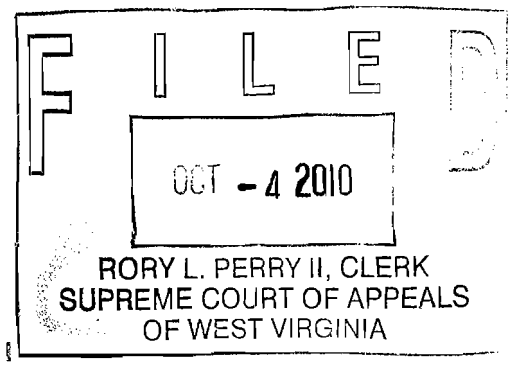
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



JEFFREY E. SKIDMORE,
Petitioner Below, Appellant

v. No: 35291

CRYSTAL L. ROGERS,
Respondent Below, Appellee

APPELLANT'S BRIEF

Daniel R. Grindo
624 Elk St.
Gassaway, WV 26624
304-364-4178
304-364-4404 fax
WVSBN 9131

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Comes now the Appellant, Jeffrey E. Skidmore, by and through his attorney, Daniel R. Grindo, and does present the following Brief in support of his Petition for appeal.

STANDARD OF REVIEW

Appellant asserts that the appropriate standard of review in this matter is abuse of discretion.

NATURE OF PROCEEDING

This case centers around the desire of a father and son to spend more time together and the efforts of a mother to thwart that goal. This matter arises from a Family Court proceeding initiated in the Family Court of Braxton County before the Hon. Robert Reed Sowa, Family Court Judge, regarding a Petition for Modification of the Parenting

Plan filed by the Father and a Petition for Expedited Modification of Child Support filed by the Mother. The Family Court denied the Father's Petition for Modification of the Parenting Plan and Granted the Mother's Petition for Expedited Modification of Child Support. Both matters were appealed to the Circuit Court of Braxton County and the Family Court's decisions were both upheld.

FACTS OF THE CASE

The Parties were divorced and a Parenting Plan was established by prior Order of the Court. The Parenting Plan was last modified by Order Entered the 25th day of February 2002. Thereafter, the Father filed a Petition to Modify the Parenting Plan in this matter based upon a change in circumstances and that the current plan is not working as anticipated. The case proceeded through litigation and a guardian ad litem was appointed in lieu of the Court taking the child's testimony. The Guardian ad Litem presented a written recommendation that the best interests of the child dictated that the parenting plan be modified to allow the Father more time with the child and set forth a proposed parenting plan allowing alternating weeks for the parents.

The Court thereafter denied the Father's Petition to Modify and made extensive findings in support of that ruling, including the following:

1. That both parties have remarried and the Father now has a second child who is a half-sister to the subject child.
2. That it is undisputed that a bond exists between the said siblings.
3. The Court did receive the report of the Guardian ad Litem, that recommended that the Parenting Plan be modified so that the parties alternate weeks of parenting time and that the current summer visitation schedule remain the same.

4. That the Guardian ad Litem reported and the court found that the child expressed a desire to spend more time with Father.
5. That the Court found that no substantial change in circumstances has occurred
6. The Court specifically found that the birth of a sibling with whom the child has a significant bond, does not rise to the level of a change in circumstances.
7. That as to whether the current plan is working; the court makes the following findings:
    a. That it is disputed by the parties as to whether the plan is working as contemplated and is in some way manifestly harmful to the child.
    b. The Father asserted that the current plan would cause him to have periods of time when he would go up to 5 weeks without seeing the child.
    c. That according to the Guardian ad Litem, the Child was asking for more time with the Father.
    d. That even if the plan is not working as contemplated, the Court must find that it is manifestly harmful to the child.
    e. That the Guardian ad Litem found that the current plan could be harmful because the child is not spending enough time with the Father, but its operation is not "manifestly harmful."
    f. That the Court believes that the Petitioner must show something close to abuse and neglect in order to support findings of manifest harm.
    g. The Court does find that it is concerned about the relationship between the child and the sister but believes that the current plan provides enough time to maintain the bond between siblings. The Court Notes the mother's

testimony that the half-sister was not always available during the child stay with the Father.

h. That although the Court was mindful of the strength of the Guardian ad Litem's recommendations and had concerns that there is now half-sibling, the Court finds itself to be a statutory body and is therefore strictly bound to the statutes governing modification of a parenting plan.

