross inequity that would occur if the court refused the wife's request for alimony because the husband was not at fault. Mrs. Crutchfield would have been left without assets. Instead, the court considered the financial conditions of the parties and concluded that an award of alimony was appropriate.

Similarly, in Kinney v. Kinney, the supreme court reversed the trial court, which had conditioned the award of alimony upon a finding of fault. The court noted that it had previously interpreted West Virginia Code section 48-2-4(a)(10) as specifically allowing "the court to make a 'just and equitable' alimony award when a divorce is granted on the grounds of irreconcilable differences." In Kinney, the trial court made no findings as to the financial conditions of the parties because it conditioned the award of

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97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
103 304 S.E.2d 870 (W. Va. 1983).
104 W. Va. Code § 48-2-4(a)(10) (Supp. 1983) provides as follows:
A divorce may be ordered:
(10) If one party to a marriage shall file a verified complaint, for divorce, against the other, alleging that irreconcilable differences have arisen between the parties, and stating the names of the dependant children of the parties or of either of them, and if the other party shall file a verified answer to the complaint and admit or aver that irreconcilable differences exist between the parties, the court shall grant a divorce: Provided, that the defendant may file and serve an answer with or without an attorney, and said verified answer shall be sufficient if it is of the form as set out in section four-a [§ 48-2-4a] of this article: Provided, however, that the circuit clerk of each county shall maintain sufficient supplies of said form and provide the same to any person at no charge. No corroboration shall be required of the ground for the divorce or the issues of jurisdiction of venue or any other proof for a divorce on the grounds of irreconcilable differences of the parties. The court may make orders for or approve, modify or reject any agreement between the parties pertaining to just and equitable (i) alimony, (ii) custody, support or maintenance of children, or (iii) visitation rights.
105 304 S.E.2d at 874.
alimony upon a finding of a party at fault. Since neither party was at fault, the trial court found neither entitled to alimony. As a result of this finding by the trial court, the supreme court reversed and remanded the issue of alimony to the trial court to determine an appropriate award of alimony. 103

Though the financial conditions of the parties is the primary factor in awarding alimony, courts may also consider the fault of the party seeking alimony as a factor bearing upon the award of alimony. In Peremba v. Peremba, 106 a party at fault 107 sought alimony pursuant to West Virginia Code section 48-2-4(a)(7). After applying equitable principles and considering the party’s fault as a factor in its determination, the trial court denied the request for alimony. The supreme court affirmed.

The core of the court’s decision is the following principle derived from case law and from West Virginia Code section 48-2-16: Though the economic means and needs of the parties are paramount considerations in a decision regarding alimony, a court may consider substantial inequitable conduct on the part of the party seeking alimony as one factor in its decision. 108 Substantial inequitable conduct is defined as “conduct which the trier of fact may infer caused the dissolution of the marriage.” 109 Since the trial court’s holding accorded with the above-stated principle and did not constitute a clear abuse of discretion, 110 the supreme court affirmed the award of alimony.

V. PROPERTY DISTRIBUTION

A. Cases Prior to LaRue v. LaRue


During the survey period and prior to the adoption of equitable distribution, the court addressed the issue of property distribution in divorce proceedings in two cases: Simmons v. Simmons, 111 in which personal property was distributed pursuant to code sections governing divorce, and Kinney v.

103 Id.


107 The trial court found both parties in this case to be at fault.

108 304 S.E.2d at 881.

109 Id.

110 The standard for reviewing a trial court’s award of alimony is whether the trial court clearly abused its discretion. In Douglas v. Douglas, 298 S.E.2d 135 (W. Va. 1982), the trial court’s order awarding an increase in alimony was affirmed. The Supreme Court of Appeals of West Virginia examined the evidence, which showed that the expenses of the party awarded the increase exceeded her monthly income, and concluded that the trial court did not abuse its discretion. Similarly, in Yanero v. Yanero, 297 S.E.2d 863 (W. Va. 1982), the court examined the evidence concerning the parties’ financial conditions but concluded that the trial court had clearly abused its discretion by not awarding a greater increase in alimony.

111 298 S.E.2d 144 (W. Va. 1982).
Kinney, in which the theory of resulting trust was used to determine ownership of real and personal property.

In Simmons, the trial court refused to determine ownership of specifically enumerated items of personal property. The supreme court reversed the trial court’s holding and found that pursuant to the West Virginia Code, when a party makes a specific request for possession of certain items of personal property, the trial court has the authority to determine ownership of the property in the divorce action. As a result, the supreme court remanded the case for a hearing on the issue of ownership of the personal property.

