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FILED

DATE 6-11-10

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

CLERK

RS

DEPUTY

IN RE: THE MARRIAGE/CHILD OF:

TEVYA WEATHERHOLTZ,
PETITIONER,

v.

Action No. 03-D-55

ELIAS TRAD VANCE,
RESPONDENT.

ORDER

This matter came before the Court for consideration of a *Petition for Appeal from Family Court* which was filed by Ms. Tevya Weatherholtz on May 19, 2010.

After carefully reviewing the Petition, Respondent's Response, the Court file, and the electronic media of the March 31, 2010 hearing, this Court hereby REFUSES the *Petition for Appeal from Family Court* for the reasons set forth in this Order.

STANDARD OF REVIEW

When reviewing a decision of the Family Court, the scope of this Court's review is relatively narrow. Pursuant to West Virginia Code § 51-2A-14(c), "the Circuit Court shall review the findings of fact made by the Family Court Judge under the clearly erroneous standard and shall review the application of the law to the facts under an abuse of discretion standard." Under the clearly erroneous

standard, if the findings of fact and the inferences drawn by a Family Court Judge 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. Robinson v. Coppala, 212 W.Va. 632, 636, 575 S.E.2d 242 (2002) (internal citations omitted). To determine whether the Family Court Judge has abused its discretion when applying the law to the facts, our case law offers guidance and indicates three principal ways in which it occurs:

(1) when a relevant factor that should have been given significant weight is not considered: (2) when all proper factors, and no improper ones, are considered, but the family law master in weighing those factors commits a clear error of judgment: and (3) when the family law master fails to exercise any discretion at all in issuing the order.

Drennen v. Drennen, 212 W.Va. 689, 693, 575 S.E.2d 299 (2002).

PROCEDURAL HISTORY

On June 27, 2003, Petitioner filed a Petition for divorce. By Order dated September 24, 2003, the parties were divorced on the grounds of irreconcilable differences. Petitioner was granted the primary custodial responsibility of the parties infant child, Elias Trad Vance II, and the Respondent was ordered to pay Petitioner \$522 per month for child support.

By Emergency Ex Parte Order entered on July 13, 2005, the Respondent was awarded temporary custody of the infant child based on allegations that the Petitioner was addicted to illegal drugs, and had been committed to Chestnut Ridge

Hospital pursuant to a Mental Hygiene Hearing. By Order dated July 26, 2005, the Petitioner was “awarded 50/50 parental time with her infant son” until the Family Court issued a decision. On October 17, 2005, Respondent filed a Petition For Modification alleging Petitioner’s illegal drug use. By Order dated December 14, 2005, the Family Court found a substantial change in circumstance because of Petitioner’s drug use, and awarded “full custody” to Respondent.

On July 28, 2006, Petitioner filed a Petition for Modification alleging (1) that she had been drug free for one year; (2) that she was employed and had her own residence, and (3) that her son had been physically abused by his father and great grandfather. By Order dated August 22, 2006, the Family Court found that there was no evidence that the Respondent abused the child or allowed others to abuse the child, and that there was no legal basis for changing custody.

On February 28, 2007, Respondent filed a Motion For Contempt and For Modification. Respondent’s allegations included (1) that the Petitioner had moved without providing him with the proper notification and new address, (2) that the Petitioner was late in returning the child after visits, or not present, (3) that the Petitioner refused to return the child at the conclusion of two visits which required the child to be picked up, and other visitation issues, and (4) that the Petitioner was in arrearages \$1,110.50 in child support. By Order dated March 27, 2007, the Family Court found (1) that Petitioner had failed to comply with the relocation

provisions of the West Virginia Code, (2) that Petitioner had failed to pay her child support obligation, and (3) that Petitioner was in contempt of court for not keeping her court ordered child support obligation current. The Family Court continued the matter until June 12, 2007, to give Petitioner the opportunity to purge herself of contempt.

On June 12, 2007, the Petitioner did not appear for the hearing, but called and left a message that her car had broken down, and that she wished to continue the hearing to another date. Respondent objected, and the Family Court proceeded with the hearing. The Family Court's findings included: (1) that Petitioner willfully failed and refused to purge herself of contempt, and (2) that Petitioner's failure to appear was willful and intentional. Whereupon, the Family Court ordered: (1) that Petitioner be committed to the Potomac Highlands Regional Jail for 45 days, subject to her giving a \$1,500 cash performance bond, (2) that Respondent was granted leave to move for the release of the cash bond for application against child support arrearages, and to file a motion for attorney fees, (3) that the delivery method for child visitation be changed (and required the party getting the child to pick up the child from the other party's residence), (4) established a 30 minute grace period for exchanges of custody, and (5) permitted telephone visitation, reasonable in time and duration, before 8:00 p.m.

