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Domestic Relations

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DOMESTIC RELATIONS

I. CHILD SUPPORT AND ALIMONY

Hopkins v. Yarbrough, 284 S.E.2d 907 (W. Va. 1981)
Robinson v. Robinson, 288 S.E.2d 161 (W. Va. 1982)
F.C. v. I.V.C., 300 S.E.2d 99 (W. Va. 1982)

In *Hopkins v. Yarbrough,*[1] the supreme court held that a circuit court is without authority to cancel or modify arrearages of a former husband's child support payments if those payments accrued prior to the date of adoption of the children by the wife's subsequent husband.[2] Citing *Rakes v. Ferguson,*[3] the court construed the West Virginia Code[4] to allow revisions of child support decrees pertaining to *future* installments of payments but not to authorize the circuit court to alter or cancel accrued installments arising from a prior final decree. The legal effect of an order of adoption is prescribed in West Virginia by statute.[5] The statute, however, does not address the question of the former husband's liability for child support arrearages which accrued prior to the adoption. The court held, in this case of first impression, that child support payments vest as they accrue. Therefore, the circuit court was without authority to modify or cancel such accrued installments. The adoption did not effect the previously accrued arrearages.

Mrs. Hopkins married Mr. Yarbrough, had two children and then received a divorce by order of the Domestic Relations Court of Cabell County. Pursuant to that order, Mrs. Hopkins received custody of the children as well as alimony and child support. Later, Mrs. Hopkins married her present husband and Mr. Yarbrough was relieved of any further alimony payments. Three years later, Mrs. Hopkins' current husband adopted the two minor children in Colorado

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[1] 284 S.E.2d 907 (W. Va. 1981).
[2] *Id.* at 907.
[3] 147 W. Va. 660, 130 S.E.2d 102 (1963).
[4] W. VA. CODE § 48-2-15 (1980) provides in part:
[T]he court may also from time to time afterward, on the verified petition of either of the parties or other proper person having actual or legal custody of such child or children, revise or alter such order concerning the care, custody, education and maintenance of the children, and make a new order concerning the same, as the circumstances of the parents or other proper person or persons and the benefit of the children may require.
[5] W. VA. CODE § 48-4-5 (1980) reads in part:
Upon the entry of such order of adoption, the natural parent or parents, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such parent or parents, except any such parent who is the husband or wife of the petitioner for adoption, shall be divested of all legal rights, including the right of inheritance from or through the adopted child under the statutes of descent and distribution of the State, and shall be divested of all obligations in respect to the said adopted child, and the said adopted child shall be free from all legal obligations, including obedience and maintenance, in respect to any such parent or parents. From and after the entry of such order of adoption, the adopted child shall be, to all intents and for all purposes, the legitimate issue of the person or persons so adopting him or her and shall be entitled to all the rights and privileges and subject to all the obligations of a natural child of such adopting parent or parents.

where Mr. Yarbrough was present and represented by counsel. Following the adoption, Mr. Yarbrough failed to pay any of the child support payments that were in arrears prior to the adoption. Upon Mrs. Hopkins' petition, the circuit court held that Mrs. Hopkins had forfeited her right to enforce the payment of child support as a result of the adoption, thereby relieving Mr. Yarbrough from all obligations to the children including arrearages in child support.[6]

The supreme court found that the original divorce decree was a final order that could not be altered except prospectively. Further, a legal adoption eliminates only prospective support of the children but does not eliminate rights which vested prior to the adoption decree.

In *Robinson v. Robinson,*[7] the court held that where a party has been appropriately served with process and is able to appear, there is no "judicially cognizable and harmful circumstance sufficient to permit a collateral attack on an otherwise valid judgment."[8] When the claim of evidentiary insufficiency arises exclusively from the failure of such a party to appear, the final order cannot be attacked collaterally on that ground. To the extent that *Myers v. Whiston*[9] indicated that alimony and child support orders can be attacked collaterally for evidentiary insufficiency after the eight month appeal period has run, it is overruled.

Mr. and Mrs. Robinson were divorced by order of the circuit court and Mrs. Robinson was awarded custody of the children, alimony and child support. Five years later, Mrs. Robinson filed a motion to show cause why Mr. Robinson should not be found in contempt for failure to comply with the payment of alimony and child support as required in the divorce decree.[10] When the circuit court held a hearing on the contempt petition, it held that adequate testimony on Mr. Robinson's ability to pay alimony and child support had not been taken in conformance with the requirements of the statute[11] thus declaring the original order void and obliterating all alimony and child support then in arrears. The supreme court found that Mr. Robinson was served with process for the divorce hearing and that he did not appear to contest either the divorce or the payment awards. While the circuit court did not engage in precise inquiry as to Mr. Robinson's financial affairs, there was sufficient evidence to infer the overall financial condition of the parties.