In November of 1979, the Simmons’ were granted a divorce on the grounds of irreconcilable differences. Upon granting the divorce, the trial court conducted several hearings on the issues of alimony and property distribution. Regarding personal property, Mrs. Simmons “claimed that many of the household furnishings at the former marital residence belonged to her. The trial court, however, refused to hear testimony regarding her ownership of the household property and suggested that ownership of the property should be determined in a separate suit.

On appeal the court addressed the issue of whether a trial court may properly determine ownership of specific items of personal property in a divorce action. The court found that the trial court has the statutory authority to determine ownership of personal property in a divorce proceeding if a party has made a “specific request for possession of enumerated personal property.” Significantly, the court also noted that under the Code provision it did not have jurisdiction to determine ownership of jointly owned property.

Mrs. Simmons also appealed on the trial court’s determination that her husband was the sole owner of the funds in several joint bank accounts. At one of the hearings on property distribution, both Mrs. Simmons and her husband testified as to their contributions to the joint bank accounts. The trial

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112 304 S.E.2d 870 (W. Va. 1983).
113 W. VA. CODE § 48-2-21 (1969) provides as follows:
Upon decreeing the annulment of a marriage, or upon decreeing a divorce, the court shall have power to award to either of the parties whatever of his or her property, real or personal, may be in the possession, or under the control or in the name of the other, and to compel a transfer or conveyance thereof as in other cases of chancery.
114 298 S.E.2d at 146 (quoting Murredu v. Murredu, 236 S.E.2d 452 (W. Va. 1977) (syllabus point 3)).
115 298 S.E.2d at 146.
116 Id.
118 298 S.E.2d at 146 (quoting Murredu v. Murredu, 236 S.E.2d 452 (W. Va. 1977) (syllabus point 3)).
119 209 S.E.2d 144, 147 n.2 (W. Va. 1982).
court, nevertheless, found the husband to be the sole owner of the funds. On appeal, the court noted that the trial court had jurisdiction to determine ownership of the joint bank accounts in the divorce action pursuant to West Virginia Code section 48-2-15, which governs alimony and the custody and maintenance of children. However, the supreme court reversed the trial court’s finding that Mr. Simmons was the sole owner of the joint banking account and stated that “once funds are deposited in a joint banking account, they are presumed to be jointly owned.” Following this principle, the court reversed and remanded the case for a hearing on the issue of ownership of the joint bank accounts.

As *Simmons* indicated, courts are able to distribute property in a limited fashion under West Virginia Code sections 48-2-15 and 48-2-21. Because the court’s power to distribute property is limited under the Code sections, courts have determined ownership of property in divorce actions by using the theories of constructive and resulting trusts. Simply stated, the court has permitted the common law actions to impress constructive or resulting trusts to be joined to divorce actions.

*Kinney v. Kinney* is an example of the use of a resulting trust to distribute property in a divorce proceeding. The Kinneys were granted a divorce on the grounds of irreconcilable differences. Pursuant to the final divorce decree, Dr. Kinney was awarded ownership of three cars and two parcels of real estate which had been titled in his wife’s name. The trial court declared a resulting trust in favor of Dr. Kinney after finding that his wife

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120 The court interpreted W. Va. Code § 48-2-15 (1980) as follows: [W. Va. Code § 48-2-15] confers on a court in a divorce suit power to make any order or decree concerning the estate of the parties, or either of them, as it may deem expedient, only for the purpose of making effectual any order or decree made in the case relating to the maintenance of the parties, or the custody and maintenance of their children. 298 S.E.2d at 146 (quoting McKinney v. Kingdon, 251 S.E.2d 216 (W. Va. 1978) (syllabus point 1)).

121 298 S.E.2d at 147.


125 The court defined a resulting trust as follows:

A resulting trust arises in favor of the person who transferred the property or caused it to be transferred, under circumstances raising an inference that he intended to transfer to the other a bare legal title and not to give him the beneficial interest. Resulting trusts are impressed only when there has been an explicit fiduciary relationship from the beginning. 304 S.E.2d at 873 (quoting 5 SCOTT ON TRUSTS § 404.2).
would be unjustly enriched if she retained sole ownership of the property,' and that "Dr. Kinney did not intend for her to have the sole beneficial interest in the assets when he gave her title." On appeal, the court reviewed the record to determine whether the trial court erred when it declared a trust in favor of Dr. Kinney. Mrs. Kinney testified that the three cars in question were gifts to her from her husband and that she had provided the down payment for the parcel of land in New Jersey, while her parents gave her the money for the second parcel. To the contrary, Dr. Kinney testified that he believed he had provided the money for the New Jersey property and had titled the land and cars in his wife's name for the following reasons: (1) he thought he would never get a divorce, (2) to pay less estate and gift tax when he died since he was much older than his wife and would probably predecease her, and (3) to maintain his assets as free as possible from medical malpractice liability." After reviewing the record, the court concluded that the trial court did not err in declaring a resulting trust in favor of Dr. Kinney. In light of the conflicting evidence, the trial court could properly find that Mrs. Kinney would have been unjustly enriched if she retained ownership of the property and that Dr. Kinney did not intend for her to have sole beneficial interest in the property when he gave her legal title.

