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Pennsylvania Upholds Parental Rights

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The long-standing doctrine of usury has been defined by the Maryland courts as the taking of more interest for the use of money or forbearance than the law allows. *Scott v. Leary*, 34 Md. 389 (1871). To constitute usury, there must be: one, a lending of money or forbearance to collect money due; two, an agreement that the money shall be returned; and three, more than legal interest must be paid. *Williams v. Reynolds*, 10 Md. 57 (1856). It is a question of the lender's intention to exact more than the allowable legal rate of interest, *Curozza v. Federal Finance & Credit Co.*, 149 Md. 223, 131 A. 332 (1925); however, nothing in the law of usury prevents a borrower from paying usurious interest, if he so desires. *Kirsner v. Sun Mortgage Co.*, 154 Md. 682, 141 A. 398 (1928). Intent to take excessive interest is an essential element to establish usury. *Beneficial Finance Co. v. Administrator of Loan Laws*, 260 Md. 430, 272 A.2d 644 (1971).

The court here, in reaching its decision on whether interest should be charged on the $45,000, emphasized the fact that this amount was never under the Lyles' control. In qualifying the issue of control, the court indicated that had Tri-county placed the money in an escrow account there would have been no question as to control, even if the escrow was subject to restrictions. *Id.* at 73,371 A.2d at 426.

In its appeal, Tri-County contended that where a loan agreement contemplates that the entire amount of the loan is available to the borrower immediately, the fact that he leaves it with the lender for some time period does not make the transaction usurious, absent a showing of intent to evade the law against usury. Judge Singley, writing for the court, discounted this rule by considering: one, that the laws against usury ought to be stricly enforced; and, two, that no subterfuge of a lender will be permitted to shield a usurious loan. *Id.* at 74-75,371 A.2d at 427. Although the heart of the rule is the lender's intent to evade the usury laws, the court does not base its holding on that point; in fact, nowhere in the opinion does the court attempt to determine appellant's actual intent in retaining the $45,000. As to the concept of unpaid balance, the court reasoned that this balance was the $15,000 and not the $45,000. The $45,000, by being in Tri-County's business account, was totally within its control. When the Lyles repaid Tri-County, they needed only to pay the sum due, i.e. $15,000 plus interest.

The court does not mention any benefits which the appellant may have received by keeping the loan in its acount and under its control. Maryland case and statutory law indicates that the intent of the Maryland usury statute is to prevent a lender from obtaining an unjust bonus or commission. *See e.g., Brenner v. Plitt*, 182 Md. 348, 34 A.2d 853 (1943); Maryland Ann. Code, Art. 49 (1972).

A final point not discussed by the court is custom and usage in the trade. The question is whether it is customary for Maryland loan companies, when retaining a portion of the proceeds, to place such proceeds in a general business account with a record of outstanding loans. Such a custom would seem to be contrary to the proscriptions of the Maryland usury statute. While some states have ruled that custom and usage cannot legalize usury, the question of whether the practice is usurious has often been influenced by commercial custom.

The court's failure to address the element of the lender's intent may have been a serious oversight; the case could have been remanded to determine if a usurious intent on the part of the appellant existed. It seems clear, however, that the decision in *Tri-County* is in line with previous decisions of the court. The appellant lender, having attempted to exact an amount in excess of the legal interest rate by a rather ingenious method, was held to be in violation of the Maryland usury statute and the case law through which it had been interpreted.

Pennsylvania Upholds Parental Rights

by Lawrence Dominic*

Of all the law's intrusions into the lives of individuals, few seem more disruptive than the one that severs the legal bond between parent and child—the termination of parental rights.

There is substantial confusion regarding the exact nature of parental rights. Attempts at clarification run from considering them as a trust relationship, a compact balancing the parent's rights against obligations, to a cluster of "rights to"—to have custody, to visit, to choose a name,

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to educate, to appoint guardians, to consent to marriage and to consent to adoption. Ketcham and Babcock, *Statutory Standards for Involuntary Termination of Parental Rights*, 29 RUTGERS L. REV. 530, 532 (1976).

Depending on the jurisdiction, termination proceedings are conducted under one of two views—the parental right or the presumptive right view. 59 AM. JUR. 2d, Parent and Child §26 (1971). Jurisdictions following the parental right doctrine hold that a natural parent is entitled to custody against all others. A challenging party must show that the natural parent is "unfit, or forfeited his rights, or is unable to properly care for the child, or other extraordinary circumstances." *Id.*,§27. Presumptive right jurisdictions hold that parental rights are presumptive and must yield to the "best interests of the child." Regardless of whether the natural parent has been found unfit, and even where he or she has been expressly found to be fit, the best interests of the child may dicatate that he or she be left with a nonparent with whom there has developed strong ties. *Id.*, §26. This nonparent is referred to in the literature as the "psychological parent." Ketchman and Babcock, *supra*, 536. The reasoning behind the presumptive right doctrine is that severe harm would be done to a child with an emotional investment in the psychological parent-child relationship if that relationship were extinguished. This view is being increasingly recognized by Courts. *Id.*, 551.

