

ALMOST HEAVEN OR JUDICIAL HELLHOLE? THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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John Denver sang West Virginia was "Almost Heaven."² Corporate defendants in West Virginia courts sing a different tune. The American Tort Reform Foundation named West Virginia a "Judicial Hellhole."³ West Virginia's courts have shown hostility toward corporate defendants and liberality in fashioning remedies for plaintiffs. The state is perceived as offering "jackpot justice."⁴ If one assumes a court liberal in the tort context would also be liberal in the context of abortion, homosexuality and other "life" issues, then West Virginia probably does not offer a favorable venue for pro-life, pro-family litigation. However, the judicial culture in West Virginia may be starting to change. In a hotly-contested election, a Republican was elected to West Virginia's highest court in November 2004.

The Court is arguably more liberal than West Virginia's governor or legislature. According to a 2005 column by the President of National Right to Life, the pro-life positions of state officials contrast with the pro-abortion attitudes of the national Democrat leadership:

The Democratic governor [Joe Manchin] is pro-life. The Democratic senate president is pro-life. The Democratic speaker of the House of Delegates is pro-life. The W. Va. Senate and the House of Delegates have solid (bipartisan) pro-life majorities. The two Democratic congressmen reliably vote pro-life (the third, a Republican, declared herself to be "pro-choice" but often votes pro-life). Politicians of both parties eagerly seek the endorsement of West Virginians for Life PAC. And pro-life President George W. Bush won West Virginia in both 2000 and 2004.⁵

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² John Denver, "Take Me Home, Country Roads," composed by Bill Danoff, John Denver and Taffy Nivert, © 1971.

³ AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2005, at 18.

⁴ Randy Coleman, *Lawsuit Abuse State Needs to Change Jackpot Justice Culture*, CHARLESTON DAILY MAIL (W. VA.), September 26, 2005, at 5A.

⁵ Wanda Franz, Ph.D., "Mission Possible" *And Grass Roots Power*, September 2005, <http://www.nrlc.org/news/2005/NRL09/PresidentColumn.html>, last viewed February 8, 2007.

The overall flavor of the Court's view of the family is exemplified by a 2006 case in which the Court decided a minor could file a protection from abuse petition against his mother on his own.⁶ The Family Court allowed the petition and issued a protective order, denying the mother access to her son. The son ended up living with a man in Maryland with whom he had formed a "mentoring" relationship. The Family Court placed the boy in the Maryland man's custody without any inquiry into his fitness to provide a suitable home. When the boy's mother tried to contact the man to inquire about her boy's welfare, she was held in contempt. The Supreme Court of Appeals affirmed the Family Court's handling of the case, even though the case was moot because the protective order had expired. In dissent, Justice Elliot Maynard decried the decision as "devastating to West Virginia families," undermining parental authority, and "simply anti-family."⁷

I. LIFE ISSUES

The Supreme Court of Appeals of West Virginia has rendered few decisions on "life issues." Those few cases indicate support for abortion, acceptance of homosexual adoption, and a generally liberal view about family issues.

Abortion

In *Women's Health Center of West Virginia, Inc. v. Panepinto*,⁸ the Supreme Court of Appeals considered the constitutionality of a West Virginia statute prohibiting the use of state Medicaid funds to pay for abortions. None of the members of the 1993 court is still serving, so it is questionable whether or not the case is indicative of the current Court's attitudes.

Section 9-2-11 of the West Virginia Code prohibited the use of state Medicaid funds for abortions except in cases of medical emergency, severe congenital deformity, rape, or incest. "The Legislature intends that the state's Medicaid program not provide coverage for abortion on demand and that abortion services be provided only as expressly provided for in this section."⁹ The funding restrictions in the West Virginia Code provision were similar to those in the Hyde Amendment with

⁶ *Katherine B. T. v. Jackson*, No. 33005, 2006 W. Va. LEXIS 119 (W. Va. Sup. Ct. App. Nov. 30, 2006).

⁷ *Id.*, slip op. at 1 (Dec. 4, 2006) (Maynard, dissenting).

⁸ 191 W. Va. 436, 446 S.E.2d 658 (1993).

respect to federal Medicaid funding.¹⁰ The Hyde Amendment's restrictions on use of federal Medicaid funds were upheld by the United States Supreme Court (USSC) in *Harris v. McRae*.¹¹ The West Virginia Legislature and the West Virginia Circuit Court considered the *Harris* decision dispositive: By providing public funding for medically necessary procedures, the West Virginia Legislature was not obligated to provide funding for abortions.

The Supreme Court of Appeals of West Virginia found otherwise. First, the Court ruled the West Virginia Constitution was more protective of individual rights than the federal Constitution. Second, the Court held the funding restriction impermissibly discriminated against poor women in the exercise of their constitutional right to abortions. The state was not obligated to provide funding for healthcare services at all, but once it decided to do so, the Court found it could not discriminate against a procedure protected by the constitutional right of privacy. Third, by providing funding for childbirth and not abortion, the government was violating an obligation to preserve its neutrality.

A dissenting opinion argued the issue was governed by *Harris v. McRae* and *Maher v. Roe*.¹² In *Maher*, the USSC upheld a Connecticut statute limiting state funding for abortions to medically necessary abortions performed during the first trimester of pregnancy. The Supreme Court said *Roe v. Wade*¹³ did not limit the authority of a state to make a value judgment in favor of childbirth over abortion in its allocation of public funds.¹⁴ The *Maher* court recognized that while a state may not interfere with a constitutionally-protected activity (abortion), a state was free to encourage an alternative activity (childbirth).¹⁵

The dissent also emphasized that people in financial need are not a suspect class for purposes of equal protection analysis.¹⁶ Because poverty was not a suspect class, the legislation should not be reviewed under the "strict scrutiny" standard but by the more lenient rational basis test. Because

⁹ W. VA. CODE § 9-2-11(b).

