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The Ramifications of West Virginia's Codified Child Custody Law: A Departure from Garska v. McCoy

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I. **INTRODUCTION**

A ubiquitous precept in our legal system is that divorce and custody cases are tumultuous, invasive experiences for children. Their unrest is exacerbated when custody disputes are rancorous, and divorcing parents are contentious, distraught, and combative. As former West Virginia Supreme Court Jus-
tice Margaret Workman noted, "[D]ivorce is a widespread phenomenon and custody of children becomes at times a major battleground with deep emotional wounds to the children the frequent result." Given the brevity of youth and extent to which marital discord permeates children's lives, custody decisions need to be resolved as expeditiously as possible. Likewise, because custody indelibly affects children, their welfare has been the paramount factor in child custody laws.\(^2\) Notwithstanding this, before 1999, West Virginia's child custody law was devoid of statutory guidance and instead relied on a primary caretaker presumption established through stare decisis.\(^3\) Because judges are often inundated with cases and have only a limited perspective into a family's dynamic, making an objective, informed decision without statutory guidance is likely arduous. As the West Virginia Supreme Court commented, "[I]n custody disputes, it is often a power struggle between the parties to see who can provide the most evidence in support of his or her position. It becomes a bitter battle and eventually comes down to one party's word against the other."\(^4\) As this quotation insinuates, parents' animosity compromises their truthfulness with the court. If parents desire custody fervently enough, they might embellish facts or even lie in self-serving ways.

West Virginia totally revamped its child custody law during the 1999 legislative session, which will hopefully ameliorate judges' difficulties, ensure continuity and predictability for children, and eradicate arbitrary, biased, or capricious judicial decisions. Specifically, the West Virginia Legislature supplanted its former system with a statute propounding preferences and guidelines for child custody decisions.\(^5\) In contrast to the former primary caretaker presumption, the contemporary law favors a shared parenting arrangement when it is feasible, thereby fostering contact between children and their parents.\(^6\)

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3. This presumption was originally espoused by Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).


5. These changes were codified originally at W. Va. CODE §§ 48-11-101 to -603 (1999) (amended and recodified at W. Va. CODE §§ 48-9-101 to -604 (2003)).

Juxtaposing the two systems will hopefully illuminate the practical differences between them and will illustrate what repercussions the current law will engender. Furthermore, an analysis of case holdings decided under the former law will reveal the pragmatism of the contemporary law by illustrating how former opinions would be decided differently today.

Given the recentness of the statute’s enactment, little empirical data is available to indicate its application in cases. In fact, only one reported case, B.M.J. v. J.D.J.,\(^7\) mentions any of the statutory sections being examined. This should serve as a caveat for the reader in that this Article, by necessity, is largely speculative and based upon the prescriptive language in the statute. No assessment can be formulated yet as to what ambiguities, contradictions, and omissions judges will identify when construing the statute or the extent to which they will deviate from its terms.

II. THE FORMER CHILD CUSTODY STANDARD PROMULGATED BY GARSKA v. MCCOY

Before 1999, little statutory guidance was available in custody disputes. For instance, the 1981 *West Virginia Code* contained only terse remarks concerning child custody.\(^8\) Likewise, even as recently as 1998, the *West Virginia Code* included only a vague single paragraph to facilitate judges in deciding custody cases.\(^9\) The wide judicial latitude that these statutes provided impeded standardization in the law. Additionally, judges were likely influenced by personal mores they harbored and by the values they believed should be ingrained.

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\(^7\) 575 S.E.2d 272 (W. Va. 2002).
\(^8\) W. VA. CODE § 48-2-15 (1981) (repealed 1999) stated:

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.


(b) Upon ordering the annulment of a marriage or a divorce or granting of decree of separate maintenance, the court may further order all or any part of the following relief:

(1) The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, as may be appropriate under the circumstances. In every action where visitation is awarded, the court shall specify a schedule for visitation by the non-custodial parent; Provided, That with respect to any existing order which provided for visitation but which does not provide a specific schedule for visitation by the noncustodial parent, upon motion of any party, notice of hearing and hearing, the court shall issue an order which provides a specific schedule of visitation by the noncustodial parent; . . . .
in children. The absence of a child custody statute is apparent in a 1993 West Virginia Supreme Court opinion: "This Court has endeavored to provide lower courts with a myriad of factors to be considered in making the difficult primary caretaker determination." The reference to "This Court" illustrates that it was the West Virginia Supreme Court justices who acted as surrogate lawmakers in light of legislative tacitness, creating the "primary caretaker presumption" in awarding child custody. Originally espoused in the hallmark case of Garska v. McCoy, this presumption established the fundamental guideline for child custody decisions from 1981 until the 1999 amendment. Given the profound impact of Garska and its progeny, a concise recitation of the case's facts will provide insight into the court's rationale.

A. Garska's Facts and Holding

A man impregnated his girlfriend's fifteen-year-old daughter in Charlotte, North Carolina. While pregnant, she returned to reside with her grandparents in West Virginia, where she remained until her son Michael was born. The grandparents did not prevail in the adoption proceedings because they failed to satisfy the statutorily imposed six-month residency requirement with the child as a result of the mother's temporary absence from their home. Thereafter, the custody dispute revolved around the mother and father. Awarding custody to the father, the court enumerated several reasons why it so decided, including the father's superior education, intelligence, financial condition, appearance, command of the English language, and ability to provide a better social and economic environment than the natural mother. The mother appealed this decision.