B. Equitable Distribution

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

The major development in West Virginia domestic relations law during the survey period was the adoption of the principle of equitable distribution of marital property. For the most part, equitable distribution stems from the theory of unjust enrichment, which is the primary underpinning of the constructive trust as applied in divorce cases. Unlike the common law theory of the constructive trust, equitable distribution emanates from statutory authority. In LaRue v. LaRue, the Supreme Court of Appeals of West Virginia interpreted West Virginia Code sections 48-2-15 and 48-2-21 in adopting its theory of equitable distribution.

126 Id. at 874.
127 Id.
128 Id. at 873-74.
129 Id. at 873.
130 Id. at 874.
131 304 S.E.2d 312 (W. Va. 1983).
132 The court has interpreted W. Va. Code § 48-2-15 (1980) as follows: [W. Va. Code § 48-2-15] confers on a court in a divorce suit power to make any order or decree concerning the estate of the parties, or either of them, as it may deem expedient, only for the purpose of making effectual any order or decree made in the case relating to the maintenance of the parties, or the custody and maintenance of their children.

133 W. Va. Code § 48-2-21 (1969) provides:
In West Virginia, equitable distribution is based upon two types of unjust enrichment: that arising from economic contribution and that resulting from the performance of homemaker services. The court in LaRue found that the authority for economic equitable distribution stems from West Virginia Code section 48-2-21.\textsuperscript{134} When a spouse has made a "material economic contribution to the acquisition of property which is titled in the name of or under the control of the other spouse,"\textsuperscript{135} that spouse is entitled to equitable distribution of the property. In LaRue, the supreme court noted that economic contributions are similar to property interests. Therefore, equitable distribution of property based upon economic contributions is proper under section 48-2-21.\textsuperscript{135} Under that section the court may transfer title to real and personal property to remedy unjust enrichment arising from economic contributions.\textsuperscript{137}

In determining the amount of economic equitable distribution to be awarded, the court must weigh the respective economic contributions of each spouse against the net assets available at the time of the divorce.\textsuperscript{139} Net assets are to be reduced to fair market value.\textsuperscript{139} They do not include assets "acquired by a party prior to the marriage, or obtained during the marriage by way of inheritance or gifts from third parties."\textsuperscript{140} The court may consider the value of gifts received by the spouse seeking equitable distribution from the other spouse in order to calculate the amount of equitable distribution.\textsuperscript{141} Additionally, the supreme court noted that fault is not a factor in the determination of economic equitable distribution.\textsuperscript{142}

Pursuant to the statutory provision which governs alimony and custody and maintenance of children,\textsuperscript{143} the court adopted a scheme of equitable distribution to compensate for homemaker services. In the calculation of an appropriate amount of equitable distribution under this scheme, the value of

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\item \textsuperscript{134} W. VA. CODE § 48-2-21 (1960); 304 S.E.2d at 321.
\item \textsuperscript{135} 304 S.E.2d at 320.
\item \textsuperscript{136} W. VA. CODE § 48-2-21 (1969). Since economic equitable distribution is invoked pursuant to W. VA. CODE § 48-2-21 (1969), which does not apply to jointly owned property, in all probability jointly owned property may not be equitably distributed. Instead, a partition suit may be joined to the divorce action. See Patterson v. Patterson, 277 S.E.2d 709, 711 (W. Va. 1981).
\item \textsuperscript{137} 304 S.E.2d at 321.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id. The fault of the parties bears no relationship to a spouse's economic contribution or to the circumstances of unjust enrichment.
\item \textsuperscript{143} W. VA. CODE § 48-2-15 (1980).
\item \textsuperscript{144} 304 S.E.2d at 323.
\end{itemize}
the homemaker services must be considered in relation to the net assets. Additionally, an award of alimony will affect the amount of equitable distribution for homemaker services. In fact, it has been suggested that equitable distribution of homemaker services is indistinguishable from alimony. In LaRue, the supreme court specifically held that fault may be considered as a factor in equitable distribution for homemaker services. To support its holding, the court asserted that, traditionally, alimony functioned to compensate the wife for homemaker services. When the wife was at fault she forfeited such compensation. Thus, in this respect, vestiges of the past may deprive a spouse of both alimony and equitable distribution and, thereby, perpetuate the inequities equitable distribution seeks to eliminate.

By considering fault as a factor in homemaker services, the court defeats the purpose of equitable distribution. When a spouse performs homemaker services, he or she directly contributes to the economic well-being of the family. Denying equitable distribution to the spouse who performed homemaker services and who is also found at fault allows the spouse benefiting from the services to be unjustly enriched. The spouse working outside the home benefits from the homemaker services without compensating the spouse managing the affairs of the home. The end result is the maintenance of an archaic and unjust scheme of property distribution in a traditional family setting.

