

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: THE CHILD OF

TEVYA WEATHERHOLTZ,  
Petitioner Below, Appellant,

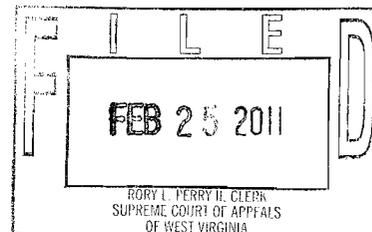
vs.

Case No. 35760

ELIAS TRAD VANCE,  
Respondent Below, Appellee.

(Appealing Order of Circuit Court of Hardy County, West Virginia  
Circuit Court Judge Jerry D. Moore  
affirming Order of Family Court of Hardy County, West Virginia  
Family Court Judge David P. Born  
Civil Action No. 03-D-55)

**APPELLEE'S BRIEF**



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**KIND OF PROCEEDING AND NATURE OF THE RULING BELOW**

This is a custody modification proceeding. Appellant appeals the Order of the Hardy County Circuit Court affirming the Final Order of the Hardy County Family Court that dismissed Appellant's petition seeking to change primary custody of the parties' child from Appellee to Appellant.

The Honorable David P. Born, Family Court Judge, entered a Final Order dated March 31, 2010, after a full hearing held March 31, 2010. Appellant filed an appeal to the Hardy County Circuit Court. The Honorable Jerry D. Moore, Circuit Court Judge, by Order entered June 10, 2010, and filed in the clerk's office on June 11, 2010, refused the appeal and affirmed the Family Court Order. Appellant appeals the Circuit Court's Order affirming the Family Court's Order.

**APPELLEE'S RESPONSE TO ASSIGNMENT OF ERROR**

The Appellant states one assignment of error, to which Appellee responds:

THE CIRCUIT COURT DID NOT ERR WHEN IT UPHELD WHAT THE FAMILY COURT FOUND, CONCLUDED, AND ORDERED RULING THE APPELLANT HAD NOT PROVEN SUBSTANTIAL CHANGED CIRCUMSTANCES TO MODIFY THE SHARED PARENTING ARRANGEMENT.

**APPELLEE'S STATEMENT OF FACTS**

The matter came before the Family Court on a petition for modification filed by Appellant to change custody of the parties' child who has been in the primary custody of Appellee since 2005.

The parties married June 10, 2000 and had one child, Elias Trad Vance II, called Eli, who was born January 17, 2001, who is now 10 years old. Their divorce Order (Order,

September 24, 2003, Record p. 28-33) approved a shared parenting arrangement by which the child resided primarily with Appellant subject to an allocation of parenting time to Appellee.

Early in July of 2005, Appellant was involuntarily committed and hospitalized at Chestnut Ridge Hospital because of her use of marijuana and methamphetamines. She claims her addiction resulted from an incident when she drove a vehicle over and seriously injured a young woman. However, while at Chestnut Ridge Hospital, she reported that she had been smoking marijuana daily for 15 years and intended to continue once she got home. (Medical Report from Chestnut Ridge, Record p. 36-38). Appellant sought, and was granted, ex parte relief granting him custody of his child. (Order Granting Ex Parte Relief, July 13, 2005, Record p. 34-35). The Family Court immediately held a hearing, resulting in a 50-50 parenting arrangement. (Order, July 26, 2005, Record p. 39-40).

Appellant continued to abuse drugs, particularly methamphetamines, and Appellee filed for primary custody on October 17, 2005. After a full hearing, the Family Court considered the evidence and issued a written statement of his rulings (Judge's statement of ruling dated December 19, 2005, Record p. 43-45) which were reduced to a written Order. The Court's Order found a substantial change in circumstance, because of Appellant's drug use, and awarded custody to Appellee and an allocation of visitation to Appellant. (Order, December 14, 2005, Record p. 46-48). Appellee has been the primary custodial parent since then and Appellant has a schedule of parenting time with the child that includes all weekends except one each month.

