

BEFORE THE WEST VIRGINIA SUPREME COURT

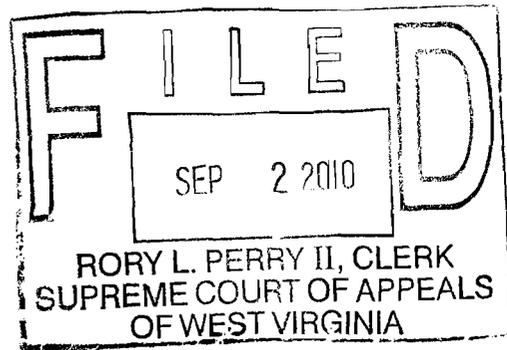
IN RE: THE CHILD OF

TEVYA WEATHERHOLTZ,
Petitioner,

VS

CASE NO. _____

ELIAS TRAD VANCE,
Respondent



PETITION FOR APPEAL

SUBMITTED BY: JOHN G. OURS, COUNSEL FOR PETITIONER
ATTORNEY AT LAW
P.O. BOX 275
PETERSBURG, WV 26847
STATE BAR NO. 2791

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TEVYA WEATHERHOLTZ,
Petitioner,

VS

CASE NO. _____

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Respondent

PETITION FOR APPEAL

Now comes Petitioner, Tevya Weatherholtz, and files this her Petition for Appeal to the West Virginia Supreme Court.

**KIND OF PROCEEDING AND NATURE OF THE
RULING OF THE LOWER TRIBUNAL**

This is an Appeal from a Motion to Modify the parties' Shared Parenting Arrangement.

The parties were married on June 10th, 2000. During the marriage, the parties had one child, Elias Trad Vance, II, now age 9, born January 17th, 2001. Petitioner was a stay at home mother. Respondent was, and is, a boiler maker, away from home most of the time. The parties divorced on September 24th, 2003. At the time of the divorce, the parties' then infant son was placed with the Petitioner, and his primary residence was with her until July 13th, 2005. In July of 2005, the primary residence of the minor son was changed to Mr. Vance as a result of an Ex Parte Order, as a result of Mrs. Weatherholtz being temporarily involuntarily hospitalized, by her family, as a result of a mental hygiene case. Petitioner had a brief stay at Chestnut Ridge Hospital and has been drug free since August of 2005.

On July 28th, 2006, Petitioner filed a pro se Motion to regain the primary residence of her

son. At that hearing, her evidence dealt with being drug free for one year, that she was employed and had her own residence, and that her son had been physically abused by his father and great-grandfather. Judge Arrington found there was insufficient evidence to support changing custody.

On March 31st, 2008, Petitioner filed a second Motion to change the primary residence from the Mr. Vance back to her. This time she had counsel. At that hearing, her evidence was: that she was drug free for three years; that she had remarried and had a stable home; that her son wanted to live with her and wished to speak to the Judge. Judge Arrington found that she had not proved any change of circumstances that would benefit the child.

In August 2009, Mr. Vance divorced his second wife.

In January 2010, Mrs. Weatherholtz filed a third Motion to change the primary residence of the parties' minor son. Her evidence was: that she had been drug free for 4 ½ years; that she had remarried in 2007 and had a stable home; that in the Fall of 2008 she became employed by the Hardy County Board of Education as a substitute teacher's aide; that Mr. Vance divorced his second wife in August of 2009; that Mr. Vance had an alcohol and drug problem; that she was more able to be at home with her son since Mr. Vance was a boiler maker unable to be home, weeks at a time, and that Mr. Vance had a violent temper. At the hearing on this Motion, on March 31st, 2010, both Petitioner and Mr. Vance's second wife, testified before the Court with regard to Mr. Vance's heavy involvement in illegal controlled substances and alcohol abuse. In the Order not filed until April 20th, 2010, Family Court Judge Born, again, denied Petitioner's Motion in essence ignoring the evidence of Mrs. Weatherholtz, and Mr. Vance's other exwife, concerning his illegal drug use and alcohol abuse.

Petitioner appealed the April 20th, 2010, decision to the Circuit Court of Hardy County.

On June 11th, 2010, Circuit Judge Jerry Moore affirmed the rulings of Judge Born.

It is from these decisions that Mrs. Weatherholtz files this Petition for Appeal.

