IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1993 Term

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No. 21474

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PATRICIA ANN S.,
Plaintiff Below, Appellant

v.

JAMES DANIEL S.
Defendant Below, Appellee

Appeal from the Circuit Court of Raleigh County
Honorable Robert A. Burnside, Jr., Judge
Civil Action No. 90-D-3529-B

AFFIRMED, IN PART;
REMANDED, WITH DIRECTIONS.

Submitted: May 5, 1993
Filed: July 21, 1993

Mary Ellen Griffith
Princeton, West Virginia
Attorney for the Appellant

H. L. Kirkpatrick, III
Beckley, West Virginia
Attorney for the Appellee

This Opinion was delivered PER CURIAM.

Chief Justice Workman dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "If the trial court is unable to establish that one parent has clearly taken primary responsibility for the caring and nurturing duties of a child neither party shall have the benefit of the primary caretaker presumption." Syl. pt. 5, Garska v. McCoy, 167 W. Va. 59, 278 S.E.2d 357 (1981).

2. "When a trial court finds that: (1) there is no primary caretaker parent before divorce; (2) both parents are fit parents; and, (3) both parents live geographically close to one another, it is not error to award legal custody to one parent but to allow visitation to the other parent during each alternate week of the year." Syl. pt. 1, Loudermilk v. Loudermilk, 183 W. Va. 616, 397 S.E.2d 905 (1990).

3. "'"Questions relating to alimony and to the maintenance and custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syllabus, Nichols v. Nichols, 160 W. Va. 514, 236 S.E.2d 36 (1977).' Syllabus, Luff v. Luff, 174 W. Va. 734, 329 S.E.2d 100 (1985)." Syl. pt. 8, Wyant v. Wyant, 184 W. Va. 434, 400 S.E.2d 869 (1990).

4. "'When the record in an action or suit is such that an appellate court can not in justice determine the judgment that should be finally rendered, the case should be remanded to the trial court for further development.' Point 2, Syllabus, South Side Lumber

Co. v. Stone Construction Co., 151 W. Va. 439 [152 S.E.2d 721]." Syllabus, Painter Motors, Inc. v. Higgins, 155 W. Va. 582, 185 S.E.2d 502 (1971).

Per Curiam:

This action is before this Court on appeal from the February 14, 1992, order of the Circuit Court of Raleigh County, West Virginia, which granted the parties a divorce upon the grounds of irreconcilable differences. The circuit court awarded custody of the parties' three children, Jason Clark, now fourteen years old; Justin Scott, now eleven years old; and Jennifer Elyse, now seven years old, to the appellee, James Daniel S.[1] On appeal, the appellant, Patricia Ann S., asks that this Court reverse the decision of the circuit court insofar as that she be granted custody of the children. This Court has before it the petition for appeal, all matters of record, and the briefs of counsel. For the reasons stated below, the judgment of the circuit court is affirmed, in part, and this case is remanded, with directions.

I

The parties were married on February 4, 1967, in Beckley, Raleigh County, West Virginia. Three children were born of the marriage. The appellant was a kindergarten school teacher but left her employment upon the birth of their first child. The appellee is an architect.

The appellant instituted this civil action by filing a complaint on July 25, 1990. A temporary order was entered on November 28, 1990. The appellee was granted temporary custody of the parties'

[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. See In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991).

two sons, and the appellant was granted temporary custody of the parties' daughter. The parties appeared before the family law master on numerous occasions. On January 10, 1992, the family law master submitted his recommended decision to the circuit court. Among other things, the family law master recommended that the appellee be awarded custody of the three children. Both of the parties submitted their exceptions to the circuit court regarding the family law master's recommendations.

On February 14, 1992, the circuit court judge affirmed the findings of fact and conclusions of law as recommended by the family law master.

On March 18, 1992, the circuit court judge granted the appellant's motion to stay the execution of the final order, and custody of Jennifer remained with the appellant for an additional ninety days. Following the expiration of the ninety-day period, the appellant moved to extend the appeal period and she renewed her motion to stay the execution of the final order. On July 16, 1992, the appellant was granted a thirty-day extension in which to file an appeal with this Court. Her request for an extension or continuance of the order staying the execution of the final order was denied. Since July 16, 1992, to the present, the appellee has had custody of Jennifer.

It is from the February 14, 1992, order of the circuit court that the appellant appeals to this Court.