The termination proceeding is the intrusive instrument used by the courts to examine the facts concerning the child's relationships with both the natural parent and a prospective adoptive parent. The evidentiary burden is on the petitioning party and the standard of proof normally required is more than the preponderance of the evidence. The requirement has been variously described as "clear, clear and conclusive, plain and certain, strong and satisfactory, or cogent and convincing." 59 AM. JUR. 2d, *supra*, §27. However, in Pennsylvania, the standard of proof required is a preponderance of the evidence. *In re Rinehart*, 70 District & County Reports 2d 739 (1975).

The obverse of the parental rights coin is parental duties. These are seen as affirmative obligations to love, protect and support the child. But performance of these duties does not require the personal presence of the parent; temporary arrangements may be made for the care of the child. Strauss, *Involuntary Termination of Parental Rights under the Pennsylvania Adoption Act*, 48 TEMPLE L.Q. 1050, 1053 (1975). However, "mere desire to perform the duties is insufficient to preserve the parent-child relationship." *In re Adoption of R.I.*, 468 Pa. 294, 361 A.2d 294 (1976).

photo by John Clark Mayden

THE CASE

On August 13, 1974, a battered, ten-month-old Melissa Pyott was admitted to a hospital with severe bruises and discolorations on her body resulting from physical abuse by her stepfather, R.T. Davis. A petition was filed by Chester County Children's Services asking for involuntary termination of parental rights pursuant to the Pennsylvania Adoption Act of 1970.[1] On September 20, 1974, temporary custody of Melissa was given to the agency. That same month the mother, Patricia, moved to Ohio with her husband, Melissa's stepfather, where he had an opportunity for employment.

Sixteen months passed between the granting of temporary custody to Children's Services and the commencement of involuntary termination proceedings. In this interval, the mother saw the child once, in January 1975, at the Chester County agency. She corresponded with the agency twice, in November, 1974 and March, 1975, expressing love and concern for the child in both letters, and indicating a hope of regaining custody in the second letter, and she invited the agency to investigate her Ohio home. Between January and August, 1975, at the request of Chester County Children's Services, an Ohio Children's agency made numerous visits to appellant's home. The mother and her husband participated in several counseling sessions with the Ohio agency. A monthly public assistance grant of only

[1] Act of 1970, July 24, P.L. 620, No. 208, Art III, Section 311, 1 P.S. Section 311 (Supp. 1977-78).

The rights of a parent in regard to a child may be terminated after a petition filed pursuant to Section 312, and hearing held pursuant to Section 313, on the ground that:

(1) The parent by conduct continuing for a period of at least six months either has evidenced a settled purpose of relinquishing parental claim to a child, or has refused or failed to perform parental duties; or

(2) The repeated and continued incapacity, abuse, neglect, refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent; or

(3) The parent is the presumptive but not the natural father of the child.

$170.00 precluded them from sending Melissa any money or gifts. However, Melissa was visited monthly by her maternal grandmother and aunt, who brought her clothing, toys and food. All this time Melissa was with a foster family. As of January 1976, the mother was living with her sister with the announced intention of remaining apart from her husband.

The Court of Common Pleas terminated the parental rights of Patricia Pyott Davis to Melissa Pyott under section 311(1) of the Adoption for failure to perform parental duties for a period in excess of six months.

Appellant mother raised two arguments in her appeal. Her first contention was that the lower court failed to consider her "particular circumstances" and to recognize that she had used the resources at her command in declining to yield to obstacles preventing her from performing her duties. *In re Adoption of McCray*, 460 Pa. 210, 217, 331 A.2d 652 (1975). Secondly, she maintained that Common Pleas incorrectly found that her mother and sister were not acting as her proxy in her absence, and in concluding that even if they were, appellant did not act unreasonably under the circumstances.

On October 28, 1977, the Supreme Court of Pennsylvania reversed Common Pleas for failing properly to apply the facts to the law, holding that Chester County Children's Services failed to prove by a preponderance of the evidence that the parental rights of Patricia Pyott Davis to her daughter, Melissa, should be terminated, *In re Adoption of Pyott*, ___Pa. ___, 380 A.2d 311 (1977). Since the appellee agency failed to meet the statutory requirement for involuntary termination, the question of the best interests of the child never arose.[2] Even if that were conceded, the Supreme Court agreed with the mother that the lower court did not accord proper weight to her individual circumstances. The court noted an earlier opinion in which it held that a court

> . . .must examine the individual circumstances and any explanation offered by the parent to determine if that evidence, in light of the totality of the circumstances, clearly warrants permitting the involuntary termination of parental rights. . . *In re Adoption of Orwick*, 464 Pa. 549, 555, 347 A.2d 677, 780 (1975).

In its analysis of appellant's explanation, the Court looked to whether she met the *McCray* test and used the resources at her command and declined to yield to obstacles preventing her from performing her parental duties. Viewing the totality of circumstances, the 3-2 majority opinion was that Patricia Pyott Davis met the test.