Reversing the circuit court's decision, former Justice Richard Neely articulated a framework for judges to employ when making similar decisions. Most notably, the court held, "[T]he law presumes that it is in the best interests of such children to be placed in the custody of the primary caretaker, if he or she

12 Id. at 360.
13 Id.
14 Id. at 361.
15 Id.
16 Id.
17 Id.
18 Id. at 358.
19 Id. at 364.
The significance of "he or she" denotes that the court was repudiating the maternal preference announced in J.B. v. A.B., and was instead establishing a gender neutral standard based on which parent is the primary caretaker. The Garska court recognized that fathers sometimes occupy historically nontraditional roles and that the West Virginia Legislature "instructed us that such a gender based standard is unacceptable." Thus, the standard became gender neutral, which likely escaped the risk of encroaching on parents' equal protection rights. Professor Elizabeth Scott captures this evolution of gender roles when she writes, "[A]s more mothers entered the work force and more fathers assumed greater involvement with their children, a rule based on gender-role differentiation seemed less viable." Thus, as perceiving women solely in domesticated roles became passé and inaccurate, it became inane to presume automatically they were primary caretakers of children.

B. Definition of a "Primary Caretaker"

Garska defined a primary caretaker as "that natural or adoptive parent who, until the initiation of divorce proceedings, has been primarily responsible for the caring and nurturing of the child." To forestall litigation surrounding what duties comprise this role, Garska provided ten responsibilities to consider:

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.;

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20 Id. at 358, Syl. Pt. 2.
22 Garska, 278 S.E.2d at 361.
23 Id. at 360.
24 Id. at 361.
26 278 S.E.2d at 358, Syl. Pt. 3.
(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, and arithmetic.27

After listing these factors, the court was careful not to intimate that custody retention would necessitate a strict fulfillment of all ten considerations. Rather, the court noted, "[W]here the primary caretaker parent achieves the minimum, objective standard of behavior which qualifies him or her as a fit parent, the trial court must award the child to the primary caretaker parent."28 This comment suggests that a court will not have insurmountable, exacting expectations of a primary caretaker parent, and it heightens the proof necessary for the other parent to rebut the presumption successfully. Thus, so long as one parent met this minimum burden of competence, the other parent was only entitled to visitation with the child. Additionally, it is noteworthy that nowhere in the Gar ska opinion does the court draw a distinction between physical and legal custody. Instead, the two roles are presumably collapsed into the term "custody," which, in most cases, is awarded to the primary caretaker.

C. Limitations on the Primary Caretaker Presumption

While the primary caretaker preference applied to the facts of Garska, the presumption had two glaring exceptions. First, its purview extended only to children of "tender years."29 Admittedly, this term is very elastic in the potential ways it can be defined. However, the court commented that is does not apply to children "old enough to formulate an opinion about . . . custody."30 Hence, it seems safe to assume that after children entered school they were likely beyond the presumption's applicability.31 Second, the presumption only applied when the evidence demonstrates that a particular parent has served as a primary care-

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27 Id. at 363.

28 Id.

29 Id.

30 Id.

31 In David M. v. Margaret M., 385 S.E.2d 912, 920 (W. Va. 1989), the West Virginia Supreme Court of Appeals explicitly stated that "[c]hildren under six years of age are called 'children of tender years.'"
taker. For instance, the court remarked that "[I]n those custody disputes where the facts demonstrate that child care and custody were shared in an entirely equal way, then indeed no presumption arises." Additionally, using the duties the court furnished for identification of the primary caretaker parent, no presumption could arise in cases where the child was a newborn or when neither parent had expressed interest in the child. In sum, Garska established a child custody law for children who were of tender years and who had a parent occupying a primary caretaker role. All other cases were to be decided in terms of the children’s best interests.

As the examples in Part IV of this Article exemplify, Garska’s holding was monumental in establishing the guidelines for West Virginia courts to use in resolving custody issues. While it was tailored and interpreted to apply to varying fact patterns, its spirit remained intact, and courts frequently cited it as their roadmap until the West Virginia Legislature codified the existing law in 1999.

III. AN EXAMINATION OF WEST VIRGINIA’S CURRENT CODIFIED CHILD CUSTODY LAW

Even a brief perusal of the current child custody statute reveals its dissimilarity from the Garska precedent in a variety of facets. The current law is comprehensive and detailed, steering judges away from floundering with case precedent in determining how holdings apply in a given context. Obviously, a critique of the entire child custody statute is too unwieldy for this Article, and provisions related to modification, temporary parenting plans, abuse and neglect, and a myriad of other issues will not be broached. The statutes given in-depth attention in this discussion are the following: West Virginia Code sections 48-9-201, 48-9-206, 48-9-207, and 48-9-209. Other referenced current statutes include West Virginia Code sections 48-1-210, 48-1-235.2, 48-9-101, and 48-9-102.

A. Adoption of the American Law Institute Proposal

West Virginia’s pioneering step in adopting verbatim the American Law Institute’s proposal for child custody merits emphasis at the outset of a discussion of West Virginia’s child custody law. As Professor Katharine Bartlett notes, “[O]nly one state thus far, West Virginia, has specifically enacted a past-caretaking standard.” Viewed in this context, it is unsurprising that legislators,

32 Garska, 278 S.E.2d at 363.
33 Id.
34 Id.
36 Katharine T. Bartlett, U.S. Custody Law and Trends in the Context of the ALI Principles of
judges, and professors from outside the jurisdiction are as curious as our own inhabitants about the effectiveness and execution of this statute. In addition, it will be interesting to observe how much emphasis, if any, judges and practitioners bestow upon this origin when ruling or litigating.

B. W. Va. Code § 48-9-201

After listing the legislature's findings\(^2\) and the statute's objectives,\(^3\) the current child custody law obligates judges to defer to privately executed parenting agreements in most cases:

\(\text{the Law of Family Dissolution, 10 VA. J. SOC. POL'Y & L. 5, 16 (2002).}\)


(a) This article sets forth principles governing the allocation of custodial and decision-making responsibility for a minor child when the parents do not live together.