¹⁰ Pub. L. No. 96-123, §109, 93 Stat. 926 (1980) and Pub. L. No. 102-170, §203, 105 Stat. 1126 (1992).

¹¹ 448 U.S. 297, 100 S. Ct. 2671 (1980).

¹² *Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376 (1977).

¹³ 410 U.S. 113, 93 S. Ct. 705 (1973).

¹⁴ *Women's Health Center of West Virginia*, 191 W. Va. at 446, S.E.2d at 668, citing *Maher*, 432 U.S. at 473-74, 97 S. Ct. at 2382.

¹⁵ *Id.*, 191 W. Va. 446, 446 S.E.2d at 668.

¹⁶ *Id.*, 191 W. Va. at 447, 446 S.E.2d at 669.

even *Roe v. Wade* recognized the state has "an important and legitimate interest... in protecting the potentiality of human life," states are entitled to make value judgments favoring childbirth over abortion and allocate funding accordingly.¹⁷ The dissent found no basis for the majority's insistence on government "neutrality" in the battle between childbirth and abortion.

In *James G. v. Caserta*,¹⁸ the Supreme Court of Appeals of West Virginia, responding to certified questions from the U.S. District Court for the Southern District of West Virginia, discussed the rights of parents and children to recover damages against healthcare providers for "wrongful pregnancy," "wrongful birth," and "wrongful life." The Court used the term "wrongful pregnancy" for those cases where a failed sterilization procedure resulted in an undesired pregnancy and the birth of a healthy child.¹⁹ The Court used the expression "wrongful birth" to apply to situations where a healthcare provider failed to perform amniocentesis or otherwise diagnose birth defects in time for the parents to consider terminating the pregnancy and the child was born with a birth defect.²⁰ The Court used the term "wrongful life" to refer to the child's claim against the mother's attending physician who failed to diagnose the birth defect.

The Court recognized a cause of action for "wrongful pregnancy," holding a doctor who fails properly to perform a sterilization procedure violates a legal duty to the patient, entitling the patient to damages such as: a refund of the fees for the unsuccessful sterilization operation; medical costs such as prenatal care, childbirth expenses and postnatal care; pain and suffering; loss of consortium; and lost wages. The Court declined to recognize the cost of raising a healthy child as an item of compensable damages, because the damages were too speculative.²¹

On the subject of "wrongful birth," that is, the parents' claim for the birth of a child with birth defects, the Court held parents may recover not only the extraordinary costs of raising the child during minority but even after majority, if the child is unable to support himself because of physical or emotional disabilities. "Parents should not be forced to pay extraordinary expenses resulting from

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Id.

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175 W. Va. 406, 332 S.E.2d 872 (1985).

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Id., 175 W. Va. at 409, 332 S.E.2d at 875.

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Id.

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Id., 175 W. Va. at 412, 332 S.E.2d at 878.

a child born with birth defects occasioned by the physician's failure to provide reasonable genetic counseling."²²

The Court refused to create a cause of action for "wrongful life," that is, the child's claim against the mother's physician for being born with birth defects that might have been diagnosed with amniocentesis. The parents' "wrongful birth" claim against the doctor is based on his failure to diagnose and inform the parents of their option to terminate the pregnancy. This logic does not extend to the child's claim for "wrongful life." The Court ruled it would be for the Legislature to create such a cause of action.²³

Protection of the Unborn from Criminal Violence

*Farley v. Sartin*²⁴ concerned whether a tortfeasor could be held liable for death of or injury to a fetus. Plaintiff filed suit as the administrator of the estate of Baby Farley, an unborn child killed along with her mother in an automobile accident. Mrs. Farley was approximately eighteen weeks pregnant with Baby Farley at the time of the fatal accident. The Circuit Court found Baby Farley was, at the time of the accident, neither large enough nor developed enough to survive outside the womb.²⁵ The question presented was whether a wrongful death action on behalf of the unborn child required a showing the baby was viable.

The Supreme Court of Appeals held the wrongful death action would apply regardless of the unborn child's viability. In doing so, the court held the term "person" in West Virginia's wrongful death statute would include an unborn child, regardless of viability.²⁶ The Court rejected the distinction drawn by other states between viable and non-viable fetuses, noting, "The societal and parental loss is egregious regardless of the state of fetal development."²⁷ By recognizing the cause of action on behalf of the unborn child, the Court stated, "Our concern reflects the fundamental value

²² *Id.*, 175 W. Va. at 416-17, 332 S.E.2d at 882-83.

²³ *Id.*, 175 W. Va. at 415, 332 S.E.2d at 881.

²⁴ 195 W. Va. 671, 466 S.E.2d 522 (1995).

²⁵ *Id.*, 195 W. Va. at 672, 466 S.E.2d at 523.

²⁶ *Id.*, 195 W. Va. at 683, 466 S.E.2d at 534.

