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Domestic Relations--Custody of Minor Children

Dennis Raymond Lewis
West Virginia University College of Law

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P was divorced from his first wife, *X*. She was awarded custody of their two month-old son. *X* and the child went to live with her parents. Five years later, upon the death of *X*, *P* filed a writ of habeas corpus against the maternal grandparents for custody of his son. The grandparents had supported and cared for the child since the divorce without any material help from *P*, who had remarried and had two children. The proceeding was contested on the grounds that the father was unfit for custody. The lower court denied the writ and awarded custody of the child to the maternal grandparents. *P* appealed. *Held*, affirmed. Although right to the custody of a minor child is usually vested in the surviving parent, this general rule is not applicable where the evidence shows that the welfare of the child is in jeopardy. A father, through his misconduct, can forfeit his parental rights to a third person regardless of the fact that he has not transferred or abandoned such rights by statute. *Perkins v. Courson*, 135 S.E.2d 388 (Ga. 1964).

The cross petition filed by the grandparents stated that *P's* mind was unbalanced and that he had a violent temper. In other evidence submitted the *P* was accused of being drunk and disorderly on several occasions; the unfounded claim that *P* had raped a Negro woman was also admitted as evidence. The grandparents provided testimony to support their claim of immoral behavior and asked to be awarded full custody of the child. The charges made against *P* were substantiated by events which had taken place before and after the divorce of his first wife. The court then proceeded to judge him unfit even though he was at the time the adequate father of two children by his second marriage. This decision implies that the cause of the divorce may place the parent in an unfavorable position when he later seeks custody for whatever reason. Such should not be the law, because the parent would, in effect, be penalized twice for the same mistake. *Florance v. Florance*, 197 Va. 432, 90 S.E.2d 111 (1955).

P contended that the court has no right to question his fitness or unfitness unless he has first lost his parental right to custody in a manner specifically provided by statute. The Georgia statute *P* relies on states certain ways in which the natural parental right can be transferred or abandoned. W. VA. CODE ch. 48, art. 4, § 1 (Michie 1961), revokes this right in a similar manner. The dissent in the prin-

cipal case supported *P's* contention and further suggested that the Georgia statute intended fitness to be considered only when the contest was between the natural parents.

This controversy was occasioned by past Georgia decisions which held that the issue of fitness was not to be considered where custody has not previously been transferred or forfeited. *Bond v. Norwood,* 195 Ga. 383, 24 S.E.2d 289 (1942). This decision refers specifically to GA. CODE ANN. § 74-108 (1953), which the court said must first be violated before the trial judge can invoke the discretionary power vested in him by GA. CODE ANN. § 50-121 (1953). Therefore, the sole issue to be determined is whether the discretionary power of the trial judge can be exercised where the parent still possesses the legal right to custody, not having transferred or abandoned it.

The harsh common law rule which gave the father unlimited authority over his minor children has never been strictly applied in American decisions. The custody, control, and earnings of minor children are now regulated in some respect by statute in every state. 4 VERNIER, AMERICAN FAMILY LAWS § 231 (1936). There is no longer considered to be a property interest in minor children, and the parents have no absolute right to control their destinies. If the parents fail in the recognized duties, it is then considered the responsibility of the state to protect its future citizens. *Taylor v. Taylor,* 103 Va. 750, 50 S.E. 273 (1902). In West Virginia, for example, there is a statute similar to the one which was applied in the principal case. This statute provides for equalization of both the rights and duties of the two parents as well as relaxation of the strict custody law. The natural right to custody of the minor child is still vested in the parents, but this is not an absolute right; the trial judge has the power to award custody to a third person when the welfare of the child so demands. W. VA. CODE, ch. 44, art. 10, § 7 (Michie 1961).

The West Virginia statute allows the court an area of discretion in a contest over the custody of an infant. This discretionary power has not been limited to any one area of custody law, as was done in *Bond v. Norwood, supra;* it has been applied to cases whenever the fitness of one of the contestants is considered to be a valid issue. Therefore, the judge's authority to inquire into the fitness of the parties is unlimited, because it is his duty to protect the welfare of the child in every situation. *Pugh v. Pugh,* 133 W. Va. 501, 56

S.E.2d 901 (1949); *Bell v. Eicholtz,* 132 W. Va. 747, 53 S.E.2d 627 (1949); *State ex rel Lipscomb v. Joplin,* 131 W. Va. 302, 47 S.E.2d 221 (1948). The court will always respect the right of the parent unless this right has been transferred or abandoned, but since the law recognizes no absolute right to the child's custody, the trial court can always look to the fitness of the parent in order to resolve the question of what is best for the child. *Hoy v. Dooley,* 144 W. Va. 64, 105 S.E.2d 877 (1958).