(b) The Legislature finds and declares that it is the public policy of this state to assure that the best interest of children is the court's primary concern in allocating custodial and decision-making responsibilities between parents who do not live together. In furtherance of this policy, the Legislature declares that a child's best interest will be served by assuring that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children, to educate parents on their rights and responsibilities and the effect their separation may have on children, to encourage mediation of disputes, and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or divorced.

\(^3\) Id. § 48-9-102 reads:

(a) The primary objective of this article is to serve the child's best interests, by facilitating:

1. Stability of the child;
2. Parental planning and agreement about the child's custodial arrangements and upbringing;
3. Continuity of existing parent-child attachments;
4. Meaningful contact between a child and each parent;
5. Caretaking relationships by adults who love the child, know how to provide for the child's needs, and who place a high priority on doing so;
6. Security from exposure to physical or emotional harm; and
7. Expeditious, predictable decision-making and avoidance of prolonged uncertainty respecting arrangements for the child's care and control.

(b) A secondary objective of article is to achieve fairness between the parents.
(a) If the parents agree to one or more provisions of a parenting plan, the court shall so order, unless it makes specific findings that:

(1) The agreement is not knowing or voluntary; or

(2) The plan would be harmful to the child.\(^{39}\)

Thus, West Virginia Code section 48-9-201 illustrates that the court will usually defer to the parents’ wishes regarding custodial allocation if they propose a plan to the court. This reflects the judicial embracement of family autonomy and the superior position that parents have in determining what is most ideal for their children.\(^{40}\) As Professor Karen Czapanskiy notes, “[I]t would be exceptional for a child’s caregivers not to know better than outsiders, including courts and court-appointed experts, what is best for the child in their care.”\(^{41}\) Thus, parents may determine what is best for their children so long as their reciprocal antagonism does not hinder them from reaching an agreement with their children’s best interests in mind. In fact, the statute states that if the parents agree to a parenting plan, the court shall order it in that form, unless it makes specific findings that the agreement is not knowing or voluntary or that the plan would be harmful to the child.\(^{42}\) Furthermore, even if the family law judge determines that the proposal fails under section 48-9-201(a), he or she still may not personally decide the custody issue. Instead, section 48-9-201(c) states that “[i]f an agreement, in whole or in part, is not accepted by the court under the standards set forth in subsection (a) of this section, the court shall allow the parents the opportunity to negotiate another agreement.”\(^{43}\) Thus, the judge is obligated to afford the parents an opportunity to renegotiate and develop an acceptable plan.

This language reflects a dramatic departure from the previous best interests standard announced in Garska. Employing a literal reading of this statute, a judicial finding that the proffered parenting plan is not in the child’s best interests is an insufficient basis for the court to rebuff it. Instead, assuming the agreement does not involve coercion, manipulation, trickery, or some other component mandating automatic invalidation, the judges must articulate some sound reason why the children will actually be harmed before they can refuse to enforce it. As previously mentioned, parents might present judges with very narrow, biased arguments of dubious veracity or objectivity. Hence, if parents

\(^{39}\) Id. § 48-9-201.

\(^{40}\) Bartlett, supra note 36, at 5-9.


\(^{43}\) Id.
can amicably agree to custodial responsibility, the courts typically must endorse the proposal. Ideally, it should be rarer for judges to rebut the proposal under this statute than under the more lenient best interest of the child evaluation of Garska. However, Professor Czapanskiy notes, "[C]ase law has shown that judges are apt to second-guess parental decisions in favor of the best interest of the child."44

Admittedly, the demarcation between a plan that harms children and one that is not in their best interests may seem obscure, but judges should be cognizant of the unquestionable distinction. Webster's Dictionary defines "harm" as "hurt; injury; damage,"45 which is indicative of something different than a "best interests standard." The word "interest" is synonymous with "advantage; welfare; benefit."46 Thus, a best interests standard focuses on what custody alternative will promote children's welfare and advantage and benefit them. Conceivably, a parenting plan could be innocuous by not damaging or hurting children without actually being in their best welfare. For instance, all other factors being equal, homes marred by poverty or limited educational opportunities might not be in the children's best interests, but it is more challenging to argue such environments are truly harmful. Therefore, under the new statute, judges must capitulate to the parents' wishes unless the children will actually be harmed, even though a more desirable option exists.


When parents do not submit a parenting plan, judges are no longer apt to show a primary caretaker preference. Instead, a judge's decision must comport with West Virginia Code section 48-9-206, which emphasizes the relative performance of past caretaking functions.47 The introductory language of this statute evidences a very different standard than that promulgated in Garska:

44 Czapanskiy, supra note 41, at 975.
45 WEBSTER'S NEW WORLD COLLEGE DICTIONARY 615 (3d ed. 1997).
46 Id. at 703.
47 W. VA. CODE § 48-1-210 (2003) reads:

(a) "Caretaker" means a person who performs one or more caretaking functions for a child. The term "caretaking functions" means activities that involve interaction with a child and the care of a child. Caretaking functions also include the supervision and direction of interaction and care provided by other persons.

(b) Caretaking functions include the following:

(1) Performing functions that meet the daily physical needs of the child. These functions include, but are not limited to, the following:

(A) Feeding;
(B) Dressing;
(C) Bedtime and wake-up routines;
Unless otherwise resolved by agreement of the parents under section 9-201 or unless manifestly harmful to the child, the court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation or, if the parents never lived together, before the filing of the action . . .

(1) To permit the child to have a relationship with each parent who has performed a reasonable share of parenting functions;

(2) To accommodate the firm and reasonable preferences of a child who is fourteen years of age or older, and with regard to a child under fourteen years of age, but sufficiently matured that he or she can intelligently express a voluntary preference for one parent, to give that preference such weight as circumstances warrant;

(3) To keep siblings together when the court finds that doing so is necessary to their welfare;

(D) Caring for the child when sick or hurt;
(E) Bathing and grooming;
(F) Recreation and play;
(G) Physical safety; and
(H) Transportation.