FACTS

The parties were married June 10th, 2000. During the marriage the parties had one child, Elias Trad Vance, II, now age 9, born January 17th, 2001. Petitioner was a stay at home mother. Mr. Vance was and is a boiler maker. Petitioner, without argument, was their son's primary caretaker. The parties divorced on September 24th, 2003. As a result of Petitioner being the primary caretaker, the primary residence of the parties' son was placed with his mother. Mr. Vance was awarded visitation every other weekend if his work schedule permitted. Mr. Vance was, and is, a boiler maker who didn't often make it home on weekends.

In 2005, after the parties divorced, Petitioner, accidentally, backed over a young mother in the city parking lot in Petersburg, injuring her severely. This accident caused the Petitioner great emotional distress. Petitioner had a hard time dealing with what happened and made a wrong decision in attempting to deal with her emotional distress. After the accident, Petitioner tried methamphetamine as a way to deal with her depression. Her family, quickly, found out, and they initiated a mental hygiene hearing for their daughter. She was sent to Chestnut Ridge Hospital for a short stay where she was treated and released. She has been drug free since.

Mr. Vance learned of her hospitalization, and filed an Ex Parte Motion to change their son's residence. On July 13th, 2005, Judge Arrington, temporarily, transferred the primary residence of the parties' son to Mr. Vance, who had then remarried and moved to Whitmer, West Virginia. On December 14th, 2005, Judge Arrington transferred "full custody" to Mr. Vance.

In 2006, Petitioner, after being drug free since August of 2005, petitioned the Family

Court, Pro Se, to regain the primary residence of her son. Mr. Vance had counsel and Petitioner did not prevail. Judge Arrington denied her Pro Se Petition.

In 2007, Petitioner remarried. Her new husband has a great relationship with the parties' son.

In 2008, Petitioner was hired by the City of Wardensville to be the manager of the City Pool, managing the town's children during the summer. At the end of the summer, when the pool closed, Petitioner made an application to the Hardy County Board of Education and was hired as a substitute teacher's aide, where she has been employed in the Hardy County Elementary Schools, since the Fall of 2008. The Hardy County Board of Education wouldn't have hired an aide for elementary schools if they had any drug problem, or drug reputation.

In 2008, Petitioner filed her second Petition seeking to change the primary residence of the parties' son. This time she had counsel, but her Petition was weak in setting forth the substantial changed circumstances that might prove that it would be in her son's best interest to be returned to her. The best evidence in the record from this hearing is the report from Eli's Guardian Ad Litem. Family Court Judge See, before being elected, was Eli's Guardian Ad Litem. She reported: "Mrs. Weatherholtz has advanced by leaps and bounds over her previous drug history, changing her circumstances substantially since her treatment at Chestnut Ridge." Again, her Petition was denied. However, at the end of this hearing, Judge Arrington told Mr. Vance that he wanted Mrs. Weatherholtz to have increased time with the child, close to half and half.

In August of 2009, Mr. Vance and his second wife divorced. After the divorce, Mr. Vance's second wife, worried about Eli's well being, came to Mrs. Weatherholtz with her concerns about Mr. Vance's drug and alcohol abuse, and her concerns for Eli's well being. As

a result of the vast amount of information gained, Mrs. Weatherholtz, in January 2010, for the third time, filed a Petition to Modify the Shared Parenting Arrangement seeking to regain the primary residence of the parties' minor son. At the hearing on March 31st, 2010, Petitioner presented, along with her own evidence, the evidence of Respondent's second exwife. Her major evidence presented to Judge Born is as follows.

Mrs. Pennington, Mr. Vance's second exwife testified that from the Fall of 2005 to August of 2009, while married to Mr. Vance, he was seldom, if ever, home, perhaps one weekend a month, except when he was Court ordered to be there on home confinement for his fourth drinking and driving conviction, which was charged as a second offense. She testified that during this four-year period, she provided all of the caretaking functions for the parties' son, Eli. Mr. Vance denied this.

Ms. Pennington further testified that before she married Mr. Vance, she had him checked out with local law enforcement. His criminal record, at that time, showed that he had three drinking and driving convictions: a drinking and driving conviction in Utah in 1990, a DUI in Grant County in 1992, and a DUI in Grant County in 1998. After she married him, he had his fourth DUI in December of 2006, charged as a 2nd offense. Ms. Pennington testified that she was ordered, by Mr. Vance to keep his last DUI conviction, in Lewis County, a secret from Mrs. Weatherholtz. Mr. Vance admitted this.

Ms. Pennington further testified that while married to Mr. Vance, she had seen Mr. Vance use cocaine on several different occasions, methamphetamine on several different occasions, and mushrooms on different occasions. However, this illegal drug use, by Mr. Vance, was nothing compared to what she identified as his daily use of marijuana, and alcohol.

