No. 29774 – *State ex rel. West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement, and Jennifer Dawn Shepard v. Carpenter*

FILED
May 15, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
May 17, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring, in part, and dissenting, in part:

While I concur with the majority's decision that a *Huffman*-type hearing[1] must be held, I part ways with the majority's determination that no discrimination results by applying this Court's holding in *Kathy L.B. v. Patrick J.B.*, 179 W.Va. 655, 371 S.E.2d 583 (1988), that the mother *may* recover the birth expenses from the child's natural father in a paternity action, to require a biological father to be responsible for the *entirety* of the birth expenses where the mother was granted birth and medical benefits from the DHHR. *See id.* at syl. pt. 1. I also take issue with the majority's holding insofar as the determination of a biological father's ability to pay is tied to "the date the mother was granted birth and medical benefits." Syl. Pt. 3, in part, *State ex rel. W.Va. DHHR v. Carpenter*, No. 29774, ___ W.Va. ___, ___ S.E.2d ___ (filed April 26, 2002). Additionally, I think that the "ability to pay" determination should be resolved in a judicial forum, rather than through an administrative proceeding.

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[1]*See* Syl. Pt. 2, in part, *State ex rel. Dep't of Human Servs. v. Huffman*, 175 W.Va. 401, 332 S.E.2d 866 (1985) (holding that DHHR's right to reimbursement for AFDC benefits "is dependent upon the ability of the responsible relative to pay, and the determination of ability to pay must be made through an administrative hearing or court proceeding").

I. Discrimination

The majority quickly dismissed Mr. Carpenter's argument that requiring the biological father of a child born out of wedlock to be *exclusively* responsible for the mother's birth-related expenses does not comport with this state's statutory scheme of basing the medical care component of child support "upon the respective ability of the parents to pay." W.Va. Code § 48-12-102 (2001). While the majority may be "technically" correct that the provisions of West Virginia Code § 48-12-102 are inapplicable to a proceeding initiated by the DHHR to recover birth expenses[2] because that statute pertains to securing health insurance coverage in connection with fixing a child support obligation, they clearly do the law, and Mr. Carpenter, a disservice by not exploring the rationale which underlies that statutory provision.

The concept of assessing the support obligation and fixing support payments based on the ability of the parties to contribute is clearly an integral aspect of our spousal and child support system. *See* W.Va. Code §§ 48-6-301; 48-12-102, 48-13-103 (2001). Thus, the majority's failure to give serious consideration to the issue of whether liability for birth expenses, like other types of support, should be analyzed under an ability to pay format is shortsighted. Since this Court created a mother's right to seek recovery of birth expenses from the child's natural father by looking to the legislatively drawn bases of support that are

[2]*See* W.Va. Code § 9-5-11(a) (1995) (Repl. Vol. 1998).

invoked upon proof of paternity, it stands to reason that the legislative framework for establishing medical support for children might be of assistance in resolving whether a biological father should be *fully* responsible for those birth-related expenses, or, consonant with other support obligations, only be required to contribute to the expenses based upon his ability to pay. *See Kathy L.B.*, 179 W.Va. at 659, 371 S.E.2d at 587. Because equitable theories of cost-sharing permeate the child support system set forth in chapter 48 of our state code, logic suggests that the issue of liability for birth costs should be approached in a fashion that is harmonious with other support obligations, rather than to assume the father bears *full* responsibility solely because federal law prevents recovery of those expenses from the mother.[3]

The notion of determining responsibility for birth-related expenses based upon the ability to pay has been codified by the Minnesota legislature in its Parentage Act, which is based upon the Uniform Parentage Act:[4]

> The judgment or order may direct the appropriate party to pay all or a proportion of the reasonable expenses of the mother's pregnancy and confinement, including the mother's lost wages due to medical necessity, after consideration of the relevant facts, including the relative financial means of the parents; the

[3]*See* 42 U.S.C. §§ 1396a[a][18] (1994); 1396p[b] (1994).

[4]*See* Uniform Parenting Act §15, 9B U.L.A. (1973). Note, however, that the drafters of the 2000 Uniform Parenting Act omitted the language from former section 15, now section 636 of the Act, pertaining to a father's payment of confinement and pregnancy costs, stating that "[t]his Act leaves such matters to other state law." Uniform Parenting Act § 636, 9B U.L.A. 351 (2001).

> earning ability of each parent; and any health insurance policies held by either parent, or by a spouse or parent of the parent, which would provide benefits for the expenses incurred by the mother during her pregnancy and confinement. . . . Remedies available for the collection and enforcement of child support apply to confinement costs and are considered additional child support.