II

The primary issue in this case is the appellant's contention that she should be awarded custody of the parties' children. In support of the appellant's contention, she cites three points of error committed by the circuit court in granting custody to the appellee: (1) the circuit court erred in failing to find that the appellant was the primary caretaker; (2) the circuit court erred in utilizing psychological experts prior to the circuit court's determination as to who was entitled to the status of primary caretaker;[2] and, (3) the circuit court erred in granting custody of the children to the appellee.

The appellant's first argument is that the circuit court erred in failing to find the appellant was the primary caretaker of the three children. The circuit court found that both parties were fit parents and they shared the child care duties; thus, neither party was granted the status of primary caretaker.

The parties agree that the guidelines for establishing custody are clearly set forth in Garska v. McCoy, 167 W. Va. 59, 278 S.E.2d 357 (1981). We defined primary caretaker, in syllabus point 3 of Garska, 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." The law presumes that

[2]We note that the parties challenged only the final ruling of the recommended order of the family law master and not the sufficiency of that order.

it is in the best interests of young children to be placed in the custody of the primary caretaker. Id. at syl. pt. 2. It is the circuit court's responsibility to determine which parent is the primary caretaker. Id. at syl. pt. 4. In Garska, we listed the factors to be considered by the circuit court in making this determination. However, in syllabus point 5 of Garska, we pointed out, "[i]f the trial court is unable to establish that one parent has clearly taken primary responsibility for the caring and nurturing duties of a child neither party shall have the benefit of the primary caretaker presumption."

It is clear from the evidence that the parties shared the primary caretaker duties as discussed in Garska. While the evidence presented established the fact that the appellant was the homemaker and the appellee was the wage earner, this Court has recognized that the length of time a parent has alone with a child is not determinative of whether the primary caretaker presumption should attach. See Dempsey v. Dempsey, 172 W. Va. 419, 306 S.E.2d 230 (1983). The appellant was at home for the children when they would return from school while the appellee would work throughout the day. However, the appellee was also a substantial participant in the child care duties once he came home from work.

With respect to the child care duties, the appellant testified that she was a night person, meaning she would stay up late at night and sleep later in the morning. As a result, both parties testified that the appellee would be responsible for getting the boys

ready for school and fixing their breakfast. Both parties further testified that the appellant would primarily plan and prepare the evening meals on the weekdays, but on the weekends the appellee would often prepare the evening meals. The parties also testified that they shared the responsibility for getting the children ready for bed each night.

In terms of school and social activities for the children, the evidence is indicative of the fact that both parties were active in their childrens' social lives. The appellant; Natalie Blankenship Coots, Jason's sixth grade teacher; and Joyce Mills, Jason's and Justin's second grade teacher, testified that the appellant participated in PTO (Parent Teacher Organization) meetings and school activities. Mrs. Mills also testified that the appellee was involved with the childrens' school activities; and, the appellee testified that he was instrumental in helping the children with their homework in the evenings.

Furthermore, each parent organized and participated in social activities with the children. The appellant; Mrs. Peggy Giompalo, whose mother lived in the same neighborhood as the appellant and appellee; and Mrs. Anita Allen, the appellant's cousin, testified that the appellant would organize birthday parties for the children, and she would often host pool parties for the children and their friends at the parties' home. On the other hand, the appellee would arrange and participate in camping, hiking and biking trips as well as other sporting events with the children as attested to by the appellee;

the appellant; Nancy Jo S., the appellee's sister-in-law; and Reese and Ron Webb, Jr., the appellee's sister and brother-in-law.

Finally, the evidence suggests that the parties shared in the responsibility of disciplining the children. The appellee admitted that he used a belt to whip the boys, but he stated that he used his hand to whip Jennifer. The appellant, however, stated that she no longer uses the belt to whip the children. Rather, the appellant testified that she had attended parenting classes, and as a result, she employed a new method of discipline such as taking away the childrens' privileges and grounding them for their wrongdoings.

The circuit court found, and we agree after reviewing the record and the relevant testimony, that neither party is entitled to the status of primary caretaker because the child care duties were shared equally by the parties. Therefore, the issue of custody properly rests on the best interests of the child. See, e.g., Dempsey, 172 W. Va. at 420, 306 S.E.2d at 231 ("In view of the fact that the primary caretaker presumption was inapplicable, the trial judge turned to a determination of which parent was better suited to have custody of [the child]. The best interests of the child must be the court's guide in this determination.") See also Loudermilk v. Loudermilk, 183 W. Va. 616, 618, 397 S.E.2d 905, 907 (1990); T.C.B. v. H.A.B., 173 W. Va. 410, 412, 317 S.E.2d 174, 176 (1984); and W. Va. Code, 48-2-15 [1992].