²⁷ *Id.*, 195 W. Va. at 682, 466 S.E.2d at 533.

determination of our society that life -- old, young, and prospective -- should not be wrongfully taken away."²⁸

However, the Court's concern for life cannot be extrapolated to the abortion context. The Court expressly distinguished abortion:

Our definition of 'person' within the confines of the wrongful death statute neither affects nor interferes with the constitutional protection afforded a woman who chooses to have an abortion.... [A] wrongful death action will not lie against a woman who chooses to exercise her constitutional right to have an abortion. By definition, if a woman has a constitutional right to decide whether to carry an unborn child to term or abort it, then the act of aborting is not tortious.²⁹

Only one member of the Supreme Court of Appeals' current justices, Justice Albright, was a member of the Court that decided *Farley*. However, for whatever reason, Justice Albright did not participate in the *Farley* decision. The state legislature adopted an Unborn Victims of Violence Act in 2005.³⁰

Assisted Suicide

There have been no decisions by the Supreme Court of Appeals on the subject of assisted suicide. Assisted suicide was mentioned in a footnote in *Plumley v. Bledsoe*³¹, a case applying the so-called "slayer rule" that prevents a killer from obtaining life insurance or other benefits from the person killed. In delivering the opinion of the Court, Justice Starcher cited a 1993 law review article suggesting that in cases of assisted suicide, "equitable considerations" might allow the party assisting the suicide to inherit from the deceased, despite being the slayer.³²

²⁸ *Id.*

²⁹ *Id.*, 195 W. Va. at 683-84, 466 S.E.2d at 534-35.

³⁰ W. VA. CODE § 61-2-30, signed into law by Gov. Joe Manchin (D) on May 20, 2005, provides that a pregnant woman and the embryo or fetus she is carrying in the womb constitute separate and distinct victims for purposes of laws governing murder, manslaughter, and certain other crimes of violence. A similar bill was vetoed by Gov. Bob Wise (D) in March 2004.

³¹ 216 W. Va. 735, 738; 613 S.E.2d 102, 105, n.4 (2005).

³² In 2000 the West Virginia Legislature enacted the West Virginia Health Care Decisions Act, W. VA. CODE §16-30-1 et seq. (2006). In reciting the Legislative purpose, the Act states: "It is not the intent of the Legislature to legalize, condone, authorize or approve mercy killing or assisted suicide." W. VA. CODE §16-30-2. The Supreme Court of Appeals has rendered no decisions interpreting this Act.

Healthcare Rights of Conscience

West Virginia has enacted statutes allowing healthcare providers to refuse to conduct abortions, perform sterilizations, or offer birth control services.³³ Healthcare institutions may refuse to perform procedures based on sincerely held religious beliefs or moral convictions central to the facility's operating principles.³⁴ There have been no decisions by the Supreme Court of Appeals on the subject of healthcare rights of conscience.

Cloning

To date, there have been no decisions by the Supreme Court of Appeals on the subject of cloning.

Destructive Embryo Research

There have been no decisions by the Supreme Court of Appeals on the subject of embryonic stem cell research.

Based on the relatively few "life issues" decisions of the Supreme Court of Appeals, one would expect the Court to continue a liberal tradition in future cases. The Court has shown its support for abortion and gay parenting. Unless there is a dramatic shift in the Court's make-up, one would not expect decisions supporting traditional family values.

II. JUDICIAL RESTRAINT

The Supreme Court of Appeals of West Virginia exercised restraint in declining to hear a gay marriage case, *Link v. King*, in 2004. Plaintiffs Patricia Link and Sheila Chambers filed a petition for a writ of mandamus against Alma King, the Kanawha County Clerk, demanding the Clerk issue them a marriage license. On April 1, 2004, the Court declined to assert jurisdiction, thus dismissing the case.³⁵

In the context of a gay parenting case, the Supreme Court of Appeals of West Virginia used the "best interests of the child" policy to grant custodial standing to the lesbian partner of a

³³ W. VA. CODE § 16-2F-7 (2006) (abortions); § 16-2B-4 (2006) (contraception); §16-11-1 (2006) (sterilizations).

³⁴ W. VA. CODE § 16-30-12 (2006).

biological mother.³⁶ Although the majority decision purported to focus on the careful construction of the text of the legislation at issue, the Court seized upon an "exceptional circumstances" loophole to craft what one dissenter characterized as an "anti-family" decision.³⁷ The Court decided for the first time that the same-sex partner of a biological parent could be treated as a child's "psychological parent" and granted custody.

In *Clifford K. v. Paul S.*, Christina S. and Tina B. began living together in November 1998. They decided they would like to have a child, so Christina S. enlisted plaintiff, Clifford K., to serve as the biological father. Christina S. became pregnant and gave birth to a boy on Christmas Day, 1999. The boy resided with Christina S. and Tina B. from then on.

On June 1, 2002, Christina S. and Tina B. were involved in an automobile accident. Christina S. was killed, and Tina B. sustained injuries. While Tina B. was recovering, Christina's father, Paul S., assumed physical custody. After Christina's death, grandfather Paul S. was appointed the boy's guardian. Clifford K. (the biological father) and Tina B. jointly filed a petition for custody of the boy in July 2002. Although Clifford K. was a party to the petition, "he apparently did so on Tina B.'s behalf and not because he sought custody of [the boy] for himself."³⁸

The Family Court of Clay County appointed a guardian *ad litem* for the child and ordered extensive psychological evaluations of all parties. Based on the guardian's recommendations and the psychological evaluations, the Family Court found Tina B. had standing to seek custody of the boy as his "psychological parent, and that giving Tina B. custody served the child's best interests."³⁹

Paul S., the grandfather, appealed to the Circuit Court of Clay County. The Circuit Court ruled Tina B. did not have standing to seek custody under West Virginia Code §48-9-103, because she was not the boy's legal parent, and the concept of "psychological parent" had never been extended to the same-sex partner of a biological parent. The Circuit Court transferred custody to the grandfather while granting visitation rights to Tina B. Ultimately, on remand, the Family Court

³⁵ *Link v. King*, ___ W. Va. ___ (2004); <http://www.freedomtomarry.org/node.asp?id=3687>, last viewed February 8, 2007.

³⁶ *Clifford K. v. Paul S.*, 217 W. Va. 625, 619 S.E.2d 138 (2005).

³⁷ *Id.*, 217 W. Va. at 648, 619 S.E.2d at 161.