Ms. Pennington testified that while she was married to Mr. Vance he would drink a 12 pack of beer, or more, in the evening, every day, and use marijuana every day. When asked how he got away with this kind of alcohol and marijuana use, when his work, as a boiler maker, involved drug testing, she advised that Mr. Vance had purchased what is known as a "Whizzinator," an artificial silicone penis that he would fill with the clean urine of another person, and use to pass any urine test required by his work, or for that matter, the Court. Specifically, she testified that at the 2008 hearing when Mrs. Weatherholtz was earlier seeking to modify the Shared Parenting Arrangement, Mr. Vance, knowing that he couldn't pass a drug test, was concerned that Mrs. Weatherholtz might move for a drug test. He had worn the Whizzinator, after he had filled the Whizzinator with his son's urine. Mr. Vance went to that hearing, ready to use his son's urine in the event he was drug tested by the Family Court. Mr. Vance denied these things.

Ms. Pennington also testified that Mr. Vance had two recent automobile wrecks; one in the fall of 2009, when he totaled Ms. Pennington's automobile, which she knew was alcohol related, and another wreck in early 2010, which she believed was alcohol related. Mr. Vance blamed these wrecks on deer.

Ms. Pennington also told the Court about Mr. Vance's temper. She advised that when Eli told Mr. Vance that he wanted to return to live with his mother, Mr. Vance had a temper fit, stopping the car, in the highway, and then beat on the hood with his fists, screaming at Eli.

Mrs. Weatherholtz told the Court that from June 10th, 2000, when she married Mr. Vance, until the time of their divorce, Mr. Vance used cocaine frequently, methamphetamine often and marijuana daily, and that he drank a 12 pack of beer daily. She confirmed that Mr. Vance's fourth

DUI in December of 2006, was hidden from her, until after Mr. Vance's divorce from Ms. Pennington, in August of 2009. Mr. Vance denied this.

Mrs. Weatherholtz is a housewife. She had her second child in July of 2010. She is now a homemaker. For the past two years, she worked as a substitute teacher's aide in Hardy County Elementary Schools. Mr. Vance is a boiler maker, seldom home.

Mrs. Weatherholtz was the primary caretaker of their son from their son's birth until July 13th, 2005, when Judge Arrington transferred the primary residence to Mr. Vance. From then until his second divorce in August of 2009, the caretaking functions for Eli were handled by Mr. Vance's second exwife, Terri Pennington. Since August of 2009, Mr. Vance's second divorce in six years, Mr. Vance has turned over the caretaking functions to his father and stepmother, when his job, as a boiler maker, requires him to be away, which is quite often.

At the hearing on March 31st, Respondent presented many family members as witnesses to try to rebut the evidence of Mrs. Weatherholtz. None of Respondent's witnesses were present in either of Mr. Vance's homes to have an opportunity to be around to deny the evidence of Terri Pennington, or Mrs. Weatherholtz. None of Respondent's family witnesses were aware of Respondent's four DUI convictions, or his drug and alcohol abuse. Respondent, again, denied his abuse of drugs, or alcohol.

During the breaks in the March 31st, hearing, both Mrs. Weatherholtz and Ms. Pennington advised Petitioner's counsel that Mr. Vance was high, or on something during the hearing. As a result, Mrs. Weatherholtz moved Judge Born to have both parties drug tested. Judge Born refused to have either party tested, which would have routinely been granted by former Judge Arrington, or Judge See. Judge Born stated that he had never ordered drug testing and he wasn't

going to start. The test results would have corroborated Mrs. Weatherholtz's evidence and would have been dispositive of the issues at that hearing.

ATTORNEY'S CERTIFICATION

Pursuant to Rule 4A(c) of the Rules of Appellate Procedure, Petitioner's counsel certifies that the facts alleged are faithfully represented and that they are accurately presented to the best of his ability.


JOHN G. OURS, Counsel for Petitioner

ASSIGNMENTS OF ERRORS

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

POINTS AND AUTHORITIES

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

In the Order of March 31st, 2010, Judge Born's finding in paragraph 6, of the Findings and Conclusions, is clearly erroneous. Judge Born found that the Respondent did not try to hide this fourth conviction for DUI from the Petitioner. Terri Pennington, his second wife, testified that Mr. Vance ordered her not to tell Mrs. Weatherholtz when it happened. Mrs. Weatherholtz

testified that she wasn't informed until after their divorce. No person testified differently. Judge Born concluded that the evidence didn't demonstrate any damage to the child as a result of Respondent's DUI in 2006. The record shows that after the December 2006 DUI conviction, Mr. Vance had a wreck, involving alcohol, totaling his second wife's car in the summer of 2009, and a second wreck totaling a second car in 2010, that she believed was caused by alcohol. This clearly shows that there is a potential for damage, danger, injury, or even death for Eli, as a result of Mr. Vance's alcohol abuse.