On July 16, 2007, and October 16, 2007, respectively, the Family Court entered Orders releasing the cash bond and granting attorney's fees to Respondent.

On March 31, 2008, Petitioner filed a Petition For Modification seeking a change in the primary residence of the child. Allegations included: (1) that Petitioner had remained drug free for more than two years, (2) that Petitioner was remarried and had a stable home, (3) that the child was adamant in wishing to reside with Petitioner; and (4) that the child repeatedly stated that he wished to speak to the judge. By Order dated April 22, 2008, the Family Court found that Petitioner was in contempt for failing to pay attorney fees, and appointed a Guardian Ad Litem "to determine what, if any, parental influence has been exerted upon the infant child." On October 14, 2008, the Guradian Ad Litem filed a report, which in part stated that:

[t]he child will say anything to please the parent he is with at the time, so it is impossible to get a true picture of the child's desires. The child is stable with the current living arrangements, however, both interviews with the child revealed a desire to spend more time with his mother. ... Mrs. Weatherholtz has apparently advanced by leaps and bounds over her previous drug history, changing her circumstance substantially since her commitment and treatment at Chestnut Ridge Hospital. The families live approximately two hours from each other, which adds to the difficulty of visitation.

By Order dated October 14, 2008, the Family Court found that Petitioner was in Contempt of Court; (2) that Petitioner's remarriage is not a circumstance that justifies a significant modification of the prior order; (3) that Petitioner "has

not proved any change of circumstance of the child and has provided no evidence that a modification would benefit the child;” and (4) that the Petitioner had moved without complying with West Virginia Code §48-9-403. The Family Court ordered (1) that the Petitioner be granted the opportunity to purge herself of the contempt by paying the child support, and (2) that a hearing be set on November 15, 2008 to determine whether Petitioner had purged herself of contempt.

By Order dated November 28, 2008, the Family Court found that Petitioner has the ability, and was given the opportunity by two prior Orders, to purge herself of contempt, but has made no payment, in whole or in part, to purge herself of contempt. The sums were originally awarded to [Respondent] over a year ago and [Petitioner] has had ample time to pay them.

The Family Court Ordered (1) that Petitioner be committed to the Potomac Highlands Regional Jail for 180 days, subject to Petitioner’s posting a \$2,000 cash performance bond; (2) that Respondent was granted leave to move for release of the cash bond for application against child support obligations; (3) that a hearing be scheduled for December 9, 2008, to further consider sanctions against Petitioner. By Order dated December 9, 2008, the Family Court released the cash bond which Petitioner had posted to purge herself of contempt, and denied Respondent’s motion for additional attorney fees.

On January 12, 2010, Petitioner filed a Petition For Modification of Shared Parenting Arrangement, with allegations including: (1) that Petitioner has been

drug free for 4 ½ years; (2) that Petitioner was remarried in 2007; (3) that Petitioner, in the Fall of 2008, became employed as a substitute teacher in Hardy County; (4) that Respondent divorced his second wife (Ms. Pennington) on August 24, 2009; (5) that Respondent has an alcohol and drug problem; (6) that Petitioner is able to spend more time caring for her son than Respondent, since he is a boiler maker, and spends weeks at a time away from his son; and (7) Respondent has a violent temper.

By Order dated March 31, 2010, findings of the Family Court included: (1) that Respondent had three DUIs prior to the parties' marriage, which Petitioner knew about, and that the most recent DUI, occurred in 2006, more than three years ago; (2) that there was no demonstration of damage to the child as a result of Respondent's DUI in 2006; (3) that Petitioner did not prove by a preponderance of the evidence that drug use by Respondent exists; and (4) that primary custody of the child has been with Respondent for four years, that the child is thriving, and that there is not any legal reason to modify custody at this time. Therefore, the Family Court Ordered that Petitioner's Petition be dismissed, and the relief denied.

Petitioner filed the instant appeal concerning alleged errors of the Family Court on May 19, 2010.

DISCUSSION

Ms. Weatherholtz sole ground for appeal is that “[t]he Family Court erred when the Family Court found, concluded, and ordered that the [P]etitioner had not shown substantial changed circumstances to modify the shared parenting arrangement.” Ms. Weatherholtz’s new evidence for the modification of custody centered around Respondent’s December 2006 DUI offense, and testimony from Respondent’s ex-wife (who was married to Respondent from 2005 to 2009) concerning Respondent’s alleged alcohol and drug use.

