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McCready v. McCready and *Domingues v. Johnson*: COURT OF APPEALS REVIEWS STANDARD FOR MODIFYING CUSTODY ORDERS.

Cutting a path through an overgrown garden of intermediary appellate court precedent, the Court of Appeals of Maryland clarified the law regarding changes in custody in *McCready v. McCready*, 593 A.2d 1128 (Md. 1991) and *Domingues v. Johnson*, 593 A.2d 1133 (Md. 1991). The court held that when a change in custody is sought, a trial court should not wait for an adverse effect on the child to occur but should instead decide whether the change in circumstances might in the future prove harmful to the child.

In *McCready*, the parties had agreed to joint legal and physical custody of their daughter, Erin. The agreement specified a schedule for the shared physical custody. Several months after the order confirming the agreement was entered, the mother, Barbara McCready, filed a complaint for divorce and permanent custody of Erin. Mrs. McCready claimed a change in custody was necessary because her employment schedule had changed from weekends to weekdays and that joint physical custody was causing the child to experience stress and confusion. In his answer, the father, Timothy McCready, admitted that the joint physical custody had not proven beneficial to the child, but stated that it would be in Erin's best interests to have primary custody granted to him. The trial judge agreed with the father and granted him primary physical custody.

On appeal, the mother presented two arguments, the most important being that the "best interest of the child" standard should be replaced by an inquiry into whether evidence existed showing a material change in circumstances affecting the welfare of the child. The court of appeals granted certiorari on its own motion from the mother's appeal to the Court of Special

Appeals of Maryland.

The Court of Appeals of Maryland used *McCready* to explain that the interaction between the concepts of "best interest of the child" and "material change in circumstances." In any change of custody dispute, proof of a change in circumstances is ordinarily required. *McCready*, 593 A.2d at 1130. The requirement of proof serves to prohibit parents from relitigating questions of custody and to afford finality in custody orders. *Id.* The court noted that there will frequently be some evidence of changes which have occurred since the earlier custody determination was made. *Id.* at 1131. Determining whether those changes warrant a change in custody "necessarily requires a consideration of the best interest of the child." *Id.* The court resolved the confusion between the two concepts by categorizing the question of "changed circumstances" as a threshold question to the "best interest" determination. *Id.*

The court next considered the mother's second argument that the chancellor's decision to modify physical custody was erroneous. *Id.* The court stated that it "will not set aside factual findings made by the chancellor unless clearly erroneous, and we will not interfere with a decision regarding custody that is founded upon sound legal principles unless there is a clear showing that the chancellor abused his discretion." *Id.* The court reviewed the chancellor's findings and concluded that he had not abused his broad discretion. *Id.* at 1132.

In an opinion decided the same day as *McCready*, the Court of Appeals of Maryland reviewed a similar case, *Domingues v. Johnson*, 593 A.2d 1133 (Md. 1991). In *Domingues*, the parties had joint legal custody but the mother had primary physical custody. The mother remarried and wished to relocate to Texas with the parties' children. She petitioned the court for a change in the father's visitation schedule which had been set forth in a prior court order. The father cross-petitioned for sole

custody. After an extensive hearing, a domestic relations master found changes in circumstances, including: 1) the remarriage of the mother and her removal with the children to Texas; 2) interference with the relationship between the father and his children by the mother's new husband; 3) the failure of the mother to communicate with the father with respect to the children; and 4) the failure of the mother to encourage an appropriate relationship between the father and his children. *Id.* at 1135. Accordingly, the master awarded primary custody to the father.

The mother's exceptions to the master's finding were heard by a chancellor, but no additional testimony was taken. Satisfied with the master's finding, the chancellor overruled the exceptions and entered an order implementing the recommendations made by the master.

On appeal, the court of special appeals reversed, holding that the chancellor improperly applied the "best interests of the child" standard when he should have instead determined whether there was sufficient evidence of a change in circumstances affecting the welfare of the children. *Id.* at 1134. The intermediate appellate court determined that the mother's remarriage and move to Texas constituted changes in circumstances, but because neither of those circumstances had any demonstrable adverse effect on the children as of the hearing date, they could not be considered changes in circumstances affecting the welfare of the children. *Id.* at 1138. Therefore, the court decided, the mother should have been granted custody. *Id.*

