

**FILED**

September 8, 1999  
DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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No. 26007    Kevin S. E., Sr. v. Diana M. E.

Starcher, Chief Justice, dissenting:

In the instant case, the circuit court erred in overruling the family law master.

The appellant's fitness to have custody of her children as found by the family law master was supported by her treating physician's report, her testimony, her children's testimony, "very positive" home studies, and testimony of social workers. Under our primary caretaker standard, if she is fit, she gets custody.

The appellant is a dark-complected woman from Mexico. It is unsurprising but tragic that she was not well-received by her "white" former husband's family in McDowell County, and this exacerbated her emotional distress. It is equally unsurprising but tragic that her former husband tried to encourage his children to fear and hate their mother.

It is indisputable that had these children been able to remain with their mother in Texas, they would in all likelihood have been safe and well cared for. But "home cooking" tilted the balance against her, despite the careful consideration that the family law master gave the case. In my opinion, this case shows that the stereotypes of race and the stigma of mental illness are still weaknesses in our court system.

Accordingly, I dissent.