Since that time, there have been numerous petitions filed and hearings held in which the Family Court reviewed the custodial arrangement and consistently denied modification to change the child's primary residence to Appellant. Those proceedings are identified as follows and the various orders entered by the Family Court have been designated as part of the record on appeal:

- a) Appellant filed for modification July 28, 2006, alleging that she was drug free and employed and the child had been physically abused by his father and great-grandfather. Finding no evidence that the child was abused by Appellee or others and no basis for changing custody, the Family Court dismissed this petition. (Order, August 22, 2006, Record p. 49-53).
- b) Appellee filed a Motion for Contempt and for Modification, on February 28, 2007, because Appellant violated the parenting plan for the child. After a hearing, the Family Court found that Appellant failed to comply with the statutory relocation provisions, failed to return the child on time, and was in contempt for failing to pay child support on a current basis. (Order, March 27, 2007, Record p. 54-58). Appellant was given an opportunity to purge herself of contempt by paying her child support arrearage, which she failed to do. The Court committed Appellant to the Potomac Highlands Regional Jail subject to giving a \$1,500.00 cash bond for application against child support arrearages. (Final Order, June 12, 2007, Record p. 60-64, and Jail Commitment, June 12, 2007, Record p. 59). The bond was posted and applied to unpaid child support.
- c) Appellant again filed for modification on March 31, 2008, saying that she was drug free, remarried, and the child wanted to reside with her and wanted to speak to the Judge. The Family Court appointed a Guardian ad Litem for the child who reported that the child was stable with the current living arrangements. The Family Court dismissed Appellant's modification petition upon finding that Appellant had not proved any change of circumstance or that modification would benefit the child. The Court found that the Appellant's remarriage was not a circumstance that would justify modification of custody. The Family Court also found Appellant in contempt for failing to pay attorney's

fees previously awarded to Appellee and gave her an opportunity to purge herself. (Final Order, October 14, 2008, Record p. 71-75). When she failed to do so, the Family Court again committed Appellant to the Potomac Highlands Regional Jail subject to her posting a cash bond. (Final Order, November 25, 2008, Record p. 79-80, and Jail Commitment, November 25, 2008, Record p. 76).

From the time Appellee was granted primary custody in 2005 until the most recent modification petition was filed in 2010, hearings were held in this case on August 22, 2006, March 27, 2007, June 12, 2007, April 22, 2008, October 14, 2008, November 25, 2008, and December 9, 2008. No change of circumstance or benefit to the child was found that justified changing the custodial arrangement to place the child in the primary custody of Appellant.

None of the Orders from the previous proceedings were appealed and they became final.

The modification petition at issue in this appeal was filed by Appellant on January 12, 2010, stating that she is drug free, remarried, employed as a substitute teacher, and home most days. Although her petition says she is a substitute teacher, she said at the hearing that she is not a substitute teacher, but is a substitute teacher's aide. (Hearing, March 31, 2010, testimony of Appellant). She alleged that Appellee divorced his second wife, that he has an alcohol and drug problem and a violent temper, and that his employment as a boiler maker requires him to spend time away from his child and he delegates child care to others.

Appellant tries to make much of the fact that Appellee is a boiler maker. He is a boiler maker and was a boiler maker when he was married to Appellant and afterward. This is not a change of circumstance. Appellant says that because of his employment, Appellee does not parent his child himself and he delegates parenting to others. This is not true. Since the last modification petition in 2008, Appellee has worked at Mt. Storm in Grant County and

Morgantown in Monongalia County, and returns home nightly to be with his son, except in rare instances when bad weather prevents travel. Appellee is laid off from his job on a regular basis, sometimes for several weeks at a time. When Appellee is laid off, he is a full-time at-home parent. Whether he is working or laid off, Appellee spends time with his son, disciplines him, helps with home-work, has a regular bed-time routine with his son, and provides hands-on caretaking for his child. The child is performing well in school and is well liked by adults and other students. He has A's and B's on his report card. Appellee reviews and signs his school paperwork. Appellee and his child spend time together and have a close and affectionate relationship. The child is well-adjusted and happy. Child care, when necessary, is provided by the child's grandparents.

Appellant says that Appellee has a drug and alcohol problem and a temper. Appellant alleged the same thing at hearings on the modification proceedings in 2006 and 2008. Appellee does not have a substance abuse or anger problem and he presented witnesses to support this. Appellee works hard and maintains employment requiring periodic drug testing. Appellant said Appellee wore an artificial penis to a previous hearing to avoid detection of drug use, which Appellee absolutely denies. His witnesses described Appellee's home, his work schedule, and his supervision and interaction with his child. Appellee's steady and demanding work schedule and the observations of his witnesses of his behavior, habits, and routines directly contradict Appellant's allegations that he is drug or alcohol impaired. It is contradictory for Appellant or her witness to say they saw Appellee drinking substantial quantities of beer and using drugs every day and at the same time say that he was away working and rarely home.