Judge Nix, writing for the majority, viewed the mother's action of one trip to Pennsylvania to visit Melissa, three trips in one week from Ohio to Pennsylvania for a custody hearing, and two communications with Chester County Children's Services advising them of her affection and desire for her daughter's return, as attempts to prevent forfeiture of

[2] When a court is establishing facts to justify a termination of parental rights, it does so without regard to the child's best interests. But once grounds for termination have been established under Section 311(1), the child's best interests are considered in determining whether parental rights should actually be terminated. *Adoption of R.I., supra* at 299.

her rights, expressions of interest and concern, and as an exercise of "reasonable firmness" in meeting the *McCray* test. They gave much weight to the counseling undergone by the mother and her husband with the Ohio agency, albeit on instructions from Chester County Children's Services. The court rationalized that the appellant mother was reasonably led to believe that these sessions would preserve her rights to her daughter.

The lower court's ruling that the grandmother and aunt were not acting on behalf of the mother was found to be without merit. Pennsylvania does not require that a parent personally take care of a child, and one may make reasonable arrangements for temporary care. *In re Adoption of Wolfe,* 454 Pa. 550, 557, 312 A.2d 793, 797 (1973). The fact that the grandmother and aunt satisfied their own emotional needs does not nullify the mother's concern. The court said that the main consideration is whether the mother reasonably relied on her family and whether they were aware of the reliance. The Court concluded that appellant's testimony supported the arrangement.

The majority noted that the mother continued to improve her environment, culminating in the separation from her husband, Melissa's stepfather, in order to make it adaptable to the raising of a child.

Justice Roberts wrote a strong and extensive dissent, charging the majority with misreading the record, erroneously construing the standard of parental responsibility required by the statute, and arriving at findings not supported by the record. He considered appellant's contacts with Melissa to have been minimal and found in the record that the counseling was unsuccessful. The record also showed that appellant and her husband denied any knowledge or responsibility for Melissa's injuries, and that the Ohio agency concluded that Melissa should not be returned to the custody of appellant. The dissent questioned appellant's sincerity in wanting to separate from her husband, noting that she never mentioned that desire until the termination hearing, and a mere two weeks before it she said her address was in Ohio.

The minority also noted that in both letters to Chester County Children's Services, the mother expressed her desire that Melissa be returned to her, and that her husband shared this wish. Justice Roberts concluded that "the decree of the Orphans' Court is supported by competent evidence. The decree granting the petition to terminate appellant's parental rights should be affirmed." *Pyott, supra,* at ___, 380 A.2d at 325.

Despite the minority's condemnatory reading of the record, the Pennsylvania Supreme Court majority seems to find failure or refusal to perform parental duties only in the most blatant situations of neglect. As the court stated in *In re Adoption of Farabelli,* 460 Pa. 423, 333 A.2d 846 (1975), "Unless there is impressive evidence either of inadequacy of the natural parent to properly care for, provide for, maintain and guide the child or other compelling facts dictated to the contrary, the relationship of parent and child should not be disturbed by granting custody of the child to a third party."

Obviously, the court saw the facts in the Pyott case as less than impressive evidence that Patricia Pyott Davis had neglected her parental duties toward Melissa, and that the tenuous contacts she maintained with Melissa were sufficient to preserve her parental rights.

It appears that Pennsylvania is following the parental right doctrine rather than the presumptive right doctrine. Although there is no direct mention in the opinion regarding any emotional investment Melissa may have made in her foster parents in those sixteen months, Justice Roberts alluded to it when he cited the legislative intent behind the Adoption Act that when ". . .the possibility exists for the child to establish an effective parent-child relationship through adoption, the parent-child relationship may be terminated." *Pyott, supra* at ___, 380 A.2d at 320. However, even had the court considered Melissa's relationship with the foster family and found the emotional investment substantial, it is unlikely that it would have allowed termination. The Pennsylvania Supreme Court has been unwilling to terminate a natural parent's rights unless the record clearly shows neglect or refusal to perform parental duties. *In re Adoption of Sarver,* 444 Pa. 507, 509, 281 A.2d 890, 891 (1971).

New Diving Board Proves Costly

by Thomas G. Ross

When the management of the Sheraton Park Hotel in Washington, D.C. first proposed to improve its swimming pool facility, they could not have envisioned the eventual expense to the corporation of that project. In 1968, the pool was equipped with a three-meter, high performance "Duraflex" diving board. Three years later, an inexperienced diver, eighteen-year-old Thomas Hooks, was propelled by the board into shallow water where his head was violently greeted by the pool's floor, resulting in Hooks' quadriplegic state.

Seeking to recover monetary damages for his disability and medical expenses, Hooks and his parents instituted a personal injury suit against the Sheraton conglomerate in the United States District Court for the District of Columbia. Their suit alleged negligence on the part of the defendant both in the operation and construction of the pool.

In a bifurcated trial on the issues of liability and damages, a jury found Sheraton liable to the plaintiffs for damages of $7,000,000. Following the jury's verdict and a defense motion, the trial judge ordered a new trial unless Hooks and his parents remitted the excess of $4,500,000 and $180,000 respectively. The plaintiffs filed the required remittiturs, and Sheraton appealed the verdict.

I. LIABILITY

In its appeal for reversal of the jury finding of liability, Sheraton contended that the trial judge's instructions to the jury on two negligence issues were improper and prejudicial. In writing the