Even though judicial interpretation of W. VA. CODE ch. 44, art. 10, § 7 (Michie 1961) has produced consistent case law, the decisions have been recorded with some very strong dissents. *Stout v. Massie,* 140 W. Va. 731, 88 S.E.2d 51 (1955); *State ex rel Palmer v. Postlethwaite,* 106 W. Va. 383, 145 S. E. 738 (1928). Therefore, it is conceivable that *P's* argument may some day be presented to the West Virginia courts. The argument of the dissent in the principal case may well be a fair criticism of the interpretation of the West Virginia statute, which states: "[T]he court . . . shall appoint . . . that parent who is, in the court's opinion, best suited for the trust. . . ." W. VA. CODE, ch. 44, art 10, § 7 (Michie 1961). Disagreement in this area only serves to point out that the discretionary power should be limited, especially when one of the parties is a parent. *Whitman v. Robinson,* 145 W. Va. 685, 116 S.E.2d 691 (1960). The natural rights of the parent should not be abridged upon a slight pretext, or even where there is a difference of opinion as to who could best raise the child. *Pukas v. Pukas,* 129 W. Va. 765, 42 S.E.2d 11 (1947). It is recognized that there is a presumption of fitness of the surviving parent, which casts upon the third party the burden of showing otherwise. If the party cannot overcome this presumption of fitness, the parent should be awarded custody even though there may be evidence to show that the third party is more fit. This is so because the law presumes that parents will make an honest endeavor to perform their obligations to their children, but the welfare of the child is the final test and this presumption must yield to overwhelming evidence to the contrary. *Walker v. Brooks,* 203 Va. 417, 124 S.E.2d 195 (1962); *Hutchinson v. Harrison,* 130 Va. 302, 107 S.E. 742 (1921).

In *Whiteman v. Robinson, supra,* the court made it clear that it requires very strong proof of unfitness before it will deprive parents of their natural rights. Yet earlier cases indicate that judges are willing to sever the child from its parents to protect the best inter-

ests of the child without ever defining what the best interests of the child are in relation to the fitness of the parent. *Stout v. Massie, supra; Conner v. Harris,* 100 W. Va. 313, 130 S.E. 281 (1925). This uncertainty makes it difficult for the parties to evaluate their positions, since each judge does not decide a case on fixed law. Such confusion raises the serious question of whether this denies equal protection as demanded by the federal constitution.

It is clear from the decision in the principal case that the Georgia court now considers the right of the parent as subordinate to the interests of the child, but they have failed, as has the West Virginia court, to define what the rights of the child are in connection with the "welfare test." In deciding the principal case the court disapproved a number of past decisions which included *Bond v. Norwood, supra,* and, although these cases were not overruled, the decision clearly implies that fitness of the contesting parties will be taken into consideration in all future custody litigations.

The fitness of the contesting parties provides an absolute rather than a relative standard. There are usually facts which can be proved or disapproved, but still there is room for arbitrary decision through discretionary power. This power of the trial judge is not to be arbitrarily applied, yet his decision will not be reversed unless he has plainly surpassed this authority. *Smith v. Smith,* 138 W. Va. 388, 76 S.E.2d 253 (1953). Even though West Virginia law may appear to be fairly well settled, there are still a great many different viewpoints in the child custody area, and the strong plea that each case be decided on fixed law may become a major issue in the future. At present, the fact that the judge must consider social as well as legal factors demands the very best from the lawyer in the trial court.

Dennis Raymond Lewis

Municipal Corporations—Absolute Liability for Disrepair of Streets

P instituted suit for personal injury and property damage against the City of Mannington based on a statute which placed liability on a municipality for disrepair of streets, sidewalks and alleys. Evidence indicated that *P* backed his car off a right of way owned by the city onto private property. The car was struck by a boulder that fell from a cliff approximately sixteen feet from the right of