Appellant says that DUI charges against Appellee in the past are a change of circumstance sufficient to require a change of custody. The incidents occurred long before this

modification was filed and did not affect the child in any way. Appellee had an underage drinking charge in Utah almost twenty years ago and no contest pleas to misdemeanor DUI charges for incidents occurring in 1992 and 1998. These occurred before the child was born and even before Appellee's marriage to the Appellant and she knew of those incidents. Appellee visited a friend who served him some moonshine during the Holidays which resulted in a DUI on December 29, 2006, which was charged as a second offense. The parties have been before the Family Court several times since then and the public record of the 2006 DUI was available to Appellant when she filed a modification petition in 2008 two years before the instant modification petition.

Appellant says in her appeal petition that she thought Appellee was high or on something during the hearing on March 31, 2010. This is not true. The hearing lasted several hours, during which Judge Born had the opportunity to see Appellee in the courtroom. The Appellee was engaged in the hearing, presented testimony that was clear and direct, was respectful and appropriate in his behavior, and there was nothing about him that might lead any reasonable person to think that he was impaired.

Appellee presented evidence to refute Appellant's accusations and to challenge the credibility of Appellant and her witness. Having heard all the testimony and the evidence presented, the Family Court found that Appellant knew about the DUIs that occurred years before the parties' marriage, that the most recent DUI in 2006 occurred more than three years ago, and there was no demonstration of damage to the child as a result of the 2006 DUI. The Family Court also found that Appellant did not prove that drug use by Appellee exists. Most importantly, the Family Court found that primary custody has been with Appellee for four years

and the child is thriving. The Court concluded that there is no legal reason to modify custody and dismissed the modification petition. (Final Order, March 31, 2010, Record p. 12-15).

Appellant appealed the Family Court Order to the Hardy County Circuit Court. After making an exhaustive and careful review of the entire file and the electronic media of the hearing held March 31, 2010, the Circuit Court refused the appeal and affirmed the Family Court Order. (Order, June 10, 2010, Record p. 16-27). The Circuit Court noted that the Family Court Judge listened to the testimony of each witness and judged the credibility and motives of each witness. Circuit Judge Moore found no basis to disturb the Family Court's decision. In addition, the Circuit Court made reference to the finding by the Family Court that the child is thriving after being with Appellee for four years.

Both the Family Court and the Circuit Court correctly applied the law which requires proof of a change of circumstances and proof that a change would materially promote the welfare of the child. The Circuit Court found no error of fact or abuse of discretion by the Family Court. The instant appeal is taken from the Circuit Court's Order entered June 10, 2010.

## ARGUMENT

### Standard of Review

“In reviewing a final order entered by a circuit judge upon a review of or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo. Syllabus, Carr v. Hancock, 216 W.Va. 474, 607 S.E.2d 803 (2004); Syllabus Point 1, Staton v. Staton, 218 W.Va. 201, 624 S.E.2d 548 (2005).

"An appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment." Syllabus point 5, Morgan v. Price, 151 W.Va. 158, 150 S.E.2d 897 (1966); Syllabus point 5, Skidmore v. Skidmore, 225 W.Va. 235, 691 S.E.2d 830 (2010).

"A reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, in part, In the Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996). "A circuit court may not substitute its own findings of fact for those of a family law master merely because it disagrees with those findings." Syllabus point 4, in part, Stephen L.H. v. Sherry L.H., 195 W.Va. 384, 465 S.E.2d 841 (1995). "Under the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences." Syllabus point 3, Stephen L.H. V. Sherry L.H., 195 W.Va. 384, 465 S.E.2d 841 (1995).

#### Discussion

THE CIRCUIT COURT DID NOT ERR WHEN IT UPHELD WHAT THE FAMILY COURT FOUND, CONCLUDED, AND ORDERED RULING THE APPELLANT HAD NOT PROVEN SUBSTANTIAL CHANGED CIRCUMSTANCES TO MODIFY THE SHARED PARENTING ARRANGEMENT.