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[6] 284 S.E.2d at 908.

[7] 288 S.E.2d 161 (W. Va. 1982).

[8] *Id.* at 162.

[9] 238 S.E.2d 227 (W. Va. 1977), *overruled, in part,* 288 S.E.2d 161 (W. Va. 1982).

[10] Initially the circuit judge found that the contempt proceeding was criminal in nature; however, the supreme court, in State ex rel. Robinson v. Michael, 276 S.E.2d 812 (W. Va. 1981), found that it was not a criminal proceeding. 288 S.E.2d at 162.

[11] W. VA. CODE § 48-2-16 (1980) states that:

> All judges and courts of this State, called upon to fix, ascertain and determine an amount as alimony, support or maintenance to be paid by a spouse or to modify any order pertaining thereto, shall take into consideration, among other things, the financial needs of the parties, the earnings and earning ability of the husband and wife, the estate, real and personal, and the extent thereof as well as the income derived therefrom of both the husband and wife and shall allow, or deny, alimony or maintenance or modify any former order with relation thereto, in accordance with the principles of justice.

The supreme court distinguished *Myers v. Whiston*[12] in that *Myers* was a habeas corpus proceeding predicated on an original divorce action where the court had no jurisdiction to award either alimony or child support since Mr. Myers was a non-resident served by publication. The habeas corpus proceeding was essentially an appeal brought within the eight months of the circuit court's final, appealable order. In *Robinson,* the circuit court order may have been in error but any error was directly attributable to Robinson's failure to appear. Additionally, Robinson ignored the order and did not enter an appeal; therefore, the circuit court's order became final and enforceable. Thus, a final alimony and child support order cannot be collaterally attacked for evidentiary insufficiency after the running of the appeal period.[13]

The court held in *F.C. v. I.V.C.*[14] that alimony may be awarded against a faultless party if justice so requires given the financial needs of the parties and the other factors listed in West Virginia Code § 48-2-16.[15]

Mr. and Mrs. C. were awarded a no-fault divorce based upon the ground of having lived separate and apart for more than one year. Mrs. C. alleged that Mr. C. had twelve to fifteen million dollars in assets, but the circuit court made no finding about his assets. Mrs. C. worked as a housewife during her marriage and had previously been employed as a beautician and as a dental technician. The court specifically found no fault by either party.

The supreme court ruled that the circuit court should have analyzed the financial position of both parties to determine if alimony was required to comport with the principles of justice. In deciding if alimony is expedient, independent of fault, the trial court must utilize the list of factors to be considered as outlined in § 48-2-16.[16] While fault is not listed in the Code section, "consideration may be given to the inequitable conduct of one party"[17] in order that the decision be in accordance with the principles of justice.

II. Child Custody

S.H. v. R.L.H., 289 S.E.2d 186 (W. Va. 1982)

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[12] 238 S.E.2d 227 (W. Va. 1977), *overruled, in part,* 288 S.E.2d 161 (W. Va. 1982).

[13] Future payments may be altered by a new decree but payments in arrears may not be cancelled without a showing of fraud or other judicially recognizable circumstances authorizing the court to set aside the previous decree, as held in *Hopkins,* 284 S.E.2d 907 (W. Va. 1981).

[14] 300 S.E.2d 99 (W. Va. 1982).

[15] *See supra* note 11. This construction of § 48-2-16 modifies Dyer v. Tsapis, 249 S.E.2d 509 (W. Va. 1978). The court now construes W. Va. Code § 48-2-4(a)(7) to find that the award of alimony need not be based upon fault in divorce proceedings based upon living apart for one year. In *Dyer,* the court had ruled that an alimony award was conditional upon a finding of fault. While West Virginia now has two no-fault grounds for divorce, only subsection (10) on irreconcilable differences divorces had been held to allow alimony where no fault was found. Haynes v. Haynes, 264 S.E.2d 474 (W. Va. 1980). *Dyer* has now been modified, by *F.C. v. I.V.C.,* to allow no fault alimony in unilateral proceedings under § 48-2-4(a)(7).

[16] *See supra* note 11.

[17] *F.C.,* 300 S.E.2d at 101.