Judge Born in paragraph 7, found that drug use by the Respondent did not exist. Mrs. Weatherholtz and Ms. Pennington both testified about Mr. Vance's use of cocaine, methamphetamine, and daily use and abuse of marijuana and alcohol. Mrs. Weatherholtz's evidence was corroborated. Judge Born ignored this evidence. This finding, by the Court, is clearly erroneous.

In paragraph 9, Judge Born found that primary custody of Eli was with his father for about four years and that Eli was thriving so the Court finds no reason to modify the arrangement; that the child's report cards and the testimony of his teacher supports this.

First, Mr. Vance had custody of Eli from July 2005 until the March 2010 hearing. That's almost five years. Mr. Vance didn't take care of Eli during this time period. Ms. Pennington did. She testified that Mr. Vance was never home more than one weekend per month except when he was Court ordered there, for six months on home confinement with work release for his fourth conviction for DUI. She testified that when he was home, he always abused drugs and alcohol. Eli was only with his father the seven months before the hearing and his grandparents were looking out for him then.

Eli has done well in school, but not because of Mr. Vance. Mr. Vance has never been to a PTA meeting and couldn't name any of his son's teachers. Eli has done well in school, not because of Mr. Vance, but in spite of Mr. Vance.

In paragraph 11, Judge Born found and concluded that there had not been a change of circumstance, and the Court did not find that a modification would serve the best interests of the child. This finding is clearly erroneous. This conclusion is an abuse of discretion.

At the time of the parties' divorce, in September of 2003, Petitioner was rightfully determined the primary caretaker. In July of 2005, Judge Arrington, as a precaution, placed the parties' son with the Respondent, who had never been the primary caretaker because of Petitioner's mistake. Since August of 2005, Mrs. Weatherholtz has been drug free. Mr. Vance has never been drug free, and has never been his son's primary caretaker. After obtaining the primary residence of his son, Mr. Vance delegated the care of his son to his second wife, who he is now divorced from. After his second divorce, in six years, he delegated that responsibility to his father and stepmother. Mrs. Weatherholtz's constitutional right to have custody of her son should not be trumped by Mr. Vance delegating the care of his son to his father and stepmother, when he is gone.

Petitioner has been drug free since August of 2005. Mr. Vance has continuously abused drugs and alcohol, to this day. Petitioner's family helped her when she had a problem five years ago. Respondent's family not only enables his problems, they deny even knowing about them.

The findings of Judge Born are clearly erroneous. The conclusions of Judge Born are an abuse of discretion. The ruling of Judge Moore upholding that decision is error.

From the record, what is wrong with the Findings and Conclusions of Family Court Judge

Born and the decision of Circuit Court Judge Moore affirming him?

1. Mrs. Weatherholtz was their son's primary caretaker.
2. Mr. Vance has never been his son's primary caretaker.
3. Mrs. Weatherholtz is now a stay at home mother. She has worked for the Hardy County Board of Education in the Elementary Schools for the past two years.
4. Mr. Vance is a boiler maker, away from home most of the time.
5. Mrs. Weatherholtz has been drug free since August of 2005.
6. Mr. Vance has never been drug free. He uses Cocaine, Methamphetamine, Mushrooms, Marijuana, and a Whizzinator to hide his drug use regularly.
7. There is no evidence in the record of Mrs. Weatherholtz's use of alcohol.
8. Mr. Vance drinks 12, or more, beers daily and has been arrested four times for drinking and driving.
9. There is no evidence of Mrs. Weatherholtz ever wrecking a car.
10. In the past year, Mr. Vance wrecked and totaled two cars, both alcohol related, one in 2009 and the most recent in 2010.
11. When Mrs. Weatherholtz began using an illegal drug in 2005, her family, immediately, got her help and treatment.
12. Mr. Vance's family has never gotten him help for his drug, or alcohol, abuse. They deny his involvement. They enable him. They claimed they didn't even know about his four drinking and driving convictions, when they were shown his convictions.
13. Mrs. Weatherholtz's home consists of Mr. Weatherholtz, that Eli loves, Mrs. Weatherholtz, and Eli's new baby sister, Grace Emma, born July 23rd, 2010.