Appellant claims that Appellee was drug addicted and alcoholic during the parties' marriage, which ended in 2003, and ever since. She claims that he uses marijuana and drinks excessively on a daily basis and has used illegal drugs in the past. Appellant, not Appellee, is the

party to these proceedings who has been involuntarily committed, hospitalized, and found to have a serious drug problem. (Judge's statement of ruling dated December 19, 2005, Record p. 43-45). Appellant claims that she does not have a drug problem at the present time, but she produced no independent evidence to substantiate this.

The parties have been before the Court numerous times since 2005 and Appellee has never been shown to have a drug or alcohol problem. After hearing all of the evidence presented at the hearing on March 31, 2010, the Family Court found that Appellant did not meet her burden of proving that drug use by Appellee exists. (Final Order, March 31, 2010, Record p. 12-15, Findings of Fact and Conclusions of Law, paragraph 7). There is no error in this finding. It is supported by the substantial and credible evidence that Appellee does not have a substance abuse problem. Appellee testified that he maintains steady, responsible work which requires periodic drug testing. (Hearing, March 31, 2010, testimony of Appellee). His witnesses described his daily routines and his ability to maintain his household, spend time with his son, and work. None of them described any incident in which he was impaired by drugs or alcohol in their presence or in the presence of his child. (Hearing, March 31, 2010, testimony of Glenn Vance, Phyllis Vance, Jill Runion). The Family Court heard substantial evidence that Appellee provides a safe and appropriate environment, provides for his child's needs, supervises and interacts with his child, helps the child succeed at school, maintains employment, and maintains a well-organized and appropriate home. (Hearing, March 31, 2010, testimony of Appellee, Glenn Vance, Phyllis Vance, Jill Runion).

At the hearing on March 31, 2010, Appellant presented Appellee's ex-wife, Terri Pennington, as a witness to support a change of custody. Appellant admitted that after Appellee and Ms. Pennington were divorced, she and Ms. Pennington conspired to bring this modification

back to court. (Hearing, March 31, 2010, testimony of Appellant). In addition, Ms. Pennington admitted that she had an affair that resulted in Appellee's separating from her and subsequently divorcing her. Ms. Pennington described her own admission and treatment at Chestnut Ridge for mental health issues. (Hearing, March 31, 2010, testimony of Terri Pennington). Judge Born heard the testimony of Appellee and Glenn Vance that, during their divorce, this ex-wife broke into Appellee's home. (Hearing, March 31, 2010, testimony of Appellee and Glenn Vance). Having had the opportunity to observe Ms. Pennington's demeanor and attitude and to assess her motives and credibility, Judge Born questioned the value of her testimony. (Order, March 31, 2010, Record p. 12-15, Findings of Fact and Conclusions of Law, paragraph 7).

The Family Court found that Appellee did not try to hide a DUI that happened in 2006. (Order March 31, 2010, Record p. 12-15, Findings of Fact and Conclusions of Law, paragraph 6). Appellant says this is error. Appellee could not hide the DUI that occurred in 2006, as it is a matter of public record and is ascertainable by anyone.

The Family Court found that there is no demonstration of damage to the child as a result of a DUI in 2006. (Order March 31, 2010, Record p. 12-15, Findings of Fact and Conclusions of Law, paragraph 6). This finding is supported by credible testimony presented by Appellee and his witnesses that Appellee does not have an alcohol problem and that the child is stable, happy, performing well in school, and well cared for. (Hearing, March 31, 2010, testimony of Appellee, Megan DiBenedetto, Glenn Vance, Phyllis Vance, Jill Runion). The incident occurred more than three years ago and there was no demonstration that it affected the child in any manner. Appellant's assertion that there is potential damage to the child is mere speculation and cannot be the basis for changing custody. Holstein v. Holstein, 152 W.Va. 119, 160 S.E.2d 177 (1968).

