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Recent Developments: Newkirk v. Newkirk: In Child's Best Interest, Sibling Awarded Custody of Minor Children over Parent's Protest

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sonality disorder were not responsible for his criminal activity.

Id.

On appeal, Winters raised exceptions to the lower court's findings. The court of appeals responded that "the lower court's factual findings are prima facie correct and will not be disturbed on review unless clearly erroneous." *Id.* at 665, 526 A.2d at 58 (citing *Attorney Grievance Commission v. Miller,* 301 Md. 592, 602, 483 A.2d 1281, 1287 (1984)). Upon review, the court of appeals found no merit to Winters' exceptions and, agreeing with the lower court's findings, concluded that his criminal activity was not, "to a substantial degree," a result of his drug addiction or mental disorder. Winters thereby was disbarred.

The Court of Appeals of Maryland clearly has indicated that when an attorney's criminal activity is not substantially the result of his drug addiction or mental disorder, disbarment is the appropriate disciplinary sanction.

—Jonathan Beiser

Newkirk v. Newkirk: IN CHILD'S BEST INTEREST, SIBLING AWARDED CUSTODY OF MINOR CHILDREN OVER PARENT'S PROTEST

In *Newkirk v. Newkirk,* 73 Md. App. 588, 535 A.2d 947 (1988), the Court of Special Appeals of Maryland recently upheld a chancellor's finding that the exceptional circumstances of a custody action warranted that guardianship be awarded to the half-brother of two minor children rather than to their surviving natural parent.

Richard A. and Patricia C. Newkirk were married in 1969. Patricia had two children from a previous marriage, Michael and Derek, whom Richard adopted shortly after their wedding. The Newkirks had two children of their own, James and Meghan, ages 16 and 13 respectively, at the time of the custody dispute. In 1977, the Newkirks were divorced and Patricia was awarded custody of and support for the minor children, James and Meghan.

On September 23, 1985, Patricia Newkirk died of cancer. In her Last Will and Testament, she requested that Derek, the Appellee, act as guardian of James and Meghan in the event of her death. On the day of Patricia Newkirk's death, Richard Newkirk, the Appellant, informed James and Meghan that he was coming to pick them up. Upon his arrival, however, he found that Derek, age 29, had removed the children from the family home. Richard Newkirk then instituted custody proceedings.

Initially, the master recommended that Richard Newkirk be awarded custody of the children. Derek, however, filed exceptions and asked for child support payments which Mr. Newkirk had been making but had subsequently terminated when Mrs. Newkirk died. At a hearing before the Circuit Court for Prince George's County, Judge Levin, the Chancellor, sustained the Appellee's exceptions and awarded custody to Derek, the children's half-brother. The court also ordered Richard Newkirk to pay retroactive child support payments from the time of Mrs. Newkirk's death ($4,100) and to continue child support payments of $100 per week.

On appeal, Mr. Newkirk contended that the chancellor abused his discretion in awarding custody to a sibling of the minor children rather than to their surviving natural father.

In rejecting this contention, the Court of Special Appeals of Maryland first addressed the appellate procedure in reviewing child custody disputes.

> Initially, it must be noted that when an appellate court reviews the factual findings of a chancellor in a child custody case, it may not substitute its judgment for that of the chancellor on findings of fact. It may only review whether those factual findings are clearly erroneous in light of the total evidence.

Newkirk, at 591, 535 A.2d at 948, (citing *Colburn v. Colburn,* 15 Md. App. 503, 292 A.2d 121 (1972)). If the chancellor has erred as to matters of law, further proceedings may be required, however, his decision may only be disturbed if there has been a clear abuse of discretion. *Id.*

In settling child custody disputes, particularly between a biological parent and a third party, the chancellor must determine what he perceives to be in the best interest of the child. He must evaluate the capacity of the custodial litigants to care for the child, the environments they offer, as well as the personal character of the child. *Id.,* at 593, 535 A.2d at 949. Although the "best interest" standard prevails in Maryland, there is a *prima facie* presumption that the best place for a child is with its natural parents rather than in the custody of a third party. "This presumption is overcome, however, if the parent is unfit to have custody or if exceptional circumstances exist which would make such custody detrimental to the best interests of the child." *Id.* (*See* Md. Fam. Law Code Ann. sec. 5-201 (1984); *Ross v. Hoffman,* 280 Md. 172, 178-9, 372 A.2d 582, 587 (1977)).