³⁸ *Id.*, 217 W. Va. 631, 619 S.E.2d at 144.

awarded custody to Clifford K. as the boy's natural father while granting "permanent shared parenting time to Paul S. and Tina B."⁴⁰

Paul S. appealed a second time to the Circuit Court, which criticized the Family Court for doing indirectly what it could not do directly, awarding Tina B. custody of the child.⁴¹ The Circuit Court directed the Family Court to determine whether Clifford K. (the biological father) or Paul S. (the maternal grandfather) should be granted custody.

While the case was bouncing back and forth between the Family Court and the Circuit Court, Tina B. filed a petition with the Supreme Court of Appeals, challenging the Circuit Court's first ruling, which had denied her standing to seek custody. The Supreme Court of Appeals characterized the issue as whether Tina B. would meet any of the criteria in West Virginia Code §48-9-103 so as to have standing to participate in the child's custody proceeding.

The statutory analysis hinged upon two provisions defining the persons who have a right to participate in custody actions. Section 48-9-103(a)(1) granted standing to a "legal parent of the child." Section 48-9-103(b) provided that in "exceptional cases," intervention might be allowed to persons whose participation would be, in the court's discretion, likely to serve the child's best interests.⁴² Tina B. asserted she qualified as the boy's legal parent within the meaning of subsection (a)(1). The Court rejected this argument, holding the concept of "legal parent" was limited to the categories "in which the Legislature has specifically bestowed parental status." Because Tina B. was neither a biological parent, nor an adoptive parent, nor an appointed guardian, she did not come within the definition of "legal parent."⁴³

The Court then turned its attention to the "exceptional cases" provision. Noting the Legislature had left the term "exceptional cases" undefined, the Court held that standing should be limited to those factual situations where a party's intervention would be likely to serve the best

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Id.

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Id., 217 W. Va. 632, 619 S.E.2d at 145.

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Id.

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W. VA. CODE §48-9-103 (2001) (Repl. Vol. 2004), cited in *Clifford K.* at 217 W. Va. 634-35, 619 S.E.2d 147-

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Id., 217 W. Va. at 638-39, 619 S.E.2d at 151-52.

interests of the child.⁴⁴ The Court reviewed several cases where it had acknowledged the concept of a child's "psychological parent" in custody cases. "Stitching together" the threads running through the "psychological parent" cases, the Court held a "psychological parent" should be recognized for custody purposes where the child has formed a significant relationship with that person over a substantial time period and where the "psychological parent" had assumed caretaking duties for, and provided emotional and financial support to, the child. The court noted the "psychological parent" need not be related to the child biologically or adoptively.

Accordingly, we hold that a psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive or foster parent, or any other person.⁴⁵

Having recognized the concept of psychological parent, the Court turned to a determination of whether Tina B. was in fact the boy's psychological parent. "Without a doubt, she is."⁴⁶ The Court then considered whether Tina B. should be permitted to intervene. The Court cautioned that not every psychological parent would necessarily be entitled to participate in custodial proceedings. But in this case, the ties between Tina B. and the boy, the wishes of the boy's biological parents that Tina B. serve as the boy's mother, and the best interests of the child, demanded that Tina B. be permitted to participate. Based on the findings of the Family Court of Clay County, the Supreme Court of Appeals determined the best interests of the boy militated in favor of an award of custody to Tina B.⁴⁷

⁴⁴ *Id.*, 217 W. Va. at 640-41, 619 S.E.2d at 153-54.

⁴⁵ *Id.*, 217 W. Va. at 644, 619 S.E.2d at 157.

⁴⁶ *Id.*, 217 W. Va. at 645, 619 S.E.2d at 158.

⁴⁷ *Id.*, 217 W. Va. at 646, 619 S.E.2d at 159.

In reaching its conclusion, the Supreme Court of Appeals completely omitted discussion of whether a lesbian mother would be a suitable parent.⁴⁸ There was no evidence before the court that Tina B. would be an unfit parent. To the contrary, the boy's guardian *ad litem* specifically stated no party raised any parental fitness issue regarding Tina B.'s role in the boy's upbringing.⁴⁹ Had the natural father, Clifford K., participated actively in the boy's upbringing, the Court might have reached a different result. The grandfather, Paul S., was not able to demonstrate a relationship with the boy on a par with that of Tina B.⁵⁰

Justice Larry Starcher wrote a concurring opinion "to applaud the actions of the family court judge in this case."⁵¹ Justice Starcher opined that many families have stepparents, stepchildren, foster children, and/or adoptive children. "We would never go so far as to say these latter [non-traditional] compilations founded on love are not 'families' and, more importantly, we should never say that mere blood relations should trump a relationship based upon love and trust."⁵²

Justices Brent Benjamin and Elliot Maynard dissented in part. Justice Benjamin concurred that Tina B. did not meet the "legal parent" requirement for standing under Section 103(a). He dissented from "the majority's resurrection and expansion of the legal fiction called 'psychological parent' which is unnecessary, and, I believe, ill-advised."⁵³ Justice Benjamin would have remanded the case for the Family Court to determine whether or not Tina B. met the "exceptional case" standard under subdivision 103(b). Justice Benjamin argued the "psychological parent" concept devised by Supreme Court of Appeals decisions was implicitly overruled by the Legislature's reformation of West Virginia custody law between 1999 and 2001. To the extent the concept survived the legislative revisions, it would be in Section 103(b), "exceptional cases." Justice Benjamin noted that, prior to 1999, the "psychological parent" rationale was typically used for grandparents seeking custody in conflict with the legal parent.

⁴⁸ The Court dodged the controversial gay parent issue except to express its appreciation for the participation of the Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights, and the Lesbian and Gay Rights Project of the American Civil Liberties Union. *Id.*, 217 W. Va. at 633, 619 S.E.2d at 146, n.5.