Appellant says two incidents in 2009 and 2010 when Appellee hit deer must be alcohol related, which Appellee denied. The Family Court heard the testimony of Appellee's ex-wife, Terri Pennington, who said that Appellee was using her truck on the occasion in 2009 and he told her he hit a deer. She said she could smell beer in the truck the next day, but there were no beer cans in it. (Hearing, March 31, 2010, testimony of Terri Pennington). Appellee's witness, Glenn Vance, said he was called to help remove the truck and arrived shortly after Appellee hit the deer. He said Appellee was not drinking and the witness did not smell alcohol or see any evidence of alcohol. (Hearing, March 31, 2010, testimony of Glenn Vance). Appellant had no information at all about the second time Appellee hit a deer and Appellee testified that he was on his way to Charleston to sign the books for a boiler-maker job and had passengers with him when he hit a deer. The Family Court heard all of the testimony. To predicate a change of custody on hitting deer would be an abuse of discretion, particularly when there is no finding of improper conduct or any affect on the child. If there is potential for danger to the child as a result of his parents' driving, it would be danger presented by Appellant who seriously injured a young woman by backing over her with a car.

The Family Court found that primary custody of the child has been with Appellee for about four years and the child is thriving. (Final Order, March 31, 2010, Record p. 12-15, Findings of Fact and Conclusions of Law, paragraph 9). This is supported by substantial evidence. The testimony of all of the witnesses, including Appellant and her witness, is that this child is a delightful, loving, well adjusted child and that Appellee is actively involved with his child. The Family Court's finding is supported by the testimony of the child's classroom teacher, Megan DiBenedetto, that he is performing well in school, is well liked by adults and other students, has A's and B's on his report card, is a good student, and that Appellee reviews

and signs off on the child's school work. (Hearing, March 31, 2010, testimony of Megan DiBenedetto). The child's report cards, midterm report, and a short written school project were admitted into evidence and also show that Appellee is personally involved with his child and providing guidance and supervision. (Exhibits R7, R8, R9, Hearing, March 31, 2010, Record p. 99-103). Evidence was presented that Appellee spends substantial time with his child, helps with homework, disciplines him, has a bed-time routine for the child, fishes, skis, and goes on vacations with him, and personally takes care of him. (Hearing, March 31, 2010, testimony of Appellee, Glenn Vance, Phyllis Vance, Jill Runion; proffered testimony of Gladys Vance and Patricia Bosley; pictures presented as Exhibit R10, Hearing, March 31, 2010, Record p. 104-113). It is supported by the evidence that Appellee makes a point of coming home at night to be with his child even when he is working in Morgantown and by the evidence that during the regularly-occurring, long periods when Appellee is laid off from work, he is a full-time parent providing hands-on care for his child. (Hearing, March 31, 2010, testimony of Appellee, Phyllis Vance, Glenn Vance, Jill Runion). Proffered testimony of Gladys Vance and Patricia Bosley of the same nature was admitted without objection regarding Appellee's parenting and his relationship with his son.

The child spends time with adult caretakers other than Appellee when Appellee is at work. This is reasonable and appropriate. West Virginia Code § 48-9-401(c)(3) says that the choice of reasonable caretaking arrangements for the child by a legal parent, including the child's placement in day care, does not justify a significant modification except where harm to the child is shown. There is no substantiation to Appellant's assertion that Appellee has inappropriately delegated his parental responsibility to third parties.

Appellee presented evidence to challenge Appellant's credibility. An example demonstrating the unreliability of Appellant's statements is that Appellant accused Appellee of abusing his own sister and gave a letter to the sister's husband telling him this story. Appellee's sister, Karee Ridgeway testified that no such thing ever happened and that Appellant made these accusations up and spread them in a malicious and hurtful manner. The Family Court had the opportunity to review the letter, which was admitted at the hearing (Exhibit R6, Hearing, March 31, 2010, Record p. 95-98) and to hear the sister's testimony that this was a malicious falsehood spread by Appellant. (Hearing, March 31, 2010, testimony of Karee Ridgeway).

Another example is that Appellant's previous counsel of record was granted leave to withdraw because of Appellant's unreasonable acts of duplicity. (Order Allowing Withdrawal of Counsel, July 28, 2008, Record 70). In addition, Appellant has not maintained full-time employment and she has not paid child support on a regular and dependable basis as shown by the child support history that was admitted into evidence at the hearing. (Exhibit R5, Hearing, March 31, 2010, Record p. 91-94).