(2) Direction of the child’s various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence and maturation;

(3) Discipline, instruction in manners, assignment and supervision of chores and other tasks that attend to the child’s needs for behavioral control and self-restraint;

(4) Arrangements for the child’s education, including remedial or special services appropriate to the child’s needs and interests, communication with teachers and counselors and supervision of homework;

(5) The development and maintenance of appropriate interpersonal relationships with peers, siblings and adults;

(6) Arrangements for health care, which includes making medical appointments, communicating with health care providers and providing medical follow-up and home health care;

(7) Moral guidance; and

(8) Arrangement of alternative care by a family member, baby-sitter or other child care provider or facility, including investigation of alternatives, communication with providers and supervision.
(4) To protect the child’s welfare when, under an otherwise appropriate allocation, the child would be harmed because of a gross disparity in the quality of the emotional attachments between each parent and the child or in each parent’s demonstrated ability or availability to meet a child’s needs;

(5) To take into account any prior agreement of the parents that, under the circumstances as a whole including the reasonable expectations of the parents in the interest of the child, would be appropriate to consider;

(6) To avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child’s need for stability in light of economic, physical or other circumstances, including the distance between the parents’ residences, the cost and difficulty of transporting the child, the parents’ and child’s daily schedules, and the ability of the parents to cooperate in the arrangement;

(7) To apply the principles set forth in 9-403(d) [§ 48-9-403] of this article if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the amount of custodial responsibility that would otherwise be ordered under this section; and

(8) To consider the stage of a child’s development.48

Rather than even entertaining a debate about which parent is the primary caretaker, the statute favors an approximation test, whereby children spend the same proportion of time with each of their parents following divorce as they did previously. Under the current statute, traditional breadwinners are not deprived of the opportunity for joint legal custody of their children if they use the time they have available to execute parenting functions. This should ideally minimize debates about who spent more time with the children before the divorce because the parent having spent less than fifty percent of time with the children will not suffer any diminution in the time spent with them after divorce.

This disinclination to award sole custody definitely differs from Garska, where the court awarded custody of the child to his mother.49 Under Garska, a parent having spent a substantial amount of time with a child but less than the

48 Id. § 48-9-206.
other parent would only be entitled to visitation. As Professor Bartlett observes, “[t]he primary caretaker presumption assumes as a fact that a primary caretaker existed, and then assumes as a state norm that one parent should have primary custody at divorce . . . . Under the ALI approach, past arrangements – whatever they were – are to guide post-divorce arrangements.”

The apparent legislative purpose of section 48-9-206 is to promote stability in children’s lives so that they spend the same amount of time with their parents following divorce as they did before separation. While this goal seems laudable, whether family court judges will subscribe to it is uncertain. For example, judges might contend that the best interests of children standard should still be the paramount factor in awarding custody. However, the best interests standard should only be employed whenever a child lacks sufficient caretaking history for judicial guidance or when a plan formulated under the introductory paragraph is manifestly harmful to the child:

(c) If the court is unable to allocate custodial responsibility under subsection (a) of this section because the allocation under that subsection would be manifestly harmful to the child, or because there is no history of past performance of caretaking functions, as in the case of a newborn, or because the history does not establish a pattern of caretaking sufficiently dispositive of the issues of the case, the court shall allocate custodial responsibility based on the child's best interest, . . . preserving to the extent possible this section's priority on the share of past caretaking functions each parent performed.

It is no coincidence that “manifestly harmful to the child” is the same language used in section 48-9-201, and the words denote something far different than a best interests standard. Once again, a judge’s belief that the favored standard produces a result that is not in the children’s best interest is inadequate to modify this outcome. Only when the result produces harm for the child may the judge use the best interest standard. This interpretation of section 48-9-206 is further buttressed by the word “shall” in the introductory paragraph, suggesting that application of the statute is mandatory and not merely discretionary.

Had the legislature chosen to make compliance optional, it would have irrefutably inserted different verbiage like “may” or “can.”

Furthermore, while the statute endeavors to promote stability in children’s lives by avoiding a best interests standard, judges may not agree that the statute furthers this objective. Judges might believe that a disruption in where a

50 Bartlett, supra note 36, at 18.
52 Id.
53 Id.
child sleeps, eats meals, performs schoolwork, etc. constitutes manifest harm to a child. Accordingly, they might consider the logistics of an arrangement following the approximation test unacceptable and be able to justify not observing the introductory paragraph of section 48-9-206. For example, if parents reside near one another (e.g., in the same school district), it might be quite feasible, even practical, for a child to spend multiple nights a week with each parent. In fact, in situations where parents have devoted a relatively equal amount of time to caretaking functions before separation, this scenario is probably what the legislators actually envisioned.\(^54\) However, if judges believe that continuity of residence is indispensable to a child’s welfare, they may believe that any custody arrangement compromising this will be manifestly harmful to the child and therefore award minimal or no overnight time with one parent. Thus, the way the statute is verbalized, well-intentioned judges might ironically depart from the statute’s intention while attempting to satisfy it.

In marked contrast, under Garska, when no parent could be deemed a primary caretaker or when a child was no longer of “tender years,” the court applied a best interest standard.\(^55\) In other words, the fit primary caretaker presumption discussed in Garska applied only when there was an identifiable person who satisfied the characteristics of such a role for a child below school age.\(^56\) In cases where neither parent could be termed a primary caretaker and in cases where the child was old enough not to be classified under the flexible tender years age, the court still suggested applying a best interest standard.\(^57\) Now, however, the best interest standard is only prescribed to the extent that the statutory factors listed fail to cultivate an acceptable plan. It is disfavored and is merely a fallback position.

**D. W. Va. Code § 48-9-207**

Yet another departure current custody law makes from the Garska standard is the presumption created in favor of awarding joint decision-making responsibility.\(^58\) This language differs tremendously from the Garska standard of a primary caretaker preference.