With this in mind, we turn to the appellant's second argument. The appellant contends that the circuit court erred in

utilizing psychological expert witnesses prior to the circuit court's determination as to who was entitled to the status of primary caretaker.

At the hearing regarding temporary custody, on September 25, 1990, the appellee called psychologist, Mari Sullivan Walker, to testify before the family law master. Ms. Walker met with the appellee and the three children for approximately ninety minutes on September 22, 1990. Ms. Walker was of the opinion that the children perceive their father as the more nurturing person rather than their mother. Ms. Walker testified that all three children told her that the appellant "beat" them. Ms. Walker further stated that rather than asking the children which parent they preferred to live with, she asked them how they thought life would be with their father versus life with their mother. Based upon the childrens' responses, Ms. Walker opined that the children have more faith in their father as opposed to their mother whom they were afraid of and with whom they were angry. Ms. Walker recommended that the appellee be granted temporary custody of the children, however, she admitted that she could not make any recommendations regarding permanent custody based upon a ninety-minute interview.[3]

[3]We note that Ms. Walker was found to be in non-intentional technical violation of the Ethical Principles of Psychologists by the West Virginia Psychological Association, Inc., Peer Review for Ethics Committee (hereinafter "Committee"). More specifically, the appellant charged Ms. Walker with making the recommendation that the appellee receive temporary custody of the children on the basis of a single ninety-minute interview, with the children and the appellee, without seeking her input or consent. The Committee found that Ms. Walker surpassed the limits of her data when making the temporary

The temporary hearing was continued on November 6, 1990. On that day, Dr. Charles Yeargan, a child psychologist, testified before the family law master. Dr. Yeargan was initially hired by the appellant, but later the parties agreed to use him as a neutral expert to give his opinion regarding the welfare of the children. In October of 1990, Dr. Yeargan interviewed the entire S. family.

In response to questions asked by appellee's counsel, Dr. Yeargan stated that he didn't ask the children where and with whom they wanted to live; however, based upon the childrens' comments, it was Dr. Yeargan's opinion that the children feel emotionally safer with the appellee. Therefore, Dr. Yeargan opined that he believed the children would prefer to live with the appellee.

Dr. Yeargan stated that the children perceive the appellee as emotional and supportive, and the appellant is perceived as angry. Further, Dr. Yeargan testified that Jennifer told him that if her brothers live with the appellee, then that is where she wants to live. Dr. Yeargan also opined that both parents have behavioral traits that they need to work out in order for them to be able to better cope with and relate to their children. Ultimately, it was Dr. Yeargan's opinion that it was in the best interests of the two boys, Jason and Justin, that they live with the appellee. With respect to Jennifer, Dr. Yeargan admitted he did not have a lot to go on, but he recommended that Jennifer live with her mother because

(..continued)
custody recommendation.

of "the interests of the two different parties," "the activity levels," "the socialization issues" and "the involvements."

At the final custody hearings on August 6 and 7, 1991, the appellee was permitted to introduce the testimony of another psychologist, Dr. Carl McGraw. In June of 1990, Dr. McGraw interviewed all three children, the appellee, and the appellee's mother, because she had been helping care for the children. Dr. McGraw stressed the importance of keeping the children together in order to keep the family unit intact. Dr. McGraw noted that he had difficulty understanding Dr. Yeargan's reasoning for splitting the children between each parent. Dr. McGraw testified that the children told him they felt their mother was mean. Dr. McGraw stated he didn't ask the children who they wanted to live with, but he testified that they were adamant about wanting to live with their father. It was Dr. McGraw's opinion that the children would "have a better chance" if all three of them were to live with the appellee, considering the rapport the appellee has with the children.[4]

The appellant argues that the family law master failed to follow the rule enunciated by this Court in David M. v. Margaret M., 182 W. Va. 57, 68, 385 S.E.2d 912, 924 (1989): "In West Virginia we intend that generally the question of which parent, if either,

[4]Dr. McGraw's testimony was called into question by the appellant pursuant to her petition for review of the family law master's recommended decision before the circuit court. The appellant alleged that her daughter revealed to her that on the trip to Dr. McGraw's office, her brother, Jason, told her what to say to the psychologist.

is the primary caretaker of minor children in a divorce proceeding is to be proven with lay testimony from the parties themselves and from teachers, relatives and neighbors." We do not believe the family law master or the circuit court judge deviated from the above-mentioned guideline.