It is unrealistic and oversimplistic to say that the husband supports the wife in exchange for homemaker services. The performance of homemaker services enables the spouse working outside the home to enjoy the benefit of a family. In most instances, that spouse's earning ability would be reduced if he or she performed a substantial amount of homemaker services. Similarly, the homemaker may have given up opportunities to earn income outside the home. Modern notions of marriage perceive the accumulation of wealth not as an achievement to solely benefit one spouse at the exclusion of the other but as a joint accomplishment to benefit the entire family. Thus, the court should be required to distribute property according to broad principles of fairness and equity in light of the totality of the marriage to compensate the homemaker and protect him or her from financial hardship.

\[\text{Id.}\]

\[\text{LaRue v. LaRue, 304 S.E.2d 312, 326 (W. Va. 1983) (Neely, J., concurring).}\]

\[\text{Id. at 322}\]

\[\text{Id.}\]

\[\text{Id.}\]

\[\text{To effectuate a fair and equitable distribution of marital property, a court may look to the six considerations set forth by Justice Neely in his concurring opinion:}\]

\[\text{(1) the length of the marriage;}\]
\[\text{(2) the occupation of the parties, whether each worked and for how long; and, where both parties worked, the respective contributions of each partner;}\]
\[\text{(3) the amount and sources of all income;}\]
\[\text{(4) the contribution of each party to the acquisition, preservation, appreciation, or}\]

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\[\text{SURVEY OF DEVELOPMENTS}\]

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In addition to fault as a factor in equitable distribution for homemaker services, the supreme court enumerated several other factors bearing upon the award of equitable distribution. The length of the marriage, the quality of homemaker services, the age, health and skills of the spouse, and the amount of his or her income may be considered in determining an appropriate award of equitable distribution for homemaker services.\(^{150}\) What the court can do to compensate the homemaker spouse is, however, limited. Because equitable distribution for homemaker services originates pursuant to statute,\(^{151}\) it is subject to the same restrictions as alimony in regard to the transfer of property. Under this Code section, the court may not transfer title to real property to satisfy an award of alimony.\(^{152}\) Therefore, to satisfy an award of equitable distribution under this provision, the court may not transfer title to real property.\(^{153}\) The court may, however, grant a possessory interest in real property, or award a lump-sum monetary amount.\(^{154}\)

In general, there are some circumstances in which a party cannot make a claim for equitable distribution. If the parties have fairly negotiated a property settlement, then a claim for equitable distribution is foreclosed.\(^{155}\) If a party does not specifically assert a claim for equitable distribution, the court is not required to apply the theory of equitable distribution.\(^{156}\) The holding of *LaRue* is prospective in nature; economic equitable distribution is available to all cases filed after the *LaRue* decision.\(^{157}\) In cases pending at the time of *LaRue*, the court may apply economic equitable distribution if a party has specifically asserted the issue.\(^{158}\) The court overruled the holding of *Patterson v. Patterson*,\(^{159}\) which forbade the imposition of a constructive trust for unjust enrichment arising from homemaker services. Finally, the court extended the application of *LaRue* to cases on appeal at the time of the decision which had asserted a claim for equitable distribution.\(^{160}\)

Two major criticisms of *LaRue* are first, the supreme court's failure to articulate a cogent theory of property distribution to provide trial courts

dissipation of marital property, including services as a homemaker;
(5) the loss of inheritance rights in property acquired during the course of the marriage and the loss of pension rights; and
(6) the income tax consequences, if any, of property division.

304 S.E.2d at 326 (Neely, J., concurring).

150 304 S.E.2d at 323.
152 277 S.E.2d at 711.
153 304 S.E.2d at 323.
154 Id. at 322.
155 Id. at 323-24.
156 Id. at 324.
157 Id.
158 Id.
160 304 S.E.2d at 324.
with standards and guidelines needed in the application for an equitable distribution theory, and second, the court's failure to state whether future interests and pensions are subject to equitable distribution. The concurring opinion of Justice Neely provides a helpful analysis of the majority opinion. He articulates an alternative approach to the theory of equitable distribution which considers pensions and advocates that fault not be considered in a court's equitable distribution of marital property for homemaker services.\textsuperscript{162}

\textit{Christopher P. Riley}

\textsuperscript{161} \textit{Id.} at 326 (Neely, J., concurring).

\textsuperscript{162} For a detailed discussion of LaRue v. LaRue, see Comment, LaRue v. LaRue: Equitable Distribution of Marital Assets Finally Available in West Virginia, 86 W. Va. L. Rev. 251 (1983).