(a) Unless otherwise resolved by agreement of the parents under section 9-201, the court shall allocate responsibility for making significant life decisions on behalf of the child, including the child’s education and health care, to one parent or to two

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\(^{54}\) *Id.* § 48-1-210.


\(^{56}\) *Id.*

\(^{57}\) *Id.*

parents jointly, in accordance with the child's best interest, in light of:

(1) The allocation of custodial responsibility under section 9-206 [§ 48-9-206] of this article;

(2) The level of each parent's participation in past decision-making on behalf of the child;

(3) The wishes of the parents;

(4) The level of ability and cooperation the parents have demonstrated in decision-making on behalf of the child;

(5) Prior agreements of the parties; and

(6) The existence of any limiting factors, as set forth in section 9-209 [§ 48-9-209] of this article.

(b) If each of the child's legal parents has been exercising a reasonable share of parenting functions for the child, the court shall presume that an allocation of decision-making responsibility to both parents jointly is in the child's best interests. The presumption is overcome if there is a history of domestic abuse, or by a showing that joint allocation of decision-making responsibility is not in the child's best interest.59

The current statute is not even an approximation guideline. Rather, it favors joint legal custody anytime parents have exhibited a reasonable, albeit unequal, share of parenting functions, which are statutorily defined.60

59 Id.
60 Id. § 48-1-235.2 reads:

Parenting functions means tasks that serve the needs of the child or the child's residential family. Parenting functions include caretaking functions, as defined in section 48-1-210. Parenting functions also include functions that are not caretaking functions, including:

A. Provision for economic support;

B. Participation in decision-making regarding the child's welfare;

C. Maintenance or improvement of the family residence, home or furniture repair, home-improvement projects, yard work and house cleaning;

D. Financial planning and organization, car repair and maintenance, food and clothing purchasing, cleaning and maintenance of clothing, and other tasks supporting the consumption and savings needs of the family; and
one or both of the parents have not done so will the court even look to the six considerations listed in subsection (a) of section 48-9-207. The way the statute is styled, subsection (b) is the preferred outcome, and subsection (a) is only used when subsection (b) is inapplicable. The preference ensures that those parents who have helped support their children will not be muzzled when it comes to influencing post-divorce monumental decisions for the child (e.g., education, dating and socializing, driving, health issues, etc.).

For instance, suppose a parent spent ten percent of pre-separation time with the child. However, further assume that the parent was the family breadwinner, maintained the family home and finances, and furnished transportation and apparel for the child. Under these circumstances, that parent would be awarded joint custody for the child’s significant life decisions. Accordingly, section 48-9-207 is utterly independent from section 48-9-206, and the two statutes should be addressed separately. Under the primary caretaker preference, even if the noncustodial parent had executed a reasonable share of parenting functions, significant decision-making was still vested with the primary caretaker parent because custody encompassed both physical and legal custody. Thus, section 48-9-207 harmonizes with the legislative purposes of continuing contact between parents and children and encouraging parents to share in the rights and responsibilities of rearing their children following separation.


Next, Garska v. McCoy only insisted that a primary caretaker fulfill a minimum standard of parental competence. Oppositely, West Virginia Code section 48-9-209 lists conduct that will diminish or even eliminate parents’ custody, which indicates the legislature’s steadfast commitment to vigilantly safeguarding children. The statute states:

(a) If either of the parents so requests, or upon receipt of credible information thereof, the court shall determine whether a parent who would otherwise be allocated responsibility under a parenting plan:

(1) Has abused, neglected or abandoned a child, as defined by state law;

61 Id. § 48-9-207.
62 See generally Garksa, 278 S.E.2d 357.
64 278 S.E.2d at 363.
(2) Has sexually assaulted or sexually abused a child as those terms are defined in articles eight-b and eight-d [§§ 61-8B-1 et seq. and §§ 61-8D-1 et seq.], chapter sixty-one of this code;

(3) Has committed domestic violence, as defined in section 27-202 [§ 48-27-202];

(4) Has interfered persistently with the other parent's access to the child, except in the case of actions taken for the purpose of protecting the safety of the child or the interfering parent or another family member, pending adjudication of the facts underlying that belief; or

(5) Has repeatedly made fraudulent reports of domestic violence or child abuse.

(b) If a parent is found to have engaged in any activity specified by subsection (a) of this section, the court shall impose limits that are reasonably calculated to protect the child or child's parent from harm. The limitations that the court shall consider include, but are not limited to:

(1) An adjustment of the custodial responsibility of the parents, including the allocation of exclusive custodial responsibility to one of them...

(c) If a parent is found to have engaged in any activity specified in subsection (a) of this section, the court may not allocate custodial responsibility or decision-making responsibility to that parent without making special written findings that the child and other parent can be adequately protected from harm by such limits as it may impose under subsection (b) of this section...

In short, if the parent commits any of the conduct specified in section 48-9-209(a), the approximation preference is overridden, and judges must impose limitations on that parent's access to the child. This could yield a complete termination of custodial responsibility or decision-making responsibility if the court deems it prudent. Once again, the vital word is "shall," which divests
judges of discretion in the matter. 68 Interestingly, the third factor is domestic violence commission. 69 As it is statutorily defined, its scope extends not only to physical assaults upon children, but also to any behavior directed to a household member that elicits even a reasonable apprehension of physical harm. 70 Hence, even conduct some might not consider egregious enough to warrant custody deprivation will strip people of contact with their children. The perpetrator need not have directed any wrongful acts toward children specifically nor physically harmed anyone for the court to intervene and deny or reduce custody or visitation. Under the former case precedent, a parent would only be disadvantaged in custody matters if the conduct deleteriously affected the child. 71 While reprehensible conduct (e.g., spousal abuse) of which the child was oblivious could be a factor in custody issues, it did not create an irrebuttable presumption that a parent’s contact with a child must be reduced like section 48-9-209 does. 72