It is true that this Court expressed antipathy towards over-reliance on such experts, by stating in David M., 182 W. Va. at 63, 385 S.E.2d at 918-19, that:

> Under the individualized approach to the 'best interests of the child' standard, custody, when contested, goes to the parent who the court believes will do a better job of child rearing. . . . In order to assign custody, the court must explore the dark recesses of psychological theory to determine which parent will, in the long run, do a better job.
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> However, this undertaking inevitably leads to the hiring of expert witnesses--psychologists, psychiatrists, social workers and sociologists. These experts are paid by the parties to demonstrate that one or the other (coincidentally, always the client) is the superior parent in light of his or her personality, experience and aptitude for parenting. The experts will advance the theory that whatever positive aspects of personality their client possesses are pre-eminently important to successful single-parent child-raising.

However, within the record, there is no evidence to suggest that the family law master or the circuit court judge over-utilized the psychologists' reports and testimony in making the primary caretaker determination. The parties and numerous other witnesses testified regarding who was primarily responsible for the child care

duties, as compared to the psychologists who barely touched upon the issue. The record indicates that the circuit court relied upon the expert witness' testimony, specifically, Dr. Yeargan's, in determining which party shall be awarded custody, as per David M., supra.

The appellant's third argument is that the circuit court erred in granting custody of the parties' three children to the appellee.

In syllabus point 1 of Loudermilk, supra, this Court held:

> When a trial court finds that: (1) there is no primary caretaker parent before divorce; (2) both parents are fit parents; and, (3) both parents live geographically close to one another, it is not error to award legal custody to one parent but to allow visitation to the other parent during each alternate week of the year.

The circuit court did find that both parties were fit parents, but the circuit court did not designate a primary caretaker. It was also clear from the record that the parties would continue to live in the same town. Moreover, the circuit court awarded the appellant the right of reasonable visitation with the children on alternate weekends.

The circuit court determined that the best interests of the children would be served by awarding custody to the appellee. There was an abundance of evidence presented in this case, which included the testimony of the parties, neighbors, teachers, family members, friends and psychologists. As we have already set forth

the psychologists' testimony, the lay witness' testimony regarding this issue is as follows.

Jessica Halstead Sharp, a neighbor and friend of the parties, testified that she found the appellee to be loving and nurturing towards the children unlike the appellant who, in Mrs. Sharp's opinion, had a problem dealing with the children. Mrs. Sharp also stated that, on more than one occasion, she overheard the appellant calling the children vulgar names.

In addition, Nancy Jo S. and Reese and Ron Webb, Jr. testified that the children interact well with the appellee. However, they all felt the appellant acted hostile with the children, and thus, the children did not respond well to her. All three witnesses further confirmed Mrs. Sharp's testimony that the appellant called the children vulgar names, and they added, she used bad language around the children as well.

In 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. The wants and needs of the parties are secondary to this Court's paramount concern, which is the best interests of the children. The evidence before us suggests that the children feel emotionally safer and more stable with their father. Accordingly, the circuit court judge, in response to the appellant's petition for review of the family law master's recommended

order, relied upon Dr. Yeargan's testimony in formulating his decision with regard to custody and noted in his summary ruling:

> Dr. Yeargan, when asked for his opinion as to placement, referred again to the fact that the children while with the mother would experience a 'sense of being out of control,' and the 'sense of feeling vulnerable in the management move, calmness in the organization of the home,' and suggested that they be with their father. Having said that, Dr. Yeargan went on to state that Jennifer may 'in the long run' be better off living with her mother. The reasons given to support this conclusion as to Jennifer consisted of vague references to 'the interests of the two different parties, the activity levels, the involvements, the things that are going on, and some of the socialization issues, a little girl with her mom[.]'
>
> While Dr. Yeargan could express concrete, coherent reasons why all three children should be with their father, he resorted to vague generalities to explain why Jennifer should be separated from her brothers and from her father with whom she felt emotionally safer, and committed to the custody of her mother. The Master was justified in concluding that this was not a sufficient reason to award custody to the Plaintiff/Petitioner.

Jason, the eldest son at fourteen years of age, is old enough to make a decision as to which parent he wants to live with, and the record clearly supports the circuit court's finding that Jason should live with his father. See Garska, supra; W. Va. Code, 44-10-4 [1923]. Justin, on the other hand, is eleven years of age and not quite capable of making such a decision, but the evidence supports the circuit court's finding that he should live with his father. In addition, the appellant admits that there is a lot of hostility between the

boys and her, and because of this anger she might not be able to manage them.