Taylor v. Taylor, 285 S.E.2d 150 (W. Va. 1981)

In *S.H. v. R.L.H.*[18] the court further enunciated the principles for award of child custody announced in *Garska v. McCoy.*[19] In *Garska,* the court held that:

> Where there is a child under fourteen years of age, but sufficiently mature that he can intelligently express a voluntary preference for one parent, the trial judge is entitled to give that preference such weight as circumstances warrant, and where such child demonstrates a preference for the parent who is not the primary caretaker, the trial judge is entitled to conclude that the presumption in favor of the primary caretaker is rebutted.[20]

The court in *S.H. v. R.L.H.*[21] defined "nominate" to mean that a child has the right to suggest their parental preference and that the court is then obligated to appoint that guardian unless the court specifically finds such guardian to be unfit. Also, where one parent has been awarded custody by the court and that parent either remarries or establishes "a relationship with another adult who is either a permanent resident or regular overnight visitor,"[22] there has been a sufficient change in the child's circumstances to warrant a re-examination of the custody order. However, this change of circumstances does not raise any *per se* presumption against the continued custody of the original parent.

In this case, the father sought a modification of the original custody order on the basis that the children had decided that they wanted to live with him. Their mother had been awarded custody originally and had subsequently remarried. The trial court found that the oldest child, age fourteen, wished to live with her father and that the two other children, ages thirteen and eleven, wanted to live with their older sister with whichever parent she chose. The trial court also found that the oldest daughter desired to live with her father because she believed that he would be more permissive than her mother in allowing her to have sexual relations with older men. The father had not been the primary caretaker for several years and the mother had done an excellent job in caring for the children. The father was found not to be unfit, but of limited experience in raising children of this age.[23]

The supreme court found that under § 44-10-4,[24] as construed in *Garska,* the father was entitled to custody of the children. While § 44-10-4 does not

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[18] 289 S.E.2d 186 (W. Va. 1982).
[19] 278 S.E.2d 357 (W. Va. 1981).
[20] *Id.* at 358.
[21] 289 S.E.2d 186 (W. Va. 1982).
[22] *Id.* at 188.
[23] *Id.* at 188.
[24] W. VA. CODE § 44-10-4 (1982) provides that:

> If the minor is above the age of fourteen years, he may in the presence of the county court, or in writing acknowledged before any officer authorized to take the acknowledgment of a deed, nominate his own guardian, who, if approved by the court, shall be appointed accordingly; and if the guardian nominated by such minor shall not be appointed by the court, or if the minor shall reside without the State, or if, after being summoned, he shall neglect to nominate a suitable person, the court may appoint the guardian in the same manner as if the minor were under the age of fourteen years.

directly apply to custody disputes between parents,[25] the statute is used by the court as evidence of the legislature's intent as to the age at which an adolescent should be given a say in his guardianship. To be consistent, the court adopted the rule that a child fourteen years of age or older has an absolute right under the Code to nominate his own guardian. In the absence of a finding that the nominated guardian is unfit, the court is obligated to appoint said guardian. To hold a parent unfit, the record must indicate that "a parent is unreasonably lax in the maintenance of discipline, indifferent to the parental obligation to give direction and provide control for an adolescent, or follows a lifestyle that inevitably sets a licentious or immoral example."[26] Under the facts of this case, the court found no indication of such unfitness. Given the mother's remarriage, allowing for a reexamination of the original custody order, and the children's preference, the principles of *Garska* were applied, giving custody to the father.[27]

In *Taylor v. Taylor*,[28] the court reiterated the primary principle of child custody awards: the welfare of the child must be the primary consideration before the court. Although a parent may have unclean hands in obtaining actual custody of the children, the trial court may not reject a modification of custody petition for that reason alone.

In the original Taylor divorce decree, the father of the children was granted a divorce on the basis of the wife's adultery and was also awarded custody of the children. Subsequently, the mother obtained actual custody with the father's tacit consent. Three years later, the mother petitioned for a modification of the divorce decree and introduced evidence to show that since the divorce she had remarried and established a home. Evidence also showed that the father's home had become less stable and that the children preferred to live with their mother.

The supreme court ruled that in failing to consider the children's best interests, the trial court committed reversible error, regardless of the mother's unclean hands. The mother, having shown that her circumstances had changed and that the change would materially benefit the children, should have been granted custody.

III. PATERNITY

State ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (W. Va. 1981)

The supreme court, in *State ex rel. S.M.B. v. D.A.P.*,[29] held that the three year limitation of actions to establish paternity is unconstitutional.[30] While the

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[25] W. VA. CODE § 44-10-4 (1982) applies to guardianship appointments in lieu of the biological parents.