⁴⁹ *Id.*, 217 W. Va. at 647, 619 S.E.2d at 160, n.21.

⁵⁰ *Id.*, 217 W. Va. at 647, 619 S.E.2d at 160.

⁵¹ *Id.*, 217 W. Va. at 650, 619 S.E.2d at 163.

⁵² *Id.*

Under no reading of the 'psychological parent' concept... could Tina B. have qualified as a 'psychological parent' because at all times when she could have been considered for such a concept, [the child] was always with his natural mother, Christina S."⁵⁴

Justice Benjamin dissented from the Supreme Court of Appeals' decision to dictate the ultimate result to the lower courts rather than allow them to apply Section 103(b) for themselves.

Justice Maynard began his dissent by saying, "I am dismayed that this Court has written an opinion that is so anti-family."⁵⁵ Justice Maynard was "at a loss to understand" a decision placing a child in a single-parent home with a person who is not a biological relative even though a two-parent home consisting of the child's grandparents was available.⁵⁶

Justice Maynard characterized the use of the "psychological parent" device as "yet another example of this Court's willingness to make law in areas reserved to the Legislature."⁵⁷ For Justice Maynard, the decision to extend custodial rights to the same-sex partner of a biological parent was a decision for the Legislature, not the Court. Although the Legislature recodified West Virginia's family law statutes in 2001, it did not address the custodial rights of same-sex partners of biological parents. By allowing intervention to Tina B., the majority was creating a substantive right where no such right existed before.⁵⁸ "Although families in our society today have taken on new forms, many have not yet been recognized by our Legislature. In my opinion, this Court should not impose its judgment where the Legislature has not spoken."⁵⁹

Stephen Crampton, chief counsel for the American Family Association Center for Law & Policy, characterized the *Clifford K.* decision as demonstrating the "lethal effects of judicial activism

⁵³ *Id.*, 217 W. Va. at 651, 619 S.E.2d at 164.

⁵⁴ *Id.*, note 2.

⁵⁵ *Id.*, 217 W. Va. at 648, 619 S.E.2d at 161.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*, 217 W. Va. at 648-49, 619 S.E.2d at 161-62.

⁵⁹ *Id.*, 217 W. Va. at 649, 619 S.E.2d at 162.

on the nuclear family," and "a stepping stone to recognition of same-sex marriage."⁶⁰ On the other hand, the decision has been hailed by gay rights groups. One website characterized the decision as rejecting "a bid to remove a five-year-old boy from his lesbian mother following the tragic death of her partner.... The Court, in its wisdom and compassion, has recognized Tina Burch for what she is: the surviving parent of a little boy who has already lost one of his mothers...."⁶¹

Women's Health Center, discussed above, was also an activist decision. The Supreme Court of Appeals of West Virginia could easily have affirmed the Circuit Court's ruling under the rationale of USSC precedents *Harris v. McRae* and *Maher v. Roe*. It could also have affirmed the Circuit Court's decision in deference to the state Legislature. By insisting state Medicaid funds be allocated for abortions, the Supreme Court of Appeals unnecessarily injected itself into a policy dispute.

In *Tax Commissioner v. MBNA America Bank, N.A.*,⁶² the Court upheld a tax imposed on an out-of-state credit card company with no property or employees in West Virginia on income realized out-of-state from accounts kept out-of-state. The only nexus with West Virginia was MBNA issued credit cards to customers in the state and promoted its business in West Virginia by mail and telephone solicitations. The Court applied a lenient view of the Commerce Clause's prohibition of state regulations unduly burdening interstate commerce. Even though precedents required a physical presence in the state to establish a substantial Commerce Clause nexus in use and sales tax cases, the Court ruled this test would not apply to business franchise and corporation net income taxes. The Court voted 4-1, with Justice Benjamin dissenting.

When analyzing the court from a judicial review point of view, long-standing precedents of the Supreme Court of Appeals of West Virginia caution that the Court must avoid invalidating a statute on constitutional grounds where reasonably possible:

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of

⁶⁰ Catholic News Agency, *West Virginia Court Redefines Family, Grants Parental Rights To Lesbian Partner* <http://www.catholicnewsagency.com/new.php?n=4206>, last viewed December 19, 2006.

⁶¹ Doreen Brandt, *Court Refused To Rip Child From Lesbian Mom*, <http://www.365gay.com/news.con05/06/061705mother.htm>, last viewed December 19, 2006.

⁶² No. 33049, 2006 W. Va. LEXIS 132 (W. Va. Sup. Ct. App. Nov. 21, 2006).

powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary.⁶³

Yet in *Morris v. Crown Equip. Corp.*, the Court proceeded to invalidate a statute designed to prevent forum-shopping plaintiffs from suing in friendly West Virginia courts. The case involved a Virginia resident who had an accident in Virginia with a fork lift manufactured by an Ohio corporation. The only connection to West Virginia was that a second defendant had allegedly distributed and serviced the machine. The legislative enactment prohibited a nonresident from bringing an action in the West Virginia courts unless all or a substantial part of the acts or omissions giving rise to the claim occurred in West Virginia. The majority held this prohibition discriminated against nonresidents, in violation of the Privileges and Immunities Clause of the U.S. Constitution.

In dissent, Justice Maynard argued that, since at least 1929, the USSC had ruled venue distinctions between residents and nonresidents constitutional.⁶⁴ The Supreme Court had expressly permitted states to prefer their own residents in access to overcrowded courts.⁶⁵ Justice Maynard would have upheld the venue statute, noting it was designed to give state residents, who pay for the courts, ready access to them.

