

Mountaineer CLE—Family Law
Marjorie Anne McDiarmid
September 7, 2001

Family Cases—1/2000 to 8/2001

Adkins v Adkins ¹	per curiam	standard of review by circuit court	<i>Stephen LH</i> and <i>Banker</i> standards for review, substantial deference to findings of family law master (flm), court holds flm properly found substantial change of circumstances
		alimony	alimony normally not contractual (unmodifiable), but a modifiable court award based on changed circumstances: We note that the parties in this action entered into a separation agreement that was later incorporated into the 1986 divorce order. <i>W. Va. Code, 48-2-16(a)</i> [1999] n4 provides, in pertinent part, that: Any award of periodic payments of alimony shall be deemed to be judicially decreed and subject to subsequent modification unless there is some explicit, well expressed, clear, plain and unambiguous provision to the contrary set forth in the court-approved separation agreement or the order granting the divorce.
		attorney fees	no language in agreement making it contractual no income disparity justifying attorney fees, flm denial appropriate

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In re George Glen B	Starcher	abuse and neglect; termination of parental rights	previous termination of parental rights for prior children makes it mandatory for Child Protective Services (cps) to file case: W.Va. Code 49-6-5b ² ; statute only lowers threshold for filing petition, still requires that CPS prove current abuse
		supervising custody plan	circuit court must supervise custody plan, cannot turn over to non-governmental agency
Denise L.B v Burnside	per curiam	writ of prohibition to prevent third party from intervening to seek custody in a divorce action	writ granted on the theory that the intervention provision of 48-11-103(2) does not apply to divorce actions under 48-2-13: Article 11 of Chapter 48 of the <i>Code</i> was designed by the Legislature to "set[] forth principles governing the allocation of custodial and decision-making responsibility for a minor child when the parents do not live together." <i>W.Va. Code</i> , 48-11-101(a) [1999]. We recognize that while Article 11 establishes extensive procedures regarding the custody and parenting of children, it also specifically states that other persons may intervene in exceptional cases only for proceedings under Article 11. In the instant case, Sherry L. sought to intervene to obtain an <i>ex parte</i> temporary order pursuant to <i>W.Va. Code</i> , 48-2-13(e)(1)(B) -- or, in other words, to participate in proceedings under Article 2 of Chapter 48. We do not believe that this intervention was authorized by the Legislature. either this holding is wrong or the entire 1999 statutory change may have no application in divorce actions

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Burnett v Burnett	Starcher	survival of WV separate maintenance beyond out-of-state divorce decree in a state lacking personal jurisdiction to decide money issues	overrules prior WV case law to hold that where WV had personal jurisdiction to issue money orders and divorce court lacked such jurisdiction, financial aspects of WV separate maintenance decree survive divorce
Collins v Collins	Davis	child support, decretal judgment for arrearage, arrearage post motion to modify;	rule 19 of the family rules (now rule 23) which requires that child support awards be retroactive to service of motion was not adopted until 6 years after motion in this case, court holds not retroactive: <p style="margin-left: 40px;">Therefore, we hold that the provisions of Rule 19 of the West Virginia Rules of Practice and Procedure for Family Law do not apply to a petition to modify child support when the petition was filed before the rule's effective date, but efforts to collect support payments accruing during the petition's pendency continue after such date because the noncustodial parent has failed to satisfy his/her support obligation for reasons other than financial hardship. n12 Accordingly, we conclude that Rule 19 of the West Virginia Rules of Practice and Procedure for Family Law does not apply retroactively to alter Mr. Collins' child support obligation.</p>
		statute of limitations	writs of execution extend statute of limitations as with any debt

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Cook v Williams	per curiam	distribution of marital property; weird case facts probably cannot be generalized	prior court opinion gave ex-husband occupancy of marital home pursuant to settlement agreement, but left wife with a right to half the property; partition an appropriate remedy to permit wife to obtain share
Czaja v Czaja	Scott	contempt in child visitation dispute over unsupervised visitation	civil fine appropriate remedy; summary transfer of custody to other parent upon further violation not appropriate: Since a change in legal custody can only result pursuant to the statutory procedures set forth in <i>West Virginia Code § 48-2-15(e)</i> (1999), which entail the filing of a motion seeking a change in custody and presume a hearing on such motion, the mechanism included in the June 17, 1999, order wrongly suggests circumvention of the statutorily-required method of obtaining a custody modification
		appeal	failure to file timely appeal cuts off claim; acceptance of untimely appeal by circuit court not a waiver
		notice of contempt charge	notice adequate when counsel of record got show cause and petition, respondent got show cause only, no surprise
		sanctions against lawyer	Civil Procedure Rule 11 sanctions against counsel for frivolous pleadings requires notice and hearing