Given the recentness of this legislative amendment, there is naturally a paucity of cases and other empirical information that reflect how the statute has been implemented and whether family court judges have abided by its literal language. Thus, any prediction the author posits is naturally conjectural. Nevertheless, practicing attorneys must work within the confines of this statute

68 Id.
69 Id.
70 Id. § 48-27-202 reads:

“Domestic violence” or “abuse” means the occurrence of one or more of the following acts between family or household members, as that term is defined in section 27-204 [§ 48-27-204]:

(1) Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons;
(2) Placing another in reasonable apprehension of physical harm;
(3) Creating fear of physical harm by harassment, psychological abuse or threatening acts;
(4) Committing either sexual assault or sexual abuse as those terms are defined in articles eight-b [§§ 61-8B-1 et seq. and 61-8D-1 et seq.] and eight-d, chapter sixty-one of this code; and
(5) Holding, confining, detaining or abducting another person against that person’s will.

72 For instance, in Henry v. Johnson, 450 S.E.2d 779, 783 (W. Va. 1994), the court stated that,

[1]n the findings underlying West Virginia’s domestic violence statute, the state legislature recognized that: “[c]hildren are often physically assaulted or witness violence against one of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence.” W.Va.Code, 48-2A-1(a)(2) [1992]. Consequently, a family law master should take domestic violence into account when making an award of temporary custody.”
when representing clients in the custody arena. Consequently, they might be served well by an exploration of how cases decided in the Garska era (1981 - 1999) might have different outcomes under the current statute if family court judges strictly follow its literal terms. This will hopefully intertwine the theory of statute with the reality of practice.

IV. A JUXTAPOSITION OF THE TWO STANDARDS: REVEALING THE DISPARITY BY EXPLORING HOW PAST CASES WOULD BE DECIDED DIFFERENTLY TODAY

Shepardizing Garska v. McCoy revealed that at least seventy West Virginia child custody cases from the 1980s and 1990s refer to it. Examining a few cases decided under the earlier standard should underscore the inconsistencies between West Virginia’s current and former child custody laws.

A. David M. v. Margaret M.

In David M. v. Margaret M., the court articulated requirements for a primary caretaker when it considered whether the mother’s adultery disqualified her from being awarded custody of a child when she was his primary caretaker. The circuit court answered the query affirmatively, but the West Virginia Supreme Court of Appeals reversed. The court regarded this misconduct as an untenable basis for custody deprivation and stated that it was “not concerned with assessing relative degrees of fitness between the two parents such as might require expert witnesses, but only with whether the primary caretaker achieves a passing grade on an objective test.” Thus, even if the father were flawless in his conduct, so long as the mother’s mistakes were not appalling enough to justify her not having custody, she would be awarded sole custody of the child. This demonstrates the degree to which courts were inclined to keep custody with the primary caretaker. In awarding sole custody to the mother, the court even acknowledged that “the father assisted in some of the cooking, and both parents were responsible for disciplining, educating and teaching general manners and elementary skills.” Rather than permitting this to advantage the father in the custody contest, the court said, “Once the primary caretaker has been identified, the only question is whether that parent is a ‘fit parent.’” The court then spelled out a guideline for determining this:

73 385 S.E.2d 912.
74 Id. at 914.
75 Id.
76 Id. at 924.
77 Id. at 927.
78 Id. at 924.
To be a fit parent, a person must:

1) feed and clothe the child appropriately;

2) adequately supervise the child and protect him or her from harm;

3) provide habitable housing;

4) avoid extreme discipline, child abuse, and other similar vices; and

5) refrain from immoral behavior under circumstances that would affect the child.\(^7\)

Using this as a guideline, courts could have unarguably made a custody determination without even delving into past caretaking roles by both parents and making a comparative analysis of their fitness. If the primary caretaker parent achieved this minimum bar of adequacy, the other parent’s pre-separation behavior became impertinent for child custody purposes. In contrast, the current statute emphasizes the relative parental contributions rather than minimum bars that the primary caretaker must satisfy to earn custody.\(^8\) Therefore, the meritorious father would be awarded custody of the child in direct proportion to the amount of time before separation he spent performing the duties mentioned. No longer would he have to allege misconduct of his estranged wife to be with his child.

B. McDougal v. McDougal

In McDougal v. McDougal,\(^8\) the Circuit Court of Marion County awarded joint legal custody of the children notwithstanding the vociferous objections of the mother, who was adjudged the primary caretaker.\(^9\) Reversing the circuit court, the West Virginia Supreme Court held that it was inappropriate to do this when the primary caretaker objected.\(^10\) In fact, the court even remarked, “[W]e find that it was entirely inappropriate for the circuit court to have considered the joint custody question in the first place.”\(^11\) This comment re-
fects the deference that a court in 1992 gave the primary caretaker's wishes. Here, the court declared that when such a person opposed joint custody, the court was precluded from even considering the issue.\textsuperscript{85} Thus, the court awarded sole custody to the mother.\textsuperscript{86} Conversely, under the current statute, the court would attempt, if at all possible, for the child's time with each parent after separation to replicate the time spent with each parent before separation.\textsuperscript{87} No longer should the court be willing to award sole custody to the mother without explaining its rationale under the statute.