Petitioner asserts (1) that Respondent hid the 2006 DUI from her; (2) that Respondent’s last DUI (in 2006) indicates that he has an alcohol problem because Respondent has three prior alcohol offenses (which include a drinking and driving conviction in Utah 1990, a DUI in Grant County in 1992, and a DUI in Grant County in 1998); (3) that Respondent has a substance abuse problem based upon the testimony of Respondent’s ex-wife who testified during her marriage to Respondent that she had seen him use cocaine on several different occasions (once in front of the child), methamphetamine on several different occasions, “mushrooms” on different occasions, alcohol and marijuana on a daily basis; (4) that Respondent had used a “whizzinator” (an artificial silicone penis) to use someone else’s urine during drug tests, and had his son urinate in a jar for Respondent to use in place of his own urine during such drug tests; (5) that

Respondent's two automobile wrecks (one in the summer of 2009, and one early in 2010) were alcohol related; (6) that Respondent had relinquished the caretaking functions of his son to wife (during the time that he was married to Ms. Pennington) and to his father and stepmother; (7) that Respondent had never attended a PTA meeting, and could not correctly name any of his son's teachers.

Respondent asserts (1) that Petitioner has repeatedly tried to modify the custodial arrangement, and repeatedly failed to comply with the Family Court's Orders; (2) that although he is a boilermaker and has worked at Mt. Storm (Grant County, WV) and Morgantown (Monongalia County, WV), that he returns home nightly to be with his son (except in rare instances when bad weather prevents travel); (3) that he and his son have a bed-time routine, and that he provides hands-on caretaking for his child; (4) that he is actively involved with his child and has not delegated the rearing of his child to the child's grandparents; (5) that the child's teacher, Megan DiBenedetto, testified that the child is performing well in school and has A's and B's on his report card; (6) that he reviews and signs his child's school work; (7) that Petitioner's "whizzinator" allegation is untrue, that he maintains employment which requires periodic drug testing, and that Petitioner failed to provide any credible evidence to support her allegation; (8) that he was candid with the Family Court concerning his alcohol use, and that his prior DUIs occurred prior to his marriage, and that the 2006 DUI occurred a couple of years

ago, did not effect his parenting or his son, and that the incident occurred during the Holidays when a friend offered him some moonshine; (9) that his witnesses testified that his son is well-adjusted; and (10) that the testimony of his witnesses and the pictures (that he admitted into evidence) show many of the activities that he and his son have enjoyed together.

The Court would note that criminal records are a matter of public record, and while a DUI or multiple DUIs are important factors for a court to consider, in this case the Family Court found that “there was no demonstration of damage” to the child as a result of the 2006 DUI. Moreover, Respondent’s three DUIs prior to the 2006 DUI occurred before his marriage to Petitioner.

However, the result in this case hinges on the credibility of the witnesses. Petitioner testified, and presented the testimony of the Respondent, and Respondent’s ex-wife. Respondent also testified during his case-in-chief, and presented the testimony of his father, stepmother, the child’s school teacher (Megan DiBenedetto), Jill Runion, and Karee Ridgeway. The Family Court Judge listened to the testimony of each witness, and judged the credibility and motives of each witness.

The Family Court questioned the testimony of the ex-wife. In West Virginia, the law is clear that “[i]n 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); Syllabus Point 1, S.L.M. v. J.M., 174 W.Va. 46, 321 S.E.2d 697 (1984). Moreover, a Circuit Court may not substitute its own findings of fact for those of the Family Court even if it might draw contrary inferences or because it disagrees with the findings. Syllabus points 3 and 4, Stephen L.H. v. Sherry L.H., 195 W.Va. 384, 465 S.E.2d 841 (1995). Robinson v. Coppala, 212 W.Va. 632, 575 S.E.2d 242 (2002); Botkin v. White, 202 W.Va. 184, 503 S.E.2d 273 (1998).

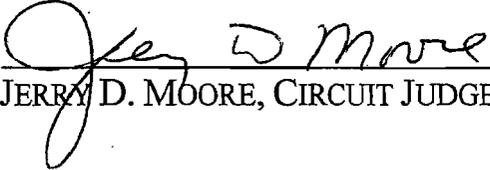
The Family Court specifically found that “the child is thriving” after living with Respondent for four years. To justify a change in custody, in addition to a change of circumstances of the parties, it must be shown that such change would materially promote the welfare of the child. Syllabus Point 2, Cloud v. Cloud, 161 W.Va. 45, 239 S.E.2d 669 (1977); West Virginia Code 48-9-401.

After a review of the Court file and the electronic media, this Court cannot find that the Family Court’s findings were clearly erroneous, or that the Family Court abused its discretion in applying the law to facts. THEREFORE, in consideration of the foregoing, this Court does hereby ADJUDGE and ORDER that Petitioner’s Petition for Appeal is REFUSED, and the Family Court’s final Order is AFFIRMED.

The Circuit Clerk shall mail true copies of this Order to all counsel of record, all parties appearing *pro se*, and to the Family Court Judge.

**Nothing further is remaining to be done in this matter, and the Circuit Clerk shall remove this action from the docket, and place it among the matters ended.

ENTERED this 10th day of June, 2010.



JERRY D. MOORE, CIRCUIT JUDGE