No. 24754 -- Bobbie J. Spear v. Mark C. Spear

Workman, J., concurring:

This case is one of those everyday tragedies of divorce that we in the court system see so frequently that we probably become enured to the real human pain involved when families are disrupted and most especially when custody and visitation issues must be resolved.

The good news about this case, if there is any, is that the record shows we have two excellent, loving parents, both of whom want continued close relationships with their children.

In Lowe v. Lowe, 179 W. Va. 536, 370 S.E.2d 731 (1988), this Court explained that joint custody should only be directed when the parties are amicable, live in close proximity, and can work together in a mutually cooperative manner.

2. "Under West Virginia Code Sec. 48-2-15 [1996], a circuit court may, in the divorce order, provide for joint custody of minor children when the parties so agree and when, in the discretionary judgment of the circuit court, such an agreement promotes the welfare of the child." Syl. Pt. 1, Lowe v. Lowe, 179 W.Va. 536, 370 S.E.2d 731 (1988).

3. "In determining if joint custody is appropriate, a court must make a sufficient factual inquiry to insure that such an arrangement is, indeed, in the best interest of the child." Syl. Pt. 3, Lowe v. Lowe, 179 W.Va. 536, 370 S.E.2d 731 (1988).

4. "A cardinal criterion for an award of joint custody is the agreement of the parties and their mutual ability to co-operate in reaching shared decisions in matters affecting the child's welfare." Syl. Pt. 4, Lowe v. Lowe, 179 W.Va. 536, 370 S.E.2d 731 (1988).

5. "When the parties to a divorce action propose shared custody, they should submit to the Court a joint parenting agreement specifying each parent's powers, rights, and responsibilities and proposing procedures for making changes to the agreement or for mediating or otherwise resolving disputes and alleged breaches." Syl. Pt. 5, Lowe v. Lowe, 179 W.Va. 536, 370 S.E.2d 731 (1988).

This is clearly the type of case where a joint custody plan maximizing the children's time with each parent giving regard to their work and school schedules would have been in the children's and parents' best interests. Unfortunately, after the parties draw lines of battle, it becomes very difficult to accomplish, and under the Lowe holding, is not something that a court can mandate.

One of the purposes of this separate opinion is to emphasize the need for the initiation of programs to facilitate the growth of mediation in domestic relations cases, especially those involving children. In Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996), Justice Recht encouraged mediation in divorce matters and recognized the substantial benefits to be derived therefrom. 196 W. Va. at 247-48, 470 S.E.2d at 201-02. The Carter opinion noted that "most research indicates that mediation can reduce the initial level of conflict, which can in turn reduce the long term level of conflict." Id. at 247, 470 S.E.2d at 201.

> When mediation is required by the circuit court or family law master, the process might follow the two-session model used by most states with mandatory mediation. In that model during the initial session, the mediator evaluates the parties' situation to determine the appropriateness of mediation and whether the parties are willing to participate in good faith. During the initial session, the mediator usually discusses the process and the substantive issues and develops a plan for dealing with the issues. During the second session the parties should try to reach an agreement. After the second session, the mediation process is evaluated by the parties and mediator and, when appropriate, terminated. Any agreement by the parties is reduced to writing and submitted to the court, for approval. Attendance and good faith participation at these sessions is generally sufficient to meet any mandatory requirement.

Id. at 248, 470 S.E.2d at 202 (footnotes and citations omitted).

My second purpose in writing separately is to emphasize that a child has a right to a continued relationship with his parent, as explained in syllabus point nine of White v. Williamson, 192 W. Va. 683, 453 S.E.2d 666 (1994), as follows: "In

considering visitation issues, the courts must also be mindful of facilitating the right of the non-custodial parent to a full and fair chance to continue to have a close relationship with his children." Likewise, a parent has a right to a continued relationship with his or her child. The visitation "schedules"[1] commonly used by family law masters around the state are tools which were developed by the masters and have never had formal approval. Although they may be useful in standardizing visitation schedules, they are of great concern because insufficient visitation threatens to destroy the right of parent and child to a continued meaningful relationship. Non-custodial parents traditionally have not had adequate opportunity to be with their children, rendering it very difficult for the parent-child relationship to flourish. These children (and their father) have a right to have a continued close relationship. It is hoped that no rancor or discord which may have resulted from this custody dispute will spill over into the arena of child visitation. Family law masters, although already swamped with large caseloads in many areas of the state, need to recognize that issues involving children are the most important; and that the time it takes to really work with the parties to develop visitation plans that will facilitate, not erode, each party's relationship with the child(ren) is the most productive time they can spend.

[1]Awaiting Penny's information regarding schedules.