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Dababnah v Dababnah	per curium	division of marital property	passive appreciation of marital property: Put simply, if property is separate property, and it increases in value because of market forces or inflation (beyond the control of either party), then this passive increase in value is also separate property. It is obvious to this Court that the corollary also holds true; namely, if <i>marital</i> property increases in value due to market forces or inflation, then that passive increase in value is also <i>marital</i> [***11] property granted wife half the value of a stock account at time of actual division, husband argued for lower value at a previous point (all passive appreciation to him), but he had caused delay, court holds circuit court evaluation appropriate
		disclosure	circuit court had permitted late filing to divide property because husband did not provide discovery, court holds appropriate
		attorney fees	circuit court determination of attorney fees entitled to deference, upheld
		child support calculation	husband says child support calculation wrong, wife had to extract payment by suggestion, got no interest, circuit court discretion will not be disturbed
		post divorce liens on marital property the separate debt of the husband	liens attached after divorce, attorney for husband conceded not marital, held not marital

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Dababnah v. WV
Board of Medicine

Scott

license revocation for
failure to pay child support

board of medicine suspended license to practice medicine on its own motion, after administrative hearing; court holds that such a suspension requires an order from the circuit court; statutory construction case only; court expressly does not decide due process claims

Dalton v Dalton

Maynard

child support and alimony
arrearage when payor and
payee had been living in the
same house

court holds not proper to presume payment of child support based solely on living in the same house and thereby shift burden; payor had burden to show that he did pay; living together is a factor in the evidentiary analysis:

Also, the obligor bears the burden of proving that he or she has made court-ordered support payments. Therefore, we conclude that the circuit court erred as a matter of law in applying a presumption that the appellee met his support obligations by cohabiting with the obligee and their minor child and in placing the burden of proving child support arrearages on the appellant.

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Driver v Driver

per
curiam

whether partial
rehabilitation, partial
permanent alimony
appropriate

14.5 year marriage, kids at home, wife currently out of job
market, but taking classes,

An award of alimony by its very nature, as well as by the
guidelines established by the Legislature, does entail the
examination of various financial questions. As has been
indicated above, one of those factors is the income-earning
abilities of the parties. *W. Va. Code 48-2-16(b)(4)*. In the
present case, [***10] it does appear that the family law
master and the circuit court considered the disparity in the
parties' income-earning abilities, but they did so in the
context of the multiple factors which should be considered in
establishing the amount of alimony.

Partial permanent no error

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Edwards v Edwards	per curiam	circuit court review	6 delay as circuit court and flm pass case back & forth, insufficient written findings to justify circuit court change (<i>Stephen LH</i> standard, written findings required to change flm judgment)
		date child support begins, date alimony begins	<p>When a court grants a party relief such as child support or alimony, Rule 23 of the <i>Rules of Practice and Procedure for Family Court</i> [2000] n1 states, with emphasis added, that: <i>Except for good cause shown</i>, orders granting relief in the form of spousal support or child support shall make such relief retroactive to the date of service of the motion of relief.</p> <p>Accordingly, the relief granted to the parties by the court is to be retroactive to the date of service of the motion for relief -- unless the court specifically finds that good cause exists for adopting a different date.”</p> <p>Reversed for findings on why different payment date appropriate.</p>
Frankel v. Frankel	per curiam	custody	child had special educational needs; custody given to dad so that kid can go to school in Texas because trial court determined adequate schooling not available here; court upholds; McGraw and Starcher dissent
		Uniform Child Custody Jurisdiction Act	joint custody decree from Texas divorce; mom and kid moved here, dad still in Texas, dad conceded jurisdiction here; different result in Uniform Child Custody Jurisdiction and Enforcement Act