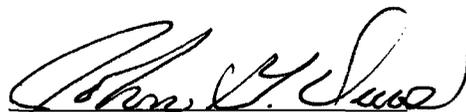
14. Mr. Vance's home is empty when he isn't there.

Judge Born made the comment near the end of the March 31st, hearing, that he didn't like exwives, or family members, as witnesses. Almost every witness at the hearing was either one of Mr. Vance's exwives, or a member of his family. Maybe this is why he ignored the evidence of Mrs. Weatherholtz and Ms. Pennington.

Petitioner, on the record, absolutely proved substantial changed circumstances warranting the return of her son unto her. Eli needs a stable home. It is in Eli's best interest, after his mother proved substantial changed circumstances, that his primary residence be returned to his mother where there is a stable home and no drug, or alcohol abuse.

RELIEF

WHEREFORE, Petitioner prays that the Honorable West Virginia Supreme Court of Appeals grant Petitioner's Petition for Appeal.



John G. Ours, Attorney at Law
WV State Bar No. 2791
P.O. Box 275
Petersburg, WV 26847
(304) 257- 1266
Counsel for Petitioner

TEVYA WEATHERHOLTZ

By Counsel

STATE OF WEST VIRGINIA,
COUNTY OF GRANT, to-wit:

TEVYA WEATHERHOLTZ, the Petitioner named in the foregoing PETITION FOR APPEAL, being first duly sworn, says that the facts and allegations herein contained are true except so far as they are therein stated to be on information, and that, so far as they are therein stated to be on information, she believes them to be true.

Tevy Weatherholtz
TEVYA WEATHERHOLTZ

Taken, sworn to and subscribed before me, this the 27 day of August 2010.

My commission expires 3/10/19.



Cynthia Strosnider
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, John G. Ours, counsel for the Petitioner, do hereby certify that I have served the foregoing PETITION FOR APPEAL and DOCKETING STATEMENT upon the Respondent by mailing a true copy thereof to his counsel, Patricia Kotchek, at her mailing address of P.O. Box 218, Petersburg, WV 26847, by U.S. Mail, postage prepaid, on this the 30th day of August, 2010.

John G. Ours
JOHN G. OURS

IN THE FAMILY COURT OF HARDY COUNTY, WEST VIRGINIA

IN RE: THE CHILD OF:

TEVYA WEATHERHOLTZ,
Petitioner,

And

Case No. 03-D-55

ELIAS TRAD VANCE,
Respondent.FINAL ORDER

On March 31, 2010, this cause came on for an evidentiary hearing before the Honorable David P. Born, Family Court Judge, who heard this case due to a conflict for The Honorable Amanda H. See, upon the appearance of the Petitioner, in person and by counsel, John G. Ours; upon the appearance of the Respondent, in person and by counsel, Patricia L. Kotchek; upon the pleadings filed and this matter; upon proper service of process and with notice to the parties. The proceedings this day were electronically recorded.

WHEREUPON, the parties proceeded with a contested hearing on the Petition for Modification of Shared Parenting Arrangement filed by Petitioner seeking modification of the allocation of parental responsibility for the child of the parties, Elias Trad Vance II, born January 17, 2001. Petitioner presented testimony under oath by Respondent, called as on cross-examination, and testimony under oath by herself and by Terri Pennington, with opportunity for cross-examination by Respondent and inquiry by the Court. Respondent presented testimony under oath by himself and by the following witnesses, with opportunity for cross-examination by Petitioner and inquiry by the Court: Megan DiBenedetto, Jill Runion, Phyllis Vance, Glenn Vance, and Karee Ridgeway. The Court accepted a proffer by Respondent of testimony of Gladys Vance and Patricia Bosley, additional witnesses available to provide

testimony similar to Respondent's other witnesses regarding Respondent's parenting and his relationship with the child. The Court heard testimony and evidence presented by the parties and admitted into the record the exhibits submitted by Respondent. The Court made rulings on the record, and the objections of the parties to adverse rulings are noted.

