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Infants–Equitable Procedure for Determining and Ordering Custody of a Neglected Child

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CASE COMMENTS

INFANTS--EQUITABLE PROCEDURE FOR DETERMINING AND ORDERING CUSTODY OF A NEGLECTED CHILD.—Petitioners filed joint petition in circuit court of Doddridge County seeking a decree changing the custody of Delbert Hammond, a four year old child neglected by his parents, from the Department of Public Assistance to them. The child, formerly in custody of petitioners under agreement with the department, had been removed from petitioners' home by the department because of petitioners' refusal to submit the boy to a tonsillectomy, which was never subsequently performed and presumably not needed anyway. The child had since been moved and removed from home to home continuously. Petitioners alleged a pending and undetermined petition by themselves in another circuit court for permission to adopt the child, and presented evidence that they are qualified and are willing and anxious to provide a suitable and permanent home for him. The department opposed the petition on the grounds first, that the circuit court of Doddridge County has no jurisdiction over custody of the child, contending that habeas corpus on the law side is the only proper proceeding to recover custody of a child, and second, that persons who have received custody of a child under contract with the department are not eligible for adoption of such child. The circuit court awarded custody to petitioners. On the department's appeal, held, first, that, having acquired original jurisdiction over the child in a proceeding to declare the boy a neglected child, the circuit court of Doddridge County, then sitting as a juvenile court, has continuing jurisdiction over him; second, that the withdrawal of the child from petitioners' custody terminated their contract, making petitioners eligible to adopt the child, and that since the decree of the court protected and conserved the welfare of the child, it was proper. Affirmed. Hammond v. Dep't of Public Assistance, 95 S.E.2d 345 (W. Va. 1956).

The basic principle underlying the decision of this case is so well settled in the West Virginia law that it can be called a maxim. The principle has been stated in varying forms, but the rule has never varied. The leading case on the point is Green v. Campbell, 35 W. Va. 698, 14 S.E. 212 (1891), in which Judge Holt said at page 702, "the welfare of the infant is the polar star by which the court is to be guided in the exercise of its discretion." This doctrine has continued to guide the actions of West Virginia courts in custody cases. Dep't of Public Assistance v. Pettrey, 92 S.E.2d
917, 921 (W. Va. 1956); *Lipscomb v. Joplin*, 131 W. Va. 302, 47 S.E.2d 221 (1948); *Pukas v. Pukas*, 129 W. Va. 765, 42 S.E.2d 11 (1947). Where the welfare of the child demanded it, the court has subordinated all other ordinarily applicable principles.

The department contended in the principal case that the circuit court of Doddridge County did not have jurisdiction over the custody of the child. The boy was originally declared to be a neglected child and was given into the custody of the department by decree of the Doddridge County court; and by the unequivocal language of W. Va. Code c. 49, art. 5, § 2 (Michie 1955), once jurisdiction has been obtained by any competent court in the case of any child, such child shall continue under the jurisdiction of such court until he becomes twenty-one years of age unless discharged by such court.

As to the proper proceeding to determine the custody of a child, the writ of habeas corpus *ad subijiciendum* or a suit in equity may be used. Law and equity have concurrent jurisdiction in the matter. *Stout v. Massie*, 88 S.E.2d 51 (W. Va. 1955); Annot., 14 A.L.R. 295, 308 (1921); 43 C.J.S., *Infants* § 5 (1945); 27 Am. Jur., *Infants* § 105 (1940).

The department's contention in the principal case that the petitioners were not eligible for adoption of the child was based purely on the previously existing contract between the department and the petitioners by the terms of which petitioners agreed that they would not, while acting under the contract, be eligible for adoption of the child. This provision ceased to exist when the contract ceased to exist, and the court held that the contract was terminated by the department's action in removing the child from petitioners' custody. This position is undoubtedly correct. Cf. *Realty Securities Corp. v. Johnson*, 93 Fla. 46, 111 So. 532 (1927); *Gessler v. Erwin Co.*, 182 Wis. 315, 193 N.W. 363 (1923).

Considering the principles applicable to such cases, as set out above, the court arrived at a just and equitable result.

There is, however, an important question of natural justice suggested by this case. What is the wisdom of the department's prerogative to make foster parents ineligible for adoption? In the writer's point of view, such a rule violates all rules of natural justice, and should be declared void as contrary to public policy. All the wisdom of humanity speaks against such an inhuman rule. To
preclude by contract the power of the court to allow adoption by foster parents, people who are in a position to know and love the child and for the child to know and love them, does not seem to square with the avowed policy of promoting the child's welfare.

If in the future this clause comes in issue in this state, it is hoped that the court will, with sound judgment, declare it to be void as against public policy.

G. W. H., Jr.

Restrictive Covenants—Right to Compensation in Eminent Domain Proceeding.—Relators alleged that their lot and all the other lots of a subdivision were subject to restrictive covenants binding the lot owners to use their lots exclusively for residential purposes. D, a municipal corporation, began a proceeding to condemn an adjoining lot. The adjoining lot owner conveyed the lot to D before the condemnation proceeding was completed. D constructed a toll bridge on the adjoining lot. Relators instituted a mandamus proceeding in a circuit court to compel D to prosecute an action in eminent domain to ascertain just compensation owing to them. A peremptory writ was awarded as prayed for. The Supreme Court of Appeals granted a writ of error. Held, that the restrictive covenants should not be so construed or applied as to require the government or one of its agencies, in the taking or acquiring of private property for a governmental use, to respond in damages either on the theory of a taking of a vested right or for breach of such a covenant. Reversed. State ex rel. Wells v. City of Dunbar, 95 S.E.2d 457 (W. Va. 1956).

It should be noted at the outset that the court expressly stated that "the holding does not determine the question as it relates to a public service corporation, that question not being here involved". Id. at 461. The decision therefore applies only to the government or a governmental agency, and not to public service corporations which have the power of eminent domain.

Private property shall not be taken for public use without just compensation. U.S. CONST. amend. V; W. VA. CONST. art. III, § 9. The basic question in the principal case (assuming that the building of a toll bridge would be a violation of the restrictive covenants) is whether relators, by virtue of the building restrictions, are entitled to compensation from D, a governmental body, which