This can be effectively achieved only by preventing nonresidents from abusing our courts by flooding them with litigation, not because they do not have a forum elsewhere, but simply because they believe they may achieve a better result here.⁶⁶

⁶³ *Morris v. Crown Equip. Corp.*, ___ W. Va. ___, 633 S.E.2d 292, 305; 2006 W. Va. LEXIS 69 (2006) (Benjamin, concurring), *cert. den. Crown Equip. Corp. v. Morris*, 166 L.Ed.2d 665, 2006 U.S. LEXIS 9480 (2006), citing *State ex rel Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965), and *State ex rel Riley v. Rudloff*, 212 W. Va. 767, 575 S.E.2d 377 (2002).

⁶⁴ *Id.*, 633 S.E.2d at 303 (Maynard, dissenting), citing *Douglas v. New Haven R. Co.*, 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929).

⁶⁵ *Id.*, citing *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 4, 71 S.Ct. 1, 2-3, 95 L.Ed. 3 (1950).

⁶⁶ *Id.*, 633 S.E.2d at 304.

During his 1996 campaign, Justice Maynard said, “Judge-made law is one of the primary reasons for West Virginia’s extraordinarily high insurance rates.” He also stated, “We have too much silly and frivolous litigation. If the Supreme Court would allow trial judges to have the power to throw out silly suits, it would help the problem immensely.”⁶⁷ Based on the decisions reviewed for this paper, Justice Maynard (and perhaps Justice Benjamin) is in the minority when it comes to judicial restraint. While the Supreme Court of Appeals of West Virginia expressly eschews judicial activism, it is easy to find cases where it struck down rational legislative enactments on constitutional grounds.

III. THE COURT

The name of West Virginia's highest court is the Supreme Court of Appeals of West Virginia. West Virginia is one of only eleven states with a single appellate court. The Supreme Court of Appeals of West Virginia is the busiest appellate court of its type in the United States.⁶⁸ The Court's jurisdiction is completely discretionary; there are no appeals as of right. The Supreme Court of Appeals hears appeals from the circuit courts (trial courts of general jurisdiction) and administrative agencies.⁶⁹

The Supreme Court of Appeals of West Virginia is comprised of five justices. The justices are elected for staggered twelve-year terms in partisan elections.⁷⁰ There are no retention votes; all races are partisan contests.

In recent times, all but one of the justices elected to the Court have been Democrats. Five Republican justices were appointed to fill vacancies by Republican governor Arch Moore, but none

⁶⁷ http://www.wvcala.com/know_judges/maynard.html, last viewed February 8, 2007.

⁶⁸ Supreme Court of Appeals of West Virginia official website, <http://www.state.wv.us/wvsca/Supreme.htm>, last viewed December 20, 2006.

⁶⁹ Workers' compensation appeals make up a large portion of the court's docket. Supreme Court of Appeals of West Virginia, 2005 statistical report, p. 2, <http://www.state.wv.us/wvsca/clerk/statistics/2005StatRept.pdf>, last viewed December 20, 2006. In 2005, 2,983 cases were filed in the Supreme Court of Appeals. Of these, 1,860 were workers' compensation cases. The next largest category was civil cases, numbering only 388 cases. *Id.* In 2005, the Supreme Court of Appeals granted review in 844 workers' compensation cases (27% of the total) and 393 civil cases (31% of the total). *Id.* at 5.

was elected to a full term. The only Republican elected to the Supreme Court of Appeals of West Virginia since 1924 (without having first been appointed to the Court)⁷¹ is Brent D. Benjamin, elected in 2004.

Brent D. Benjamin, the only Republican on the Supreme Court of Appeals, unseated Justice Warren McGraw in a campaign so nasty it generated support for judicial merit selection. Because the 2004 election may forecast a change in West Virginia's judicial temperament, it merits discussion.

In 2004, the U.S. Chamber of Commerce declared the defeat of West Virginia Supreme Court Justice Warren McGraw as one of its top electoral priorities. The West Virginia Chamber of Commerce and the West Virginia Medical Association complained Justice McGraw's decisions hurt the State's business climate by favoring plaintiffs.⁷² In the Democrat primary, these organizations endorsed Circuit Court Judge Jim Rowe and raised over \$1 million in support of his failed challenge to Justice McGraw.

After defeating Rowe in the May 12 primary, McGraw was targeted by a 527 group called "And for the Sake of the Kids," which ran more than \$1 million worth of ads asserting McGraw was soft on crime. One ad criticized McGraw for casting the deciding vote to release a convicted child sex offender on probation. Disclosure reports showed And for the Sake of the Kids raised \$1.7 million from Don Blankenship, the CEO of Massey Energy, and \$745,000 from Doctors for Justice of Wheeling. A 527 group backed by trial lawyers, West Virginia Consumers for Justice, raised over \$1 million in support of Justice McGraw.⁷³

Brent Benjamin faced an uphill battle. No Republican had been elected to the Supreme Court of Appeals (without first having been appointed) since 1924.⁷⁴ Benjamin had never served as a judge and was virtually unknown at the beginning of his campaign. But he garnered the support of

⁷⁰ Richard A. Brisbin, Jr., and John C. Kilwein, *The West Virginia Supreme Court of Appeals*, WEST VIRGINIA PUBLIC AFFAIRS REPORTER, Vol. X, No. 2 (Spring 1993), at 1.

⁷¹ THE CHARLESTON GAZETTE, May 13, 2004.

⁷² <http://www.justiceatstake.org/contentViewer.asp?breadcrumb=4,126,115,464,487>, last viewed December 13, 2006.

⁷³ *Id.*

⁷⁴ THE CHARLESTON GAZETTE, May 13, 2004.

the same business interests that supported Judge Rowe in the primary and added Republican votes to achieve victory in November.