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Settle v Settle	per curiam	credit toward child support arrears from social security back payment	respondent stopped paying child support after kids got social security dependent payments; did not seek to modify; proper to give credit against arrears from social security payments; discretionary dependent on good faith, no other assets, no countervailing circumstances; failure to credit an abuse of discretion
Snider v Snider	Starcher	personal jurisdiction over alimony and marital property	joint home in West Virginia which husband visited with some frequency, but never permanently lived in; divorce in Illinois; sufficient minimum contacts to permit WV alimony and property judgment; no specific info on service; held facts sufficient under WV general long-arm; appellant apparently contested only due process issue; this is a huge leap in WV long arm in divorce cases
		subject matter jurisdiction over alimony and property post-divorce	WV statutes (48-2-15 and 48-2-32) permit alimony & property distribution only in cases of divorce; here, divorce already granted in Illinois; court holds power to grant divorce & property nevertheless survives: We hold, therefore, that under the divisible divorce doctrine, where a foreign jurisdiction does not have personal jurisdiction over both parties to a marriage, the personal and property rights of the parties may be litigated in West Virginia separately from a divorce decree issued in another jurisdiction. Spousal support and marital property rights, available under <i>W.Va. Code, 48-2-15</i> survive such an <i>ex parte</i> So much for <i>Sigal v Beard</i>

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State ex rel Brandon v Moats	Albright	grandparent visitation statute trumps termination of relationship under adoption statute	denial of writ of prohibition which sought to block hearing on propriety of grandparent visitation; no order for grandparent visitation pre-adoption; court holds that [former] grand parents can bring action to obtain visitation rights; relies on 48-2B-3 for standing; does not give <i>a fortiori</i> effect to 48-2B-9(b) which provides that even when an order is in place, that order terminates upon adoption [substantive law]; Davis dissents
		parent's rights under due process	does not violate due process as determined by <i>Troxel v Granville</i> because not an over broad intrusion on the rights of parents
State ex rel Evans v Frye	Maynard	third party (son) seeks writ of prohibition to prevent sale of marital and separate property	writ granted; son intervened and then did not provide discovery; lower court ordered forced sale of all property: Even though the petitioner refused to comply with the family law master's discovery orders, the circuit court clearly erred as a matter of law and thus, exceeded its legitimate powers by ordering the parties' assets to be sold prior to classifying the property as marital or nonmarital, establishing its value, and determining the parties' interests in the property court held separation between separate and marital property must precede sale
		power of circuit court to reassume case	circuit court had power on its own motion to reassume case

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State ex rel Rose L v Pancake	Starcher	abuse & neglect	application for writ of prohibition by <i>guardian ad litem</i> (gal) to prevent circuit court from hearing motion by father to set aside relinquishment of paternity; writ denied; circuit court has jurisdiction under statute to hear motion; concurring opinion suggests heavy burden to support motion
State ex rel Kimberly P v. George K	Starcher	paternity acknowledgment	one alleged dad signed paternity acknowledgment; blood tests determined he was not dad; another alleged dad adjudicated pursuant to blood test, but case dismissed because of acknowledgment; court held acknowledgment should be set aside because of material mistake of fact; dad determined by blood test should be adjudicated dad
State ex rel Ray v Canady	per curiam	writ of prohibition does circuit court have authority to grant temporary alimony pending petition for review	circuit court has authority, writ denied; The respondent also alleged that the petitioner had frozen and deprived the respondent of access to all joint marital bank accounts. She alleged that the petitioner had done so on the ground that the parties had filed objections to the family law master's recommendations regarding the distribution of those accounts, and that he had indicated he would not allow the respondent to access those accounts until a ruling was received on those objections.” 48-2-13 gives power to grant temporary alimony at any time after commencement of action, circuit court has authority; if error, correctable on appeal (including reimbursement), therefore no writ

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State ex rel Stump v Starcher attributing income
Gibson

proper to attribute income to dad because record did not demonstrate disability during the whole period of non-payment; appropriate not be attribute income to mom because pre-school children at home although the pre-school child was not the couple's child; relies on reasonable and prudent person language of 48A-1A-3(b)(3);

Essentially, a family law master or court should examine what a reasonable, similarly-situated parent would have done had the family remained intact or, in cases involving a non-marital birth, what the parent would have done had a household been formed. foreign divorce decree when the foreign court did not have personal jurisdiction over the defendant in the foreign proceeding.