Minn. Stat. Ann. § 257.66 (West 2001); *see also State ex rel. Kandiyohi County v. Swanson*, 381 N.W.2d 84, 86 (Minn. App. 1986) (applying subdivision 3 of Minnesota Statute § 257.66 to require remand for determining whether mother would owe father one-half of birth expenses upon his payment of full amount of expenses).

While the DHHR asserts that Mr. Carpenter is necessarily the only party that can be held liable[5] for the birth-related expenses at issue here given the interplay with federal welfare laws, which preclude seeking reimbursement from the mother,[6] it is important to realize that no statutory provision or prior decision of this Court spoke to the issue of what amount of the birthing and medical expenses the biological father could be required to pay. Nothing in *Kathy L.B.*, or in subsequent code enactments, suggests that the father is responsible for the *entirety* of these expenses. Until now, a circuit court had the discretion to determine what amount, if any, of these birth-related expenses an unwed father could be

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[5]*See Walker v. Walker*, 2001 WL 965519 *3 (Mich. App. 2001) (discussing distinction between statutory liability and financial liability and concluding that "[a] determination that one person is liable for a debt does not necessarily exclude all others").

[6]*See supra* note 3.

expected to pay.[7] By completely eviscerating the lower court's discretion to consider the financial circumstances of the father at the obligation-setting phase of the determination, I am convinced that the majority has gone too far.[8] *See Walker v. Walker*, 2001 WL 965519 *2

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[7]I note that the statute at issue in the New York case heavily relied upon by the majority contains the critical element of reposing discretion in the trial court to decide how to apportion the birth expenses between the birth parents:

> "[T]he court shall direct the parent or parents possessed of sufficient means or able to earn such means to pay * * * a fair and reasonable sum * * * for [the] child's support and education * * *. The *order may also direct each parent to pay an amount as the court may determine and apportion* for * * * the necessary expenses incurred by or for the mother in connection with her confinement and recovery [and] such expenses in connection with the pregnancy of the mother *as the court may deem proper*."

In re Comm'r of Social Servs. v. Bernard B., 637 N.Y.S.2d 659, 664 n. 2 (N.Y. App. 1995) (citing section 545 of New York Family Court Act) (emphasis added).

[8]Another issue which arises due to the removal of all discretion from the lower court concerning the amount of the birth-related expenses that the biological father is responsible for is the apparent omission of any consideration regarding whether the expenses were "necessary" – a statutory requisite to including such expenses in any support award. *See* W.Va. Code § 48-1-244(3) (2001) (defining support for mother to include "necessary expenses incurred by or for the mother in connection with her confinement or of other expenses in connection with the pregnancy of the mother"). While this Court, in announcing its holding in syllabus point two of *Kathy L.B.*, was clear to hold that any recovery of birth-related expenses from an unwed biological father must be made pursuant to the former statutory version of West Virginia Code § 48-1-244, the majority glosses over the need to initially find that the expenses at issue were "necessary" by directing that the entirety of whatever amount DHHR paid on the mother's behalf is recoverable against the child's father. *See* W.Va. Code § 48A-1-3(20)(C) (1986); Syl. Pt. 2, *State ex rel. W.Va. DHHR v. Carpenter*, No. 29774, ___W.Va. ___, ___S.E.2d ___ (filed April 26, 2002); *see also Huffman*, 175 W.Va. at 404, 332 S.E.2d at 870 (discussing fact that DHHR's recovery from a third-party is not always "the full amount of AFDC benefits paid out" and noting further that "[t]he actual amount of AFDC benefits paid to the assignor provides a ceiling and not a floor on state recoupment").

(Mich. App. 2001) (recognizing that trial court's discretion to apportion birth-related costs between mother and father under Paternity Act prevented statute from violating Equal Protection clause based on gender).

To reach its conclusion that no gender-based discrimination results from the DHHR's policy to seek the full amount of the birthing expenses from an unwed father where the mother has applied for and obtained a medical card, the majority *completely* ignores the first prong of the Equal Protection argument presented to the Court. The initial Equal Protection hurdle is whether a denial of Equal Protection results through imposition of *liability* solely on a biological father for birth-related costs. The primary case upon which the majority relies to find no resulting gender-based discrimination initially addressed and resolved this same issue by doing exactly what the majority refused to do here. The New York Court of Appeals looked to the support section of the Family Court Act after determining that the statute imposing discretionary liability for birth-related expenses upon the father had to be read in *pari materia* with the later-enacted support section of the Act, which permitted the trial court to apportion these expenses and other child-rearing expenses among the parents based on their respective ability to pay for such expenses. *See In re Comm'r of Social Servs. v. Bernard B.*, 637 N.Y.S.2d 659, 663-64 (N.Y. App. 1995). In *Bernard B.*, the court determined that "section 514 [of the Family Court Act] is properly understood as authorizing the court to impose liability without regard to gender" based solely on the fact that the trial court had *discretion* to "impose[] liability for these [birth-related costs] on *either* parent." 637

N.Y.S.2d at 663-64. Only after this first hurdle was cleared did the New York Court proceed to determine whether gender-based discrimination resulted from the singular recoupment of these birth-related costs from unwed biological fathers.[9] *Id.* at 664.

