No. 31972 – *Glen Falls Insurance Company v. Billie Joe Smith, Robin Smith and Johnny Combs* and *GMAC Insurance Company v. Johnny Combs*

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Starcher, J., concurring, in part, and dissenting, in part:

I concur with the majority's conclusion that GMAC Insurance Company had no duty to provide coverage to Johnny Combs. As this Court held in *Farmers Mutual Ins. Co. v. Tucker*, 213 W.Va. 16, 576 S.E.2d 261 (2002), a person can be an insured "resident" of multiple households for purposes of insurance coverage, and whether residency has been established is *usually* a question of fact for jury resolution. But to get by the summary judgment stage, the person has to make out a *prima facie* case of residency. There just wasn't anything in this record to convince me that Mr. Combs wasn't anything more than an occasional visitor to his mother's house. GMAC Insurance Company therefore had no responsibility to provide Johnny with coverage under his mother's insurance policy.

I dissent, however, to the majority's anti-family conclusion that Johnny Combs could never be an insurable resident of the household of Billie Joe Smith, Johnny's former stepfather. The majority opinion is based on the erroneous conclusion that "there has never been a legally recognized relationship" between Johnny Combs and Mr. Smith. This conclusion ignores long-standing precedent. It also establishes a short-sighted public policy that increases insurance company profits at the expense of innocent children whose loving caretakers are ignorant of legal niceties. The lower court's grant of summary judgment to Glen Falls Insurance Company should have been reversed.

Nobody disputes the fact that Johnny Combs was ignored by his biological father, and that his biological mother put more time into her own healthcare than into raising Johnny. Instead, Johnny lived in Mr. Smith's house for upwards of fourteen years and called Mr. Smith his "dad." Mr. Smith reciprocated and raised the boy as his own son. Anybody who looked at this situation would applaud the fact that a biological stranger to Johnny stepped forward and took on the moral, financial and emotional burden of raising this young man.

In times past, this Court has recognized the existence of these informal parent-child relationships, and given these relationships equitable legal status. For most other legal situations, Johnny Combs would be considered a "resident" of his former stepfather's household.

The majority opinion takes a step back and says "so what" and punishes Mr. Combs for the sins of his biological father and mother. Johnny Combs is also punished because his "adopted" father, Mr. Smith, didn't hire a team of lawyers to terminate the parental rights of those biological parents and formally adopt the boy. Mind you, this punishment extends only to protecting insurance companies by denying Johnny Combs un- or under-insured insurance coverage through Mr. Smith's policy. To impose this punishment on Johnny Combs, the majority opinion ignores well-established law that makes Johnny's and Mr. Smith's situation a "legally recognized relationship."

In 1978, this Court first recognized that Mr. Combs could potentially inherit from Mr. Smith's estate upon Mr. Smith's death. In *Wheeling Dollar Savings & Trust Co.*

v. Singer, 162 W.Va. 502, 250 S.E.2d 369 (1978), we found a person could prove they had been "equitably adopted" by a decedent by showing that, from an age of tender years, they had stood in a position exactly equivalent to that of a formally adopted or natural child. If the person showed they had been equitably adopted by the decedent, then the person could inherit just as could a formally adopted or natural child. This rule was crafted in recognition of the fact that many "informal" parent-child relationships arise in our society, relationships that are never given a statutory or legal imprimatur:

> While formal adoption is the only safe route, in many instances a child will be raised by persons not his parents from an age of tender years, treated as a natural child, and represented to others as a natural or adopted child. In many instances, the child will believe himself to be the natural or formally "adopted" child of the "adoptive" parents only to be treated as an outcast upon their death. We cannot ascertain any reasonable distinction between a child treated in all regards as an adopted child but who has been led to rely to his detriment upon the existence of formal legal paperwork imagined but never accomplished, and a formally adopted child. Our family centered society presumes that bonds of love and loyalty will prevail in the distribution of family wealth along family lines, and only by affirmative action, i.e., writing a will, may this presumption be overcome. An equitably adopted child in practical terms is as much a family member as a formally adopted child and should not be the subject of discrimination. He will be as loyal to his adoptive parents, take as faithful care of them in their old age, and provide them with as much financial and emotional support in their vicissitudes, as any natural or formally adopted child.