This Court has consistently recognized, as stated in syllabus point 8 of Wyant v. Wyant, 184 W. Va. 434, 400 S.E.2d 869 (1990) that:

> '"Questions relating to alimony and to the maintenance and custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syllabus, Nichols v. Nichols, 160 W. Va. 514, 236 S.E.2d 36 (1977).' Syllabus, Luff v. Luff, 174 W. Va. 734, 329 S.E.2d 100 (1985).

We, therefore, are of the opinion that the circuit court did not abuse its discretion by awarding custody of the two boys to the appellee.

However, with respect to Jennifer, we do not believe that the record has been adequately developed. A close reading of the record offers minimal insight into her thoughts and behavior. The record further indicates that Dr. Yeargan prefaced his opinion regarding custody by stating he did not "have a whole lot to go on" regarding Jennifer. The circuit court judge also recognized the lack of focus on Jennifer when he stated, in his summary ruling above, that Dr. Yeargan "resorted to vague generalities" to explain why Jennifer should live with her mother.

The boys have been in the custody of their father since November 28, 1990, the date the temporary custody order was entered. The appellant was granted temporary custody of Jennifer. By order dated March 18, 1992, the circuit court judge granted the appellant's

motion to stay the execution of the final order; and thus, Jennifer was permitted to remain in the custody of the appellant for an additional ninety days. Following the ninety-day period, the appellant renewed her motion to stay the execution of the final order but such motion was denied. Since July 16, 1992, the date of the order denying appellant's motion to stay the execution of the final order, Jennifer has been in the custody of her father. We are unaware of the reason why counsel for the appellant did not request this Court to stay the execution of the final order when counsel presented the petition for appeal. As a result, Jennifer has been with her brothers and in the custody of the appellee for a little more than a year.

Jennifer is still very young. As noted by Dr. Yeargan, Jennifer is the least "scathed" or the least harmed of the three children from this battle between her parents.

This Court has recognized when the record is unclear and factual development would aid in reaching the correct legal decision, a remand is warranted:

> 'When the record in an action or suit is such that an appellate court can not in justice determine the judgment that should be finally rendered, the case should be remanded to the trial court for further development.' Point 2, Syllabus, South Side Lumber Co. v. Stone Construction Co., 151 W. Va. 439 [152 S.E.2d 721].

Syllabus, Painter Motors, Inc. v. Higgins, 155 W. Va. 582, 185 S.E.2d 502 (1971). See also Allen v. Allen, 173 W. Va. 740, 320 S.E.2d 112 (1984); 27C C.J.S. Divorce § 754 (1986).

Based upon the foregoing, we remand this case to the circuit court for additional testimony in order to further develop the record to determine what is in the best interests of Jennifer. The appellee shall continue to have custody of Jennifer pending the outcome of the proceedings below.

The record is replete with evidence that the parenting skills of both parents are lacking. Further evidence suggests that the appellee has been using and manipulating the children against the appellant, and this controlling behavior by appellee has had an adverse impact on the appellant's relationship with her children, especially the two boys.

The majority of the witnesses who testified in this case noticed the destructive effects on the children due to the absence of good parenting skills. Dr. Yeargan, in his testimony before the family law master, even made recommendations as to how each party could improve upon such skills. Based upon all the evidence, we think the circuit court judge should have identified the need of the parties to obtain parental counseling. We note that the appellant, as suggested by the evidence, appears to be more receptive to counseling, unlike the appellee, who was more unwilling to participate.

We are of the opinion that it is important that the appellee, as well as the appellant, seek parental counseling. Therefore, the circuit court judge should recognize the importance of counseling on remand when determining what is in Jennifer's best interest.

Clearly, counseling for the parties would materially promote the welfare of the children.

This is a very difficult case. As a result of the parties' divorce, perhaps the children can be separated, in some degree, from the hurt and anger that have become so prevalent in their lives. The children may then form the important bonds of parent and child without undue interference from the parents.

Thus, after a thorough review of the record and arguments of counsel, we hold that the circuit court judge did not abuse his discretion by concluding that the best interests of the two boys would be served by awarding custody to the appellee. With respect to Jennifer, we remand the case to the circuit court for further development of the record in order to determine what is in her best interests; and, as previously mentioned, she shall remain in the custody of the appellee pending the outcome of the proceedings below. Because of the passage of time, upon remand, the circuit court should ensure that this matter receives an expedited hearing to resolve the issues raised in this opinion.

For the foregoing reasons, the judgment of the Circuit Court of Raleigh County is affirmed, in part, and this case is remanded, with directions to further develop the record.

Affirmed, in part;
remanded, with directions.