The Family Court heard contradictory statements and could draw its conclusions regarding credibility and accuracy of the witnesses. "In a divorce suit the finding of fact of a trial chancellor based on conflicting evidence will not be disturbed on appeal unless it is clearly wrong or against the preponderance of the evidence." Syllabus Point 3, Taylor v. Taylor, 128 W.Va. 198, 36 S.E.2d 601 (1945); Dalton v. Dalton, 207 W.Va. 551, at 556, 534 S.E.2d 747, at 752 (2000). The Court did not ignore Appellant's evidence. On the contrary, the Family Court saw and heard the witnesses, assessed credibility and weighed the evidence and reached its findings set forth in its Order after listening to all of the evidence produced. As noted in the case of In re Elizabeth Jo Beth, 192 W.Va. 656, at 659, 453 S.E.2d 639, at 642 (1994): "In this

regard, the circuit court has a superior sense of what actually transpired during an incident, by virtue of its ability to see and hear the witnesses who have firsthand knowledge of the events. Appellate oversight is therefore deferential, and we should review the circuit court's findings of fact following an evidentiary hearing under the clearly erroneous standard. If the circuit court makes no findings or applies the wrong legal standard, however, no deference attaches to such an application. Of course, if the circuit court's findings of fact are not clearly erroneous and the correct legal standard is applied, the circuit court's ultimate ruling will be affirmed as a matter of law.”

To justify a change in custody, in addition to a change of circumstances of the parties, it must be shown that such change would materially promote the welfare of the child. Syllabus Point 2, Cloud v. Cloud, 161 W.Va. 45, 239 S.E.2d 669 (1977); Syllabus, Cunningham v. Cunningham, 188 W.Va. 235, 423 S.E.2d 638 (1992); West Virginia Code § 48-9-401.

This is a two-part test. “The two-part test, adopted by this Court, to determine when a change of custody is justified requires a showing that (1) the parties have experienced a change in circumstances and (2) the change in custody would materially promote the welfare of the child.” Cunningham v. Cunningham, 188 W.Va. 235, at 237, 423 S.E.2d 638, at 640 (1992). A change in circumstance without benefit to the child does not allow a change of custody. This is illustrated by Jenkins v. Jenkins, 191 W.Va. 619, 447 S.E.2d 554 (1994), a case where the family law master heard the testimony and recommended against changing custody. The Circuit Court did not follow that recommendation and ordered a change of custody. The Supreme Court of Appeals reversed on appeal, saying that, although the evidence suggested that there had been changes in the circumstances of the parties, the family law master had found that the children were pleasant, happy and doing well in school. The Supreme Court of Appeals could not find

that the changed circumstances had a deleterious effect on the children or that a change in custody would materially promote their welfare.

In the instant case, there was no finding of a change in circumstances. Even if the DUI against Appellee in 2006 could be considered a change of circumstance, the Family Court specifically found that it did not affect the child. Even if there were changes in the parties' circumstances, which neither the Family Court nor the Circuit Court found, there is no showing that there is any benefit to the child to change custody when he is thriving in the custody of his father.

The Appellant has the burden of proving both change and material benefit to the child. She did not do so. The Family Court stated in its Order that it did not find that there was a change of circumstance or that a modification would serve the best interests of the child. (Order, March 31, 2010, Record, p. 12-15, Findings of Fact and Conclusions of Law, paragraph 11). Neither Appellant's marriage nor her employment as a substitute teacher's aide is a change of circumstance since the last modification petition. Marriage of a party is not a change of circumstance upon which a modification can be based unless there is harm to the child. West Virginia Code § 48-9-401(c)(2). Appellant's assertion that she and her new husband enjoy a good relationship with the child is not enough to change custody. As stated in Cunningham v. Cunningham, 188 W.Va. 235, at 238, 423 S.E.2d 638, at 641 (1992), "[E]vidence that the non-custodial parent enjoys a good relationship with his children standing alone is insufficient to justify a change of custody."

There is ample support for the finding that the child is thriving in the Appellee's custody and the Family Court could, and did, conclude that there was no reason in the evidence to modify this arrangement.

The following syllabus points from the case of Holstein v. Holstein, 152 W.Va. 119, 160 S.E.2d 177 (1968), are instructive:

“2. Where, upon being awarded a divorce, a mother acquires custody of her children, but by reason of her own indiscretions, loses such custody, she will not be permitted to regain that custody unless she can show that the proposed change of custody will materially promote the moral and physical welfare of the children.