About five weeks before the November election, the President of the West Virginia Chamber of Commerce published a commentary in the Charleston *Daily Mail*, saying, "Our state has a reputation as an undesirable business location due to frivolous lawsuits and the anti-employer sentiments of the McGraw majority on the court."⁷⁵ During the campaign, Mr. Benjamin repeatedly attacked Justice McGraw for finding in favor of workers' compensation claimants, ruling against business, and driving up insurance costs. Benjamin pledged to apply the law, not make the law. The Defense Trial Counsel of West Virginia released 2003 statistics showing McGraw voted in favor of employees and against business in 97% of the cases.⁷⁶ Business leaders cited escalating workers' compensation costs as one factor causing businesses to leave West Virginia for other states. They hailed the election of Brent Benjamin as "the first step toward making West Virginia more business friendly."⁷⁷ McGraw supporters, however, claimed the election results "prove[d] that West Virginia Supreme Court seats were for sale."⁷⁸

Putting aside politics, many commentators assailed the nastiness of the campaign. "The Benjamin race was one of the dirtiest I've seen in my life," said Fairmont State University Professor George Sprowls.⁷⁹ Dr. Richard Brisbin, Jr., a professor of political science at West Virginia University, opined that the vicious attack ads during the judicial election might prompt West Virginia to adopt some form of non-partisan judicial elections.⁸⁰

Indeed, in direct response to the Benjamin-McGraw campaign, the West Virginia State Bar organized a committee to examine the State's partisan judicial election system and consider alternatives.⁸¹ The bar committee completed its work by October 2005. At the annual meeting of

⁷⁵ Steve Roberts, *To Change W. Va. Change the Court*, CHARLESTON DAILY MAIL, September 30, 2004, republished at http://www.wvchamber.com/rbwv/News/Commentary/DailyMail_RobertsColumn_09302004.htm.

⁷⁶ *W. Va. Business Leaders Hope Court Change Improves Image*, THE HERALD-DISPATCH, November 10, 2004.

⁷⁷ *Id.*

⁷⁸ Beth White, West Virginia Consumers for Justice, quoted in *W. Va. Supreme Court Justice Defeated In Rancorous Contest*, WASHINGTON POST, November 4, 2004.

⁷⁹ *Courting Change: Benjamin Hopes To Shine Light On Justice*, THE STATE JOURNAL, November 4, 2004.

⁸⁰ *W. Va. Business Leaders Hope Court Change Improves Image*, THE HERALD-DISPATCH, November 10, 2004.

⁸¹ *Ugly Race May Fuel Changes In Judge Selection*, CHARLESTON DAILY MAIL, November 5, 2004.

the Board of Governors of the West Virginia State Bar on October 7, 2005, a motion was made, seconded, and passed to maintain the present partisan election system for appellate court positions. Apparently, the sentiment was not unanimous; a minority report was filed.⁸²

There were no judicial contests on the November 2006 ballot, but the results in legislative races favored Democrat candidates. In both the House and Senate, Democrats increased the majorities they have held since the 1930s. Massey Energy CEO Don Blankenship spent \$3.7 million in an unsuccessful bid to influence the 2006 legislative races. Blankenship's independent "And For The Sake Of The Kids" campaign urged support for 45 specific GOP House candidates, while attacking 42 of their Democrat opponents by name. Only one of the Democratic incumbents targeted by Blankenship lost. Thirty-nine Blankenship-backed candidates lost, including four Republican incumbents.⁸³ The 2006 election results seem to indicate that it is too soon to declare Justice Benjamin's election in 2004 as a harbinger of change.

The Current Members of the Court

The Chief Justiceship rotates annually among the justices.⁸⁴ The current Chief Justice is Robin Jean Davis.

⁸² WEST VIRGINIA STATE BAR BOARD OF GOVERNORS, Minutes, October 7-8, 2005, Section 14, *Report From Judicial Selection Committee*.

⁸³ *Blankenship's Spending Exceeded All Of Senate*, CHARLESTON DAILY MAIL, December 18, 2006.

⁸⁴ However, in a break with tradition, the Justices voted on October 26, 2006, to appoint Justice Davis to serve a second year as Chief Justice, to be followed by Justice Maynard in 2008. This means that Justice Larry Starcher, who was due to serve as Chief Justice in 2007, will not serve as Chief Justice before facing the voters in 2008. See *Starcher Will Not Serve As Chief Justice*, THE STATE JOURNAL, October 30, 2006.

Member	Year Elected	Term Expires	Miscellaneous
Robin Jean Davis ⁸⁵	Elected to unexpired term in 1996; reelected to full twelve-year term in November 2000.	2012	<ul style="list-style-type: none"> - Biographical Information: B.S., 1978, West Virginia Wesleyan College; M.A. and J.D., 1982, West Virginia University. - Noteworthy Opinions: <i>Clifford K. v. Paul S.</i>,⁸⁶ granting biological mother's lesbian partner standing to participate in custody proceeding. - Other: Democrat; most senior member of the Court; Chief Justice in 1998, 2002, and 2006; previously in private practice, employee benefits, and domestic relations; Husband, Scott Segal, is a prominent personal injury lawyer;⁸⁷ 69% of 1996 campaign contributions and 60% of 2000 campaign contributions came from personal injury lawyers.⁸⁸

⁸⁵ <http://www.state.wv.us/wvsca/davis3.htm>, last viewed on February 6, 2007.

⁸⁶ *Id.*, 217 W. Va. 625, 619 S.E.2d 138 (2005).

⁸⁷ http://www.wvcala.com/know_judges/davis_ws_j.html, last viewed February 8, 2007.

⁸⁸ http://www.wvcala.com/money/cont_summary.html, last viewed February 8, 2007.