[26] *S.H.*, 289 S.E.2d at 190.

[27] *S.H.*, 289 S.E.2d at 191.

[28] 285 S.E.2d 150 (W. Va. 1981).

[29] 284 S.E.2d 912 (W. Va. 1981).

[30] W. VA. CODE § 48-7-1 (1980) limits paternity actions to within three years and this provision has now been declared unconstitutional under the W. VA. CONST. art. III, §§ 10 and 17.

United States Supreme Court has not yet held that such statutes are unduly restrictive under equal protection analysis, the court expressed the opinion that they were in the belief that the Supreme Court will eventually agree. The court also found that, under the doctrine of "least intrusive remedy," the statute serves a necessary public purpose with only one unconstitutional element which is not integral to the statute's full scheme. Therefore, the court struck only the three year limitation clause as unconstitutional.

It is a criminal offense for any parent, without lawful excuse, to wilfully neglect or desert or refuse to provide for the support of his or her child, whether legitimate or illegitimate.[31] Yet, under § 48-7-1, an unmarried woman may accuse any person of being the father of her illegitimate child only within three years of the child's birth in order to establish paternity as a basis for an obligation of support. The court decided that a complete bar against illegitimate children from obtaining support, unless a claim has been filed within three years, creates a classification producing unequal treatment of legitimate and illegitimate children.[32] This unequal treatment based exclusively upon an immutable human characteristic does not bear any substantial relationship to a permissible state interest. The state argued that there was a permissible state interest in limiting bastardy warrants in order to avoid fraudulent claims brought after the defendant is unable to adequately prepare his defense. The court reasoned that since the paternity action has many of the attributes of a criminal prosecution, the defendant would be adequately safeguarded.[33]

Thus, the court concluded that the mere passage of time did not work to the disadvantage of the defendant. Indeed, the court felt that the current statute might actually work to prevent the state goal of support since a woman might be reluctant to bring an action within three years if she had any hope of a future married relationship with her mate.[34]

IV. Breach of Promise to Marry

Bryan v. Lincoln, 285 S.E.2d 152 (W. Va. 1981)

In *Bryan v. Lincoln,*[35] the court held that § 56-3-2a[36] does not have application to the duties and rights of parties relative to the transfer of specific property or money to a betrothed.

In reliance upon an agreement to marry, Bryan borrowed $5,000 and gave it to Lincoln with the understanding that she would use the money to buy for

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[31] W. Va. Code § 48-8-1 (1980).

[32] 284 S.E.2d at 916.

[33] Among the attributes cited by the court, in protection of the defendant, were the requirements that paternity be proven beyond a reasonable doubt, court-appointed counsel, and the right to blood grouping tests at state expense.

[34] 284 S.E.2d at 916.

[35] 285 S.E.2d 152 (W. Va. 1981).

[36] W. Va. Code § 56-3-2a (1982) states that "[N]otwithstanding any other provision of law to the contrary, no civil action shall lie or be maintained in this State for breach of promise to marry or for alienation of affections, unless such civil action was instituted prior to the effective date of this section [March 6, 1969]."

Bryan her first husband's interest in real estate of which she owned the other half. Lincoln used the money to buy her first husband's interest but she took full title. Lincoln then remarried her first husband. Upon Lincoln's refusal to return any of the money, Bryan brought a civil suit for the return of the money or a lien on the real estate. The trial court found that under § 56-3-2a, the action was barred because no civil action can be maintained for breach of promise to marry. After reviewing cases from other states with similar statutes, the supreme court found that the predominate view is that these statutes only bar actions for damages based upon loss of marriage, humiliation and other direct consequences of the breach; they do not apply to gifts, the transfer of property or money rights which are still to be determined according to common-law principles. The court decided that to hold otherwise would be to deprive Bryan of the benefit of Article III, section 17 of the West Virginia Constitution, allowing access to the courts for any injury to person, property or reputation. Thus, to the degree that a property right has been damaged by breach of contract, the constitutional provision must prevail.[37]

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[37] The court distinguished Wallace v. Wallace, 155 W. Va. 569, 184 S.E.2d 327 (1971), as an alienation of affections case involving a minor child. These facts were wholly unrelated and therefore the court did not consider its conclusion, that the statute was constitutional, binding authority on the case at bar. The court declined to determine the parameters of the constitutional protection with regard to the statute, beyond the holding that neither prevents a cause of action to recover property after a breach of contract to marry.