“3. ‘The exercise of discretion by a trial court in awarding the custody of minor children will not be disturbed on appeal unless it clearly appears that such discretion has been abused.’ Point 11, Syllabus, Smith v. Smith, 138 W.Va. 388 (76 S.E.2d 253).

“4. Where a mother is seeking to regain the custody of her children it is incumbent upon her to show that a change of the existing custody would materially promote the welfare of the children, and where the evidence indicates clearly that she has failed to satisfy that requirement, the court should not disturb the existing custody of the children.

“5. Where it is clearly established by the evidence that children of divorced parents enjoy a happy home life in the custody of their father, such custody will not be changed upon the petition of the mother unless she can show that the proposed change will result in material benefit to the children.

“6. A change of custody should not be based only upon speculation that such change will be beneficial to the children.”

In the instant case, although Appellant was the primary custodial parent at the time of the divorce, she subsequently lost that position as the result of her continued drug use and Appellant became the primary custodial parent in 2005. Appellant now wants to modify the custodial arrangement that has existed since 2005. She has the burden of proving material benefit to the child, not just speculative benefit, but real and material benefit in addition to proving a substantial change of circumstance. Cloud v. Cloud, 161 W.Va., 45, 239 S.E. 669 (1977). The Family Court did not find either a change of circumstance or benefit to the child. The Circuit Court fully reviewed the record, including reviewing the electronic media of the hearing, and found no error in the Family Court’s findings or abuse of discretion in applying the law to facts.

On appeal of a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, findings of fact made by the family court judge are reviewed under the clearly erroneous standard and the application of law to the facts is reviewed under an abuse of discretion standard. Syllabus, Carr v. Hancock, 216 W.Va. 474, 607 S.E.2d 803 (2004); Staton v. Staton, 218 W. Va. 201, 624 S.E.2d 548 (2005).

The Appellant has the burden on appeal of showing error. "An appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment." Syllabus point 5, Morgan v. Price, 151 W.Va. 158, 150 S.E.2d 897 (1966).; Syllabus point 5, Skidmore v. Skidmore, 225 W.Va. 235, 691 S.E.2d 830 (2010).

After hearing the evidence presented by both parties, the Family Court Judge made findings of fact and conclusions of law and ordered that the custody arrangement should not be modified. Matters of custody are within the sound discretion of the court and its action will not be disturbed on appeal unless it clearly appears that such discretion has been abused. Syllabus, Nichols v. Nichols, 160 W.Va. 514, 236 S.E.2d 36 (1977); Syllabus point 2, Wilson v. Wilson, 214 W.Va. 14, 585 S.E.2d 14 (2003). If the findings of fact and the inferences drawn by the Family Court are supported by substantial evidence, they may not be overturned even if a Circuit Court may be inclined to make different findings or draw contrary inferences. Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002); Stephen L.H. v. Sherry L.H., 195 W.Va. 384, 465 S.E.2d 841 (1995).

In the instant case, the Circuit Court noted that the case hinges on the credibility of the witnesses and that the Family Court listened to the testimony of each witness and judged the

credibility and motives of each witness. The Family Court questioned the testimony of Appellant's witness, who was Appellee's ex-wife. Appellee presented evidence to question the credibility and motives of both Appellant and her witness. Appellant testified that she and the witness conspired to bring the modification back to court. The Circuit Court reviewed the entire record and examined the electronic media of the hearing and found no reason to alter the Family Court's findings or inferences.

The findings of a trial judge in a custody case are to be accorded great weight because the trial judge is in a position to observe the demeanor of the witnesses and to assess credibility. S.L.M. v. J.M., 174 W.Va. 46, 321 S.E.2d 697 (1984); Michael D.C. v. Wanda L.C., 201 W.Va. 381, 497 S.E.2d 531 (1997). As stated in Stephen L.H. v. Sherry L.H., 195 W.Va. 384, at 395-396, 465 S.E.2d 841, at 852-853 (1995):

“There are many critical aspects of an evidentiary hearing which cannot be reduced to writing and placed in a record, e.g., the demeanor of witnesses. These factors may affect the mind of a trier of fact in forming an opinion as to the weight of the evidence and the character and credibility of the witnesses. Thus, the importance of these factors should not be ignored by a reviewing court. Given a family law master's intimate familiarity with the proceedings, the family law master is in the best position to weigh evidence and assess credibility in making the ultimate ruling on disputed issues.