Chancellor Levin found that exceptional circumstances existed which merited the granting of guardianship to the Appellee, Derek Newkirk. Evaluations presented to the chancellor from the Mental Hygiene Consultation Service, the Department of Social Services, and the Juvenile Services Administration all recommended that James and Meghan remain in the custody of Derek, their older half-brother. The reports noted that an excellent relationship existed between Derek and the children and that Derek had taken over the parental role. Placing the children with their father would surely disrupt their lives. Furthermore, one of the evaluations revealed that the relationship between Richard Newkirk and his two adopted sons was a distant one. Richard Newkirk blamed this on his inability to relate to children as a father.

In addition to these reports, Chancellor Levin also interviewed the children. When he spoke with them in his chambers, both children expressed that although they loved their father, they wished to remain with Derek.

In contrast, Mr. Newkirk presented a psychiatrist who testified that in the best interest of the children, they should be placed in the custody of their father. It was the psychiatrist's opinion that it was natural for the teenagers to prefer living with Derek, who is closer to their age, than with a parent of a different generation. He also stated that the children felt bound to fulfill their mother's wish for Derek to take care of them. *Newkirk*, at 595, 535 A.2d at 950.

In awarding the children to Derek, Chancellor Levin considered the reports presented to the court and additionally indicated that he feared the estranged relationship that developed between Mr. Newkirk and his adopted sons would repeat itself if the father was given the custody of James and Meghan. The chancellor also gave sufficient weight to the children's desires to live with Derek. Md. Fam. Law Code Ann. § 9-102 (1984) and Md. Est. & Trusts Code Ann. § 13-702 (1974) allow minors, who have attained the ages of 16 and 14 respectively, to petition for or designate their prefered guardians. *Newkirk* at 595, 535 A.2d at 950-51.

Reviewing this decision, the Court of Special Appeals of Maryland could not conclude that the chancellor was clearly erroneous in his findings nor that he abused his judicial discretion in giving Derek custody of the children.

The Appellant next contended that the chancellor erred in admitting into evidence evaluative reports by the Juvenile Services Administration and the circuit court's Mental Hygiene Consultation Service. Mr. Newkirk alleged that "the children never waived their respective privileges (of non-disclosure) nor were they advised of the existence thereof." *Id.* at 596, 535 A.2d at 951. The court, again, found no merit to this contention.

Both reports were ordered by officers of the court to aid in evaluating the emotional stability of the children, as well as the capacity of the two litigants to provide for James and Meghan. The court further indicated that the Appellant failed to raise this issue below and therefore, it had been waived under Md. Rule 1085.

Richard Newkirk's final averment was that there was no basis in fact or in law for the judgment entered against him for retroactive child support and continued weekly support payments. *Id.* The court of special appeals held that by an order effective prior to Patricia Newkirk's death, Richard Newkirk had a continuing obligation to provide for the support of his children until modification of the order, and that the judgment for arrearages was proper.

The decision handed down by the Court of Special Apeals of Maryland in *Newkirk* makes it clear that the presumption that a biological parent is always the best custodian of a child can be rebutted. The courts must thoroughly evaluate each custody dispute situation if the best interests of children are to be served. This important evaluative process attempts to ensure that Maryland's minors have a person at home who has the capacity, as well as desire, to care for them.

—Jonathan C. Levy

Campbell v. Montgomery County Bd. of Educ.: FEMALE MINOR DOES NOT ASSUME RISK OF SEXUAL ASSAULT WHEN IMPERMISSIBLY ENTERING BOYS' LOCKER ROOM

In *Campbell v. Montgomery County Board of Education*, 73 Md. App. 54, 533 A.2d 9 (1987), the Court of Special Appeals of Maryland recently held that a junior high school student did not assume the risk of sexual assault, as a matter of law, when she entered the boys' locker room. As a result, the court confirmed the importance that the fact-finder decide issues of contributory negligence and assumption of the risk.

On a late October day in 1983, Dawn Campbell was at her junior high school in Montgomery County, Maryland. That day, Dawn was excused from her physical education class because she had a broken finger. While her physical education class was in session, Dawn wandered onto the athletic field. According to Dawn, she was ordered by the boys' physical education teacher, Steven Rubinstein (Rubinstein), back into the building because she was disrupting his class. Rubinstein claimed that he told Dawn and a friend to find their own physical education class that was also on the field. Rubinstein said that he watched them begin walking toward their class and then returned to his own.

Instead of joining her class, Dawn reentered the building and proceeded to the boys' locker room with Georgia, another student. Dawn entered the boys' locker room but evidently Georgia did not follow. At trial, Dawn testified that she had been in the boys' locker room four other times in the preceding two months. Each