C. Lowe v. Lowe

In Lowe v. Lowe,\textsuperscript{88} the West Virginia Supreme Court considered the option of awarding joint custody when a certified question was posed to it.\textsuperscript{89} The court responded by saying that such an award is permissible, but only when the parents can agree on the logistics of the arrangement when joint custody promotes the child's welfare.\textsuperscript{90} The court explained, "Thus, this Court has repeatedly found joint custody to be inappropriate when each parent seeks exclusive custody of the child or either parent contests the other parent's petition for custody."\textsuperscript{91} In fact, even if the parties were capable of submitting a plan for joint custody to which they both consented, the court was vested with complete discretion to reject this plan.\textsuperscript{92} The court declared, "[S]uch an agreement, however, cannot be binding on a court in determining custody issues, since the welfare of the child controls this determination . . . . The court shall . . . consider the proposed joint parenting agreement in making its custody decision and shaping the relief granted in the divorce order."\textsuperscript{93} In short, under the former system, a proposed parenting plan was merely one alternative that a court could consider. Even assuming amiable parents reached the plan cooperatively, the court would still not rubber stamp the agreement. Rather, the court still had to decide whether "the joint custody arrangement proposed by the parties was in the best interest of the child."\textsuperscript{94}

\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{88} 370 S.E.2d 731 (W. Va. 1988).
\textsuperscript{89} Id. at 733.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 734.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
In contrast, if such a proposal were proffered to the court today, section 48-9-201 would bind the judge to implement it absent it being submitted unknowingly or involuntarily or it being harmful to the child.\textsuperscript{95} As mentioned, if these two prerequisites are satisfied, the court is disallowed from denying enforcement of the plan simply because it can fashion a more ideal remedy for the child. Hence, if a court today were certified with a similar question, the court would respond not only that joint custody can be granted, but also that it shall be granted if the proposal satisfies the test of section 48-9-201. No longer are judges authorized to make the plan’s effect contingent upon a finding that it is in the child’s best interests or upon other improvised criteria.

D. Kenneth L.W. v. Tamyra S.W.

In \textit{Kenneth L.W. v. Tamyra S.W.},\textsuperscript{96} the West Virginia Supreme Court reversed an award of custody of two children, ages six and three, to the father and instead awarded custody to the mother.\textsuperscript{97} The family law master found “evidence regarding primary caretaker status to be conflicting and determined that neither party was entitled to the primary caretaker presumption.”\textsuperscript{98} Then, after considering the mother’s two adulterous relationships during the marriage, the family law master found that the children’s best interests would be served by awarding custody to the father.\textsuperscript{99} The mother appealed.\textsuperscript{100} Regarding the adultery, the court declared, “[I]n resolving a child custody issue, this Court will not concern itself with the adulterous conduct of a parent absent a deleterious effect upon the children.”\textsuperscript{101} It then determined that while the circuit court failed to designate a primary caretaker, the evidence established that the mother earned this title through her pre-separation care for the children.\textsuperscript{102} The court seemed to be suggesting that even if the noncustodial parent’s morality and wholesomeness were impeccable, the primary caretaker still deserved custody, so long as his or her promiscuity did not affect the children. Consequently, the court granted the mother custody of the children, instructing the parents to “endeavor to fashion a plan of transition of custody designed to minimize any unsettling effects on the children’s lives.”\textsuperscript{103}

\textsuperscript{95} See W. VA. CODE § 48-9-201 (2003).
\textsuperscript{96} 408 S.E.2d 625 (W. Va. 1991).
\textsuperscript{97} Id. at 626.
\textsuperscript{98} Id. at 627.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 628.
\textsuperscript{102} Id. at 629.
\textsuperscript{103} Id. at 630.
While the West Virginia Supreme Court's regard for the children's stability is commendable today, this directive for a transition of custody would hopefully be unnecessary today. The entire issue would be less likely to reach a court because of the preference for reasonable contact with both parents. A family law judge would find that both parents had exhibited parenting functions and award joint legal custody per section 48-9-207. Regarding allocation of custodial responsibility, the judge would simply calculate the percentage of time that each parent had spent with the children before separation. Then, he or she would devise an arrangement that mimicked this time allotment. An appeal that the court failed to declare a primary caretaker would be futile because this designation is no longer determinative in the upshot of custody arrangements. Therefore, parents would have the mental serenity of knowing that they could maintain the amount of time they spend with their children without having the sordid issue of adultery even surfacing in court.

E. Loudermilk v. Loudermilk

A quintessential example of the entirely different way in which courts rationalized their way through custody decisions in the past is Loudermilk v. Loudermilk. Regarding the couple's four-and-one-half-year-old child, "the law master and circuit court found that parenting duties were shared and that both parents are fit custodians." Consequently, the circuit court was unable to cast one parent as the primary caretaker and "concluded that the best interests of the child would be served by awarding legal custody to Mr. Loudermilk with very liberal visitation rights to Mrs. Loudermilk." This holding granted the mother physical custody every other week. The West Virginia Supreme Court affirmed but cautioned that "this case is right on the border of our rule prohibiting court-ordered joint custody[,]" a rule expressed in David M. v. Margaret M. The court's customary disdain for ordering joint custody was mitigated here for several reasons. First, unlike most cases, neither parent was the single primary caretaker. Second, this type of shared physical custody

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105 See id. § 48-1-235.2.
106 397 S.E.2d 905 (W. Va. 1990).
107 Id. at 906-07.
108 Id. at 907.
109 Id. at 906.
110 Id.
112 Loudermilk, 397 S.E.2d at 906-07.
worked acceptably during the preceding two years under an interim order.\textsuperscript{113} Lastly, the parents resided near one another, which facilitated the arrangement by causing no disruption in the child's schooling, friendships, social activities, etc.\textsuperscript{114} In explaining that this was an atypical holding, the court reiterated its earlier sentiment: “[W]e emphasize, however, that this is a narrow exception to our strong precedent disallowing involuntary joint custody.”\textsuperscript{115}