“As we said in Board of Education v. Wirt, 192 W.Va. 568, 579, 453 S.E.2d 402, 413 (1994): ‘Indeed, if the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact.’ (Citation omitted). This deference given to the lower tribunal in Wirt also is appropriate in the present case because the family law master ‘is in a position to see and hear the witnesses and is able to view the case from a perspective that an appellate court can never match.’ Weil v. Seltzer, 873 F.2d 1453, 1457 (D.C.Cir.1989). (Citation omitted).”

In the case of Michael D.C. v. Wanda L.C., 201 W.Va. 381, at 388, 497 S.E.2d 531, at 538 (1997), the Supreme Court of Appeals, considering on appeal a determination of the trial court based on circumstantial evidence, said: “A reviewing court cannot assess witness

credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.”

Rule 52(a) of the West Virginia Rules of Civil Procedure says: “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” (emphasis added). “[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings.... Deference is appropriate because the trial judge was on the spot and is better able than an appellate court to decide whether the error affected substantial rights of the parties.” In re Faith C., 226 W.Va. 188, 699 S.E.2d 730, at 737 (2010) citing In the Interest of Tiffany Marie S., 196 W.Va. 223, at 231, 470 S.E.2d 177, at 185 (1996). If there are two or more plausible interpretations, the trial court’s choice controls. In the Interest of Tiffany Marie S., Id.

Deference must be given to Judge Born’s review of the evidence. As stated in State ex rel. Diva P. v. Kauffman, 200 W.Va. 555, at 562, 490 S.E.2d 642, at 649 (1997):

“The critical nature of unreviewable intangibles justify the deferential approach we accord findings by a circuit court. As we said in Brown v. Gobble, 196 W.Va 559, 563, 474 S.E.2d 489, 493 (1996), ‘the standard of review for judging a sufficiency of evidence claim is not appellant friendly.’ See Gentry v. Mangum, 195 W.Va. 512, 520 n 6, 466 S.E.2d 171, 179 n 6 (1995) (‘Only rarely and in extraordinary circumstances will we, from the vista of a cold appellate record, reverse a circuit court’s on-the-spot judgment concerning the relative weighing of probative value and unfair effect.’).”

Two different Family Court Judges have reviewed the custodial arrangement for this child on multiple occasions since 2005 and Appellant has raised essentially the same allegations and made the same accusations against Appellee every time. Each of those judges had the opportunity to weigh the evidence and the credibility of the witnesses. Neither of those judges found a change of circumstance or any material benefit to change custody. The Circuit Court

affirmed the Family Court's determination and did not find any reason to change custody. The Circuit Court did not err in affirming the Family Court's findings and its ruling that Appellant did not prove substantial changed circumstances.

### CONCLUSION AND PRAYER FOR RELIEF

The findings and conclusions made by the Family Court and the Circuit Court are supported by the entire record of this case. There is substantial evidence that Appellee is providing capable parenting and the child is happy, well cared for, and achieving academically. The Appellant did not prove either a change of circumstance or that a change in custody would materially promote the child's welfare. Thus, the requirements of Cloud v. Cloud, 161 W.Va. 45, 239 S.E.2d 669 (1977), and West Virginia Code § 48-9-401 have not been met and the Family Court's Order denying modification should stand as affirmed by the Circuit Court.

Wherefore, Appellee respectfully requests:

1. That the Order of the Circuit Court of Hardy County dated June 10, 2010, which affirmed the Order of the Family Court of Hardy County dated March 31, 2010, be **AFFIRMED**.
2. That Appellee be awarded attorney's fees, costs, and expenses for the defense of this appeal.
3. That Appellee be granted such other and further relief, both general and special, as is proper.

ELIAS TRAD VANCE  
BY COUNSEL

GEARY AND GEARY, L. C.



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**CERTIFICATE OF SERVICE**

I, Patricia L. Kotchek, do hereby certify that on the date set forth below, I have served a true and complete copy of the foregoing Appellee's Brief on the person or persons set forth below by first class mail, postage prepaid, addressed as follows:

John G. Ours  
P.O. Box 275  
Petersburg, WV 26847

Date: February 24, 2011

  
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Patricia L. Kotchek