<p>Elliot E. Maynard⁸⁹</p>	<p>Elected in 1996.</p>	<p>2008</p>	<ul style="list-style-type: none"> - Biographical Information: B.S., 1967, Florida Southern College; J.D., 1974, West Virginia University; served in U.S. Air Force in 1960s; private practice, 1974 to 1981; elected Prosecuting Attorney of Mingo County in 1976 and 1980; served as Chief Justice in 2000 and 2004. - Professional Affiliations: Member of American Judge's Association, American Bar Association, American Judicature Society, West Virginia Bar Association, National District Attorney's Association, and Charleston Rotary Club. - Civic/Social Affiliations: Involved with Boy Scouts for over 30 years. - Noteworthy opinions: Noteworthy opinions include pro-family dissents in the <i>Clifford K.</i> and <i>Katherine B.T.</i> cases. - Other: Democrat; only 20% of 1996 campaign contributions came from personal injury lawyers.⁹⁰
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⁸⁹ <http://www.state.wv.us/wvsca/maynard2.htm>, last viewed February 6, 2007.

⁹⁰ http://www.wvcala.com/money/cont_summary.html, last viewed February 8, 2007.

<p>Larry V. Starcher⁹¹</p>	<p>Elected in 1996.</p>	<p>2008</p> <p>21</p>	<p>- Biographical Information: A.B., 1964, and J.D., 1967, West Virginia University; former Director, North Central West Virginia Legal Aid Society; private practice until elected Circuit Judge in 1976; former President, West Virginia Judicial Association; served as Circuit Judge for 20 years, 18 as Chief Judge; served as Chief Justice in 1999 and 2003.</p> <p>- Articles: <i>Choosing West Virginia's Judges</i>, 12 W. VA. LAW. 18 (1998).</p> <p>- Other: 71% of 1996 campaign contributions came from personal injury lawyers;⁹² honored by NAACP, Trial Lawyers and Probation Officers; During 1996 campaign, triggered ethics charges by writing to county labor councils that labor would like the decisions he would make on the court.⁹³ Judicial administration initiatives include the Gender Fairness Task Force. Speaking at West Virginia Political Science Association, Justice Starcher called Massey Energy CEO Don Blankenship "stupid," "a clown" and "an outsider."⁹⁴ A Massey affiliate, Marfork Coal Company, petitioned Justice Starcher to recuse himself from a pending case, citing his hostile comments with respect to Massey's CEO. Justice Starcher declined.⁹⁵</p>
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Joseph P. Albright ⁹⁶	Appointed Sept. 1995 by Gov. Gaston Caperton. Elected in November 2000.	2012	<p>- Biographical Information: Bachelor of Bus. Admin, University of Notre Dame; J.D., Notre Dame Law School; Private practice, 1962 to 1995; Appointed to an unexpired term on the Supreme Court of Appeals, 1995; Returned to private practice December 1996; Former Assistant Prosecuting Attorney; Former City Attorney, City of Parkersburg; Former member and Speaker of the West Virginia House of Delegates.</p> <p>- Other: 78% of 2000 campaign contributions came from personal injury lawyers.⁹⁷ Member, St. Francis Xavier Catholic Church in Parkersburg; Officer and director of Albright's of Belpre, Inc., a family-owned retail furniture business; Democrat.</p>
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⁹¹ <http://www.state.wv.us/wvsca/starcher3.htm>, last viewed February 6, 2007.

⁹² http://www.wvcala.com/money/cont_summary.html, last viewed February 8, 2007.

⁹³ http://www.wvcala.com/know_judges/starcher.html, last viewed February 8, 2007.

⁹⁴ George Hohmann, *Massey Wants Starcher Off Case Company Says Justice Remarks Make Fair Trial*

Impossible, CHARLESTON DAILY MAIL, November 2005, at <http://www.dailymail.com/news/News/2005110124/>.

⁹⁵ Editorial, *Temperament Counts in Judges; Justice Starcher Has Demonstrated An Overt Prejudice Against A Litigant*, CHARLESTON DAILY MAIL, November 3, 2005 at 4A, cited in AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2005, note 86.

⁹⁶ <http://www.state.wv.us/wvsca/albright.htm>, last viewed February 6, 2007.

⁹⁷ http://www.wvcala.com/money/cont_summary.html, last viewed February 8, 2007.

Brent D. Benjamin ⁹⁸	Elected in 2004.	2016	<ul style="list-style-type: none"> - Biographical Information: B.A. and J.D., The Ohio State University. - Other: Republican; 20 years in private litigation practice; Elizabeth United Methodist Church; 1999 graduate of Leadership West Virginia.
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CONCLUSION

Traditionally, the Supreme Court of Appeals of West Virginia has been a liberal court. At least according to commentators, it has tended to favor plaintiffs over defendants and workers over employers. Judging by the relatively few decisions on "Life Issues," the Court's liberal tendencies have carried over. The Court extended Medicaid benefits to abortions, in defiance of legislative intent. The Court recognized a "wrongful birth" cause of action that necessarily depended on the availability of abortion. And the Court extended child custody standing to the lesbian partner of a child's biological mother, despite the eagerness of the maternal grandparents to raise the child.

The West Virginia political scene continues to be dominated by the Democrat Party, notwithstanding the election of a Republican to the Supreme Court of Appeals in 2004. Given the Democrat resurgence in the November 2006 elections, it is easier to see Justice Benjamin's 2004 election to the high court as an aberration than as a trend. Absent a rightward shift in 2008, one cannot recommend West Virginia as a favorable venue for pro-life litigation.

⁹⁸ <http://www.state.wv.us/wvsca/benjamin.htm>, last viewed February 6, 2007.