Incontrovertibly, if a court were deciding the same issues and adhered to our contemporary statute, the entire decision-making process would differ. In \textit{Loudermilk}, the court first sought a primary caretaker.\textsuperscript{116} Having found none, it then looked to the child's best interests.\textsuperscript{117} This led the court to grant the father sole legal custody to avoid the violent disagreements between parents regarding the child's life-altering decisions.\textsuperscript{118} Furthermore, it spurred the court to give the mother and father alternating weeks with the child.\textsuperscript{119} Today, the reasoning might go as follows: First, under section 48-9-206, the court would not even contemplate which parent was the “primary caretaker.” Rather, to decide the children's physical custody, the court would use the approximation objective in the section's introductory paragraph, which would produce an arrangement similar to what the court in \textit{Loudermilk} devised.\textsuperscript{120} Going to the best interests fallback position would be needless because the parents' close proximity to one another would prevent manifest harm to the child and because there is a caretaking history.\textsuperscript{121} Furthermore, a contemporary court would likely find that joint legal custody should be awarded under section 48-9-207(b) because both parents exercised a reasonable share of parenting functions.\textsuperscript{122} Thus, unlike in \textit{Loudermilk}, the mother would not be deprived of input in significant life decisions for her child. In sum, although the physical custody outcomes would be similar, the legal custody issues would not. More importantly, the courts' methods in arriving at their decisions would be utterly dissimilar.

\textsuperscript{113} Id. at 907.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 906.
\textsuperscript{117} Id. at 907.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 906.
\textsuperscript{121} See \textit{id}.
\textsuperscript{122} See \textit{id.} § 48-9-207(b).
F. Rhodes v. Rhodes

In *Rhodes v. Rhodes*, the West Virginia Supreme Court reversed a circuit court’s award of custody to the children’s father because it found that the mother had been the primary caretaker for the majority of the children’s lives. Here, the father was employed when the children were young, and the mother stayed home with them. Then, when the family declared bankruptcy, the mother sought and secured a position with the United States Department of Defense in Germany. While the family was residing abroad, the father stayed at home with the children while the mother worked. Eventually, the father returned to the United States, while the mother continued to reside with the children in Germany. Significantly, the court found that “both parties are certainly fit caretakers of the children,” yet it awarded custody to the mother in Germany. Under the existing statute, the activities and functions in which the father participated are “caretaking functions” under the introductory clause of section 48-9-207. The father’s active role in the children’s lives and fulfillment of caretaking functions would definitely bolster his chances of being awarded at least joint legal custody, providing him with input in the children’s significant life decisions.

G. Shearer v. Shearer

In *Shearer v. Shearer*, the West Virginia Supreme Court reversed the circuit court’s award of custody to the father and instead awarded it to the mother. After reviewing extensive evidence of the parents’ conduct during the three-year-old child’s life, the family law master concluded that neither parent was entitled to the primary caretaker presumption. However, the court awarded custody to the father because he had more local family members, had completed his education, was gainfully employed, and was better off financially.

123 449 S.E.2d 75 (W. Va. 1994).
124 Id. at 76.
125 Id.
126 Id.
127 Id.
128 Id. at 76-77.
129 Id. at 78.
130 See W. VA. CODE § 48-1-210(b) (2003).
131 448 S.E.2d 165 (W. Va. 1994).
132 Id. at 165-66.
133 Id. at 166.
than the mother.\footnote{Id. at 166-67.} The court considered the mother's appeal two years after the circuit court's judgment.\footnote{See generally id.} On appeal, the court noted that the mother had been the child's almost exclusive caregiver during the first six or seven months of his life.\footnote{Id. at 168.} Thereafter, despite the father's active role in the child's life, the court believed that the evidence clearly established the mother as the primary caretaker.\footnote{Id. at 168-69.} Accordingly, the court transferred the child from the father to the mother's custody and, acknowledging the father's fitness as a parent, suggested that he have liberal visitation.\footnote{Id. at 168-70.}

Were this divorce to happen today, it would have flowed much more smoothly for everyone involved, especially the child. Because both parents performed parenting functions, section 48-9-207(b) would direct that the parents be awarded equal responsibility in making significant life decisions for the child.\footnote{See W. Va. Code § 48-1-235.2 (2003).} In addition, under the approximation test, neither parent should feel compelled to demonstrate why he or she is more deserving of custody.\footnote{See id. § 48-9-206.} Because both parents spent significant time with their son before separating, the family law judge would ideally award them equal time with their son following divorce. Not only would this minimize competition between divorcing parents, but it also would have prevented a three-year-old from being placed in his father's home for two years, and then being transplanted to his mother's abode at age five. During the two years between the circuit court's ruling and the West Virginia Supreme Court's reversal, the child could have grown accustomed to staying an equal amount of time at both homes and not suffered the trauma of residing for two-fifths of his life in one home and then being abruptly moved. Lastly, the current law would be fairer for the parents. The statute contains a secondary objective of achieving fairness between the parents, and this is more attainable here through section 48-9-206's directive of shared parenting.\footnote{Id. § 48-9-102.} Unlike in Shearer, a mother would not have to fight for two years to be with her son extensively, and a father who had cared for his son for two years would not be ordered to surrender his child.
V. CONCLUSION

As this discussion demonstrates, a dramatic evolution has occurred, and inevitably will continue, in West Virginia child custody laws. The sample of cases decided under Garska v. McCoy cogently reveals that the statutory change in West Virginia is more than an esoteric, theoretical change in the law. Assuming family court judges adhere to its directive, they will decide cases very differently than judges abiding by the Garska standard. The current law assures that judges will not embark on an unguided journey when determining custody issues and ideally forbids judges from inserting their own preconceived biases, mores, convictions, and emotions as the dominant forces in their decisions. Moreover, the current statute seeks to immunize families from judicial intervention, thereby suggesting that, whenever possible, family autonomy should shape the results of child custody disputes. When this is impossible, the West Virginia Code now lists comprehensive, detailed instructions to lead judges. If judges adhere to black letter law before them, the statute’s paramount objective of promoting children’s welfare will be realized. Nonetheless, while this statute is alluring theoretically, how well it will function practically is still uncertain.

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