To be clear, it is not a statutory directive that imposes full responsibility on the unwed father for birth-related costs, but a court-imposed one. *Cf.* W.Va. Code § 48-1-244(3) to *Carpenter*, ___W.Va. ___, ___S.E.2d ___, syl. pt. 2. Nonetheless, it is the wholesale removal of any discretion on the trial court's part in assessing liability for those birth-related costs that convinces me that gender-based discrimination results at the liability stage of the

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[9]While I do not challenge the majority's determination that there is a rational relationship underlying the DHHR's policy of not seeking reimbursement of birth-related costs from indigent women, I question the *clear* departure from this Court's holding that the intermediate level of scrutiny applies to Equal Protection claims that involve issues of gender. *See* Syl. Pt. 5, *Israel v. West Virginia Secondary Schools Activities Comm'n*, 182 W.Va. 454, 388 S.E.2d 480 (1989). Without any explanation for its abandonment of a higher-level of scrutiny (normally, gender classifications can only withstand Equal Protection analysis where the classifications serve important governmental objectives and are shown to be substantially related to achieving those objectives), the majority simply veered from the accepted analytical path with the cautionary caveat that it may decide not to similarly veer from such path in the future. *See Carpenter*, ___ W.Va. at ___, n. 4, ___ S.E.2d at ___, n. 4.

The majority further clouds the future of Equal Protection analysis for the practitioners of this state by relying almost exclusively on a case that concludes that pregnancy-based classifications are, as a rule, medical conditions and, therefore, not gender-based classifications. Despite its apparent adherence to the gender discussion in *Bernard B.*, the majority nonetheless characterizes pregnancy as "inherently gender-related." *See* Carpenter, ___ W.Va. at ___, n. 4, ___ S.E.2d at ___ n. 4. Under well-established law, the only way the majority could properly apply the rational relationship level of Equal Protection analysis was to find that the classification was not gender-based–a conclusion that the majority never makes.

process when biological fathers are held exclusively responsible for these costs without any consideration of apportioning such costs based upon an ability to pay.

II. Date for Determining Ability to Pay

I disagree with the majority's decision to link the determination of the father's ability to pay solely to the date on which the mother obtained birth and medical benefits from the state. The right of recovery against the father for birth-related costs incurred by the mother is admittedly steeped in third-party liability. *See* W.Va. Code §§ 9-5-11(a), 48-1-244(3); *Bernard* B., 637 N.Y.2d at 663. However, just as the New York Court determined in *Bernard B.* that there was no state or federal statutory basis for requiring an ability to pay determination to be made at the time the expenses were incurred, there is similarly no basis for the majority's determination in the instant case that the ability to pay determination should only be made concurrent with the chronological granting of the medical and birth-related benefits to the mother. *See id.* Instead, the father's ability to pay should be determined, like other support obligations, by examining his present ability to pay.[10] *See, e.g.*, W.Va. Code § 48-12-102; *see Bernard B.*, 637 N.Y.2d at 663.

[10]Moreover, to make a determination retroactive to a date that precedes any establishment of paternity simply defies logic. *See Carpenter*, ___ W.Va. at ___, n. 5, ___ S.E.2d ___, n. 5 (acknowledging that "paternity of an out of wedlock child is generally not established until after a child is born"). Additionally, the setting of a finite date restriction for making an ability to pay determination, rather than utilizing a more open-ended present ability to pay inquiry, may contribute to or encourage the "hiding" of assets or dilatory behavior with regard to procuring the means to pay for such costs.

III. Judicial Determination

Finally, while I recognize the source of the majority's conclusion that the ability to pay determination can be made administratively or judicially,[11] I think it should be made solely in a judicial forum. The issues that need to be examined, including the necessity of the expenses in the first instance,[12] demand appropriate consideration of all relevant factors – considerations that warrant both judicial expertise and experience. Moreover, since a judicial officer typically makes determinations of an individual's ability to pay for child support and spousal support purposes, it stands to reason that judicial officers should be permitted to apply those same factors to resolve the ability to pay issues pertaining to this particular type of support.[13] *See* W.Va. Code § 48-1-244(3).

Based on the foregoing, I respectfully concur, in part, and dissent, in part.

I am authorized to state that Justice Maynard joins in this concurring and dissenting opinion.

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[11]*See supra* note 1.

[12]*See* W.Va. Code § 48-1-244(3).

[13]The fact that DHHR argued that it had no list of factors for making an ability to pay determination further supports requiring such hearing to be conducted by a judicial officer.