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State ex rel Young v
Prichard per
curiam

paternity

mother married two men in rapid succession; divorce from first said no kids; bcse filed paternity action against first husband; flm dismissed on grounds of equitable estoppel; court holds dismissal inappropriate; no change in position on reliance:

This Court has also stated that "behavior by a mother, even if inequitable *vis-a-vis* the father, can ordinarily [not] be attributed to an innocent child so as to weigh substantially on behalf of freeing a biological father from the responsibilities of supporting his offspring.

presumption of legitimacy

marriages too close in time to give rise to presumption

guardian ad litem

no gal required in action to prove paternity

Steel v. Hartwick per
curiam

reimbursement of child support payments based on social security back payment covering the same period denied

receipt by child of back payments from social security for the period of previous child support payments is not a basis for reimbursement; child support not reimbursable:

The children in the present case had a legal right under court and administrative orders, to both the child support and the social security benefits in issue in this case, and this Court can find no inequitable conduct on the part of the children, or unjust enrichment on their part, which in the Court's view, would support a legal basis for depriving them of their property.

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Stewart v Stewart

per
curiam

permanent v rehabilitative
alimony

Molnar criteria: 22 year marriage, minor child, 50 year old
wife, out of job market; permanent not abuse of discretion

alimony amount

It is not clear to this Court whether the circuit court gave the
appellant credit for the partnership debts which he was
obligated to pay. If he received such credit and the \$ 200,000
valuation was placed on the partnership after such credit was
granted, then the Court would conclude that it was not
improper for the circuit court to base the appellant's alimony
on his \$ 12,746 per month net income since the \$ 6,746 per
month going to retire partnership debt would actually be
increasing his personal net worth
reversed for valuation determination

cruel and inhuman
treatment

Further, the Court has recognized that conduct by one party
to a marriage which humiliates and embarrasses the other
party and exposes the other party to public mockery of the
marriage to such an extent that it tended to destroy the other
party's mental and emotional well-being, is adequate to
establish fault sufficient to support an award of alimony.
Hanging out with a female friend after being requested to
stop qualifies as cruel & inhuman

expert and attorneys fee

The illiquidity of the appellant's assets, as a practical matter,
suggests that she does not have available resources to meet
her cost and fee obligations.
fee award appropriate

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Stout v Stout	McGraw	Uniform Interstate Family Support Act (uifsa)	under uifsa, if holder of WV child support order voluntarily modifies that order through judgment in another state, the judgment of that other state entitled to full faith & credit; WV loses exclusive continuing jurisdiction, 48B-2-205(c); suggests that previous WV case law never permitted out of state modification; lowers the apparent burden of 48B-2-205(a) which requires written consents to assume continuing, exclusive jurisdiction–no record in this case
Taylor v Hoffman	Albright	paternity statute of limitations does not govern actions to inherit in an intestate action	Accordingly, we hold that, with regard to establishing a right to inherit from a person who died before the 1999 amendment to <i>West Virginia Code</i> § 49-2-5 was effective, a prospective heir born out of wedlock may maintain an otherwise unobjectionable action without regard to the limitations on actions set forth in <i>West Virginia Code</i> § 48A-6-1 et seq.
Wilson v Wilson	per curiam	custody effect of rules of evidence 703	not in child’s interest to be with mom, extensive discussion of mom’s misfeasance post separation, dad had kid the majority of the time post separation pursuant to temporary order, no discussion pre-separation parenting, custody to dad expert testimony contains hearsay from child, expert basis permissible under 703, does not discuss use of hearsay for truth although court does not rely on these facts for its opinion

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Zirkle v Zirkle	per curiam	child custody, appeal	custody to mom, no appeal; after appeal period but before circuit court signed final order, rule 60(b) motion on the theory of mistake of law; no discussion excusable neglect; query effect on appeal period
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1. An electronic version of this chart with links to the West Virginia Supreme Court web site can be found at <http://www.wvu.edu/~lawfac/mmdiarmid>.
2. All Code citations are to the pre-2001 code.