162 W.Va. at 508, 250 S.E.2d at 373.

In addition to ignoring Johnny Combs' potential rights to inherit from Mr. Smith as his equitably adopted child, the majority opinion also ignores Mr. Smith's status as

a "psychological parent" to Johnny Combs. We recently stated, in Syllabus Point 3 of *Tina B. v. Paul S.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 31855, June 17, 2005), 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. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian.

Mr. Smith appears to have fit the bill as Johnny Combs' "psychological parent," and as such had clear legal standing to act as his "parent." The majority's opinion takes a disastrous public-policy detour away from *Tina B.* and says that while Mr. Smith could provide for the boy's "emotional and financial support," he could not provide him with insurance coverage.[1] This result is not only absurd, but dangerous to the well-being of children who are being raised by someone who is not their biological or legal guardian.

Last, but not least, in 1988 this Court held that stepchildren – who do not have a "legally recognized relationship with the purported parent or guardian" – can be considered as "children" of the parent or guardian for purposes of being beneficiaries of a life insurance

[1]While the majority's opinion is confined to un- and under-insured motorist coverage, I am horrified to think its reasoning may be extended – by insurance companies – to health insurance coverage. The result could be that untold numbers of guardians buying health insurance to protect their wards, only to learn upon filing a claim that because the *de facto* parent-child relationship has no formally recognized legal stamp of approval, the child is not entitled to coverage.

policy. In *Transamerica Occidental Life Ins. Co. v. Burke*, 179 W.Va. 331, 368 S.E.2d 301 (1988), a parent (Richard Wayne Nelson) was married twice. In the first marriage, the parent fathered three biological children. In the second marriage, no children were born, but for fifteen years the parent lived together with his wife and her three children from her prior marriage. When the parent died, he had an employee life insurance plan and an employee pension plan designating his wife as beneficiary of 50% of the death benefits under both plans. The other beneficiary was designated as "50% – children."

The issue before the Court in *Burke* was whether the term "children" meant only the natural children of the parent, or included the parent's stepchildren as well. The record indicated that the parent provided food, shelter, clothing and transportation for the stepchildren, disciplined the stepchildren, paid for health insurance for the stepchildren, and claimed the stepchildren as dependents on his income tax returns. The parent attempted to adopt the stepchildren, but before the adoptions could be completed, the parent "was laid off from his job and he decided, for financial reasons, not to pursue the adoptions until he was employed again." 179 W.Va. at 334, 368 S.E.2d at 304.

The Court conceded that the "term 'children' ordinarily does not include stepchildren, but it may include stepchildren when a contrary intent is found from additional language or circumstances." Syllabus Point 2, *Burke*. Looking to the parent's use of the term "children" when designating the beneficiaries to his death benefits, the Court found the designation ambiguous, and so turned to examine the parent's factual circumstances when

he designated his beneficiaries. Looking at those circumstances, the Court concluded that the stepchildren were "children" who were entitled to share death benefits.

Why the majority opinion turned its back on these precedents is beyond me. The facts presented are substantial enough to show that Johnny Combs was, beyond question, a *de facto* "child" of Mr. Smith's. There are uncountable numbers of similar cases in this State, where children are being raised by caring grandparents, siblings, friends and neighbors. The majority opinion ignores the facts and ignores the true status of our society. The majority opinion imposes a rigid legalistic standard which does nothing to carry out any legislative policy, nothing to protect these voluntary caregivers, and nothing to protect these children.

The majority opinion is not "for the sake of the kids;" it is purely for the sake of insurance companies. I therefore respectfully dissent to that portion of the opinion pertaining to Glen Falls Insurance Company.