The Court of Appeals of Maryland, reiterating its holding in *McCready*, reversed the court of special appeals. The court determined "[t]hat the (court of special appeals') view of 'change' is unduly restrictive" and that proof that change has already caused identifiable harm to the children is not necessary before a custody order can be modified. *Id.* Instead, the court found "that it is sufficient if the chancellor finds

that changes have occurred which, when considered with all other relevant circumstances, required that a change in custody be made to accommodate the future best interest of the children" *Id.* at 1139. The court acknowledged that "[a] determination of custody requires an element of prediction" and that it is "neither necessary nor desirable" to wait until a child is harmed to make a custody change. *Id.*

The court also examined the relationship between a master's recommendations and a chancellor's judgment. In particular, the court was troubled by the chancellor's failure to exercise independent judgment after subjecting the master's fact-finding to a clearly erroneous test. The court called the burden on chancellors "substantial," and the court emphasized that while consideration may and should be given to a master's recommendations, the final decision must be that of the chancellor's. *Id.* at 1135, 1138. "That the conclusions . . . of the master are well supported by the evidence is not dispositive if the independent exercise of judgment by the chancellor on those issues would produce a different result," explained the court. *Id.* at 1135.

The *McCready* and *Domingues* opinions should provide fresh guidance for change-in-custody cases. The decisions affirmed that the standard for modification of custody orders is the "best interests of the child." Additionally, the Court of Appeals of Maryland clearly stated that a child need not have been adversely affected before a change in custody can occur. Finally, the court's emphasis on the chancellor's duty to exercise independent judgment forces trial judges to take procedural steps to avoid the appearance of rubber-stamping the recommendations of masters.

- Catherine E. Head

***Murphy v. Edmonds*: MARYLAND'S STATUTORY CAP ON NONECONOMIC DAMAGES IN PERSONAL INJURY CASES IS CONSTITUTIONAL AND NEITHER VIOLATES DUE PROCESS NOR DENIES RIGHT TO A JURY TRIAL.**

In *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992), the Court of Appeals of Maryland upheld the State's statutory cap on noneconomic damages in personal injury cases as constitutional. Using the least burdensome test in analyzing the Courts & Judicial Proceedings article, section 11-108 of the Maryland Code, the court found that the law was rationally related to the State's purpose and did not violate the equal protection clause of the constitution. The court's ruling also means that limiting a jury's award with a noneconomic damages cap does not violate an individual's constitutional right to a jury trial. In justifying its position, the court proclaimed its deference to the legislature in removing the issue from the judiciary and enacting the cap with legislation.

Sarah Murphy was involved in an automobile accident while driving on I-83 in Baltimore. The defendants' tire blew out and his truck ran across the median striking Ms. Murphy, causing her serious injuries. Ms. Murphy and her husband filed a complaint in Baltimore County Circuit Court for compensatory and punitive damages. The jury awarded the Murphys \$510,000 in noneconomic damages. The defendants filed post trial motions requesting that the noneconomic damages be reduced to the statutory amount of \$350,000 as provided in section 11-108.

The plaintiffs, however, argued that section 11-108 violated the equal protection guarantee embodied in the Due Process Clause found in article 24 of the Maryland Declaration of Rights. The trial court ruled that the statute limited an important right, and therefore, the statute would have to pass the heightened scrutiny test. *Id.* at 106.

The judge found the statute failed heightened scrutiny and therefore upheld the jury award.

The court of special appeals reversed the trial court's holding in *Edmonds v. Murphy*, 573 A.2d 853 (Md. Ct. Spec. App. 1990). There, the court found that there was no important right which the statute was limiting and, determined that as such, section 11-108 was rationally related to the State's goal of economic regulation and thus constitutional.

The plaintiffs appealed to the court of appeals on two issues: 1) that the classification created by section 11-108 violated the equal protection guarantee of article 24 of the Maryland Declaration of Rights, and 2) that section 11-108 infringes upon the right to a jury trial under articles 5 and 23 of the Maryland Declaration of Rights.

The court began its analysis on the premise that equal protection as addressed in Fourteenth Amendment of the United States Constitution and article 24 of the Maryland Declaration of Rights was the same concept for analytical purposes. Opinions of the United States Supreme Court dealing with the Equal Protection Clause of the Fourteenth Amendment were therefore viewed by the court of appeals as "practically direct authorities." *Id.* at 108 (citing *Attorney General v. Waldron*, 426 A.2d 929 (1981)).

The plaintiffs argued that section 11-108 created two classes of people when damages were awarded under this statute. One group, composed of those who were less seriously injured, got to keep the entire jury award, while the other group, those who were more seriously injured, did not. Such classification, the plaintiffs argued, was in violation of the equal protection guarantee of the Maryland Declaration of Rights.

In addressing the plaintiffs' claim, the court discussed the three different standards of review for classifications challenged under the equal protection guarantees. The least restrictive standard of review was the rational basis