Upon consideration of all of which, the Family Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. The Court has ongoing jurisdiction of the parties and the subject matter of this action, and venue of this action lies with this Court. The issuance and service of process in this action are in the form and manner required by law and this action is regularly matured for hearing at this time.
2. Petitioner resides in Hampshire County, West Virginia, and has a mailing address of HC 64, Box 74, Yellow Springs, WV 26865.
3. Respondent resides in Grant County, West Virginia, and has a mailing address of HC 33, Box 3180, Dorcas, WV 26847.
4. The parties are the parents of Elias Trad Vance II, born January 17, 2001.
5. By Order dated December 14, 2005, primary custody of the child was granted to Respondent. Modification petitions filed by Petitioner in 2006 and 2008 seeking primary custody were denied. On or about January 13, 2010, Petitioner filed the instant Petition for Modification of Shared Parenting Arrangement asking that Petitioner be granted the primary residence of the child.
6. Petitioner alleges that Respondent has an alcohol and drug problem. Respondent had three DUIs prior to the parties' marriage and Petitioner knew about all of those. There is only one DUI that Petitioner can complain about and it was in 2006. That was more

than three years ago. The Court does not find that Respondent tried to hide this. Modification petitions have been filed and hearings have been held since then. There is no demonstration of damage to the child as a result of Respondent's DUI in 2006.

7. Petitioner alleges that Respondent has a drug problem, which Respondent denies. The After carefully considering the evidence and testimony presented, the Court does not find that Petitioner has borne her burden of proving by a preponderance of the evidence that drug use by Respondent exists. The Court questions the value of testimony provided by Terri Pennington, Respondent's ex-wife, who may have a grudge against him.

8. There is an extensive record in this case and this matter has been before the Family Court on numerous occasions. There is nothing to indicate that prior rulings made by the Family Court Judge in this case were inappropriate.

9. Primary custody of the child has been with his father (Respondent) for about four years. The child is thriving and the Court ~~sees no reason to upset this~~ ^{finds no reason in the evidence to modify this arrangement.} The child's report cards and the testimony of his teacher support this.

10. The parties should be aware that continued fighting over custody may be detrimental to the child and his relationship with the parties.

11. The Court has carefully considered the evidence and the arguments of counsel. There has not been a change of circumstance and the Court does not find that a modification would serve the best interests of the child.

Based upon the FINDINGS OF FACT and CONCLUSIONS OF LAW set forth above, it is therefore, ADJUDGED and ORDERED as follows:

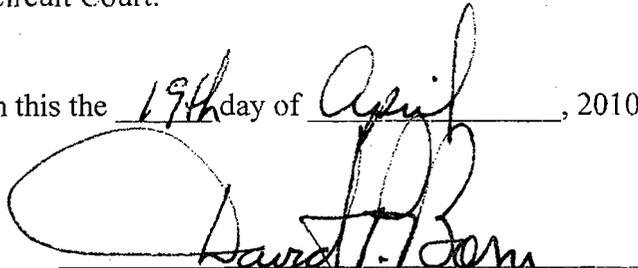
1. Petitioner's Petition is dismissed and the relief requested by Petitioner is denied.

2. Jurisdiction shall be retained by this Court for matters pertaining to support and allocation of parental responsibilities with respect to the minor child.

Nothing further appearing to be done in this action, and the costs thereof having been paid, it is hereby ORDERED that this action be removed from the docket of the Court and retired among the actions ended. The Clerk is directed to mail a certified copy of this Order to the persons set forth below.

NOTICE: The parties are given the following explicit notice regarding appeal of this Order: The foregoing Order is a final Order. Any party aggrieved by the final Order may take an appeal either to the Circuit Court or directly to the Supreme Court of Appeals. A Petition for Appeal to the Circuit Court may be filed by either party within thirty days after entry of the final Order. In order to appeal directly to the Supreme Court both parties must file, within fourteen days after entry of the final Order, a joint notice of intent to appeal and waiver of right to appeal to the Circuit Court.

Entered on this the 19th day of April, 2010.



David P. Born, Family Court Judge

Copies to:

Petitioner's counsel: John G. Ours, P.O. Box 275, Petersburg, WV 26847

Respondent's counsel: Patricia L. Kotchek, P.O. Box 218, Petersburg, WV 26847

FILED

DATE 6-11-10

CLERK

RS

DEPUTY

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

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).

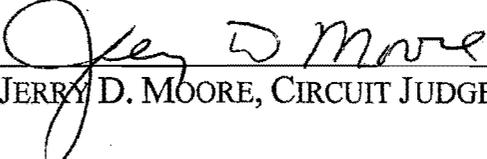
The Family Court specifically found that “the child is thriving” after living with Respondent for four years. To justify a change in custody, in addition to a change of circumstances of the parties, it must be shown that such change would materially promote the welfare of the child. Syllabus Point 2, 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