Shortly after the Family Court announced its rulings on the Parenting Plan, the Mother did file a Petition for Expedited Modification of Child Support. Father filed the necessary objections and the matter proceeded to hearing. At that hearing, the Father requested that the Court allow him to carry insurance for the child as it would be to the financial benefit of both parties to allow that.

The Family Court did then Grant the Mother's Petition for Expedited Modification of Child Support but refused to allow the Father to carry the child on his insurance which would have ultimately saved the Father in excess of $100.00 per month and would have saved the mother approximately $300.00 per month.

The Father did file timely, separate appeals from both Orders to the Circuit Court of Braxton County. The Circuit Court did hear argument as to the Parenting Plan issue and ultimately upheld the rulings of the Family Court. The Circuit Court did not hear argument on the Child Support issue and refused the appeal. It is from both of these Orders that the Petitioner does appeal. As the Circuit Court merely held that the Family Court's rulings were not erroneous, this Petition will address the substantive rulings of the Family Court directly.

QUESTIONS PRESENTED

1. Can a Family Court ignore the mature firm and reasonable preferences of a child who has not yet reached the age of fourteen when said preferences are consistent with the well-reasoned opinion of a Guardian ad Litem?
2. Can a Family Court ignore the best interests of a child when considering a modification of a parenting plan?
3. Does the subsequent birth of a sibling constitute a change in circumstances?
4. Does the age and development of a child constitute a change in circumstances?
5. Must manifest harm rise to the level abuse and/or neglect in order to warrant a modification of a parenting plan?
6. Was the lower court incorrect in refusing to modify the assignment of primary insurance for the child when said refusal is clearly contrary to the law and the financial best interests of all parties?

DISCUSSION

Preferences of the Child, the Recommendations of the Guardian ad Litem, and the Best Interests of the Child

In the instant case, the central and undisputed set of facts were that both father and son desired more time with each other and that the Guardian ad Litem clearly opined that a more equal division of time between the parents would be in the best interest of the child.

The appellee has spent considerable time and effort focusing on technical defenses and attempting to shift the Court's focus away from these facts. However, when questioned, the mother conceded that her son wanted more time with his father and could not explain why granting her son such a basic request would be contrary to his best interest.

In the instant case, the Court had appointed an attorney as Guardian ad Litem pursuant to W.Va. Code §48-9-302, after Father had made a motion to take the testimony of the child. The Guardian ad Litem, who is now a sitting Family Court Judge, did interview the parties and made an extensive and specific recommendation to the Court. After receiving the report, the Court declined to interview the child directly.

In IN RE CLIFFORD K.,217 W.Va. 625, 619 S.E.2d 138 (2005) the Supreme Court opined that "Companion statutes to this provision make it abundantly clear that the primary aim of this legislation is to secure custodial placements of children that serve their best interests and to promote stability and continuity with those parents or parental figures with whom such children have formed an emotional attachment bond. W. Va.Code § 48-9-101(b) (2001) (Repl.Vol.2004) poignantly states that "[t]he Legislature finds and declares that it is the public policy of this state to assure that the best interest of children is the court's primary concern in allocating custodial and decision-making responsibilities between parents who do not live together." Similarly, W. Va.Code § 48-9-102 (2001) (Repl.Vol.2004) enumerates specific factors that are essential to promoting and safeguarding the best interests standard: (a) The primary objective of this article is to serve the child's best interests, by facilitating:(1) Stability of the child;

(2) Parental planning and agreement about the child's custodial arrangements and upbringing; (3) Continuity of existing parent-child attachments; (4) Meaningful contact between a child and each parent; (5) Caretaking relationships by adults who love the child, know how to provide for the child's needs, and who place a high priority on doing so; (6) Security from exposure to physical or emotional harm; and (7) Expeditious, predictable decision-making and avoidance of prolonged uncertainty respecting arrangements for the child's care and control. (b) A secondary objective of [this] article is to achieve fairness between the parents.

These legislative statements of purpose also are consistent with this Court's pronouncements identifying the best interests of the child as being the paramount consideration by which custody determinations should be made. We repeatedly have held that "`[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Point 2, Syllabus, *State ex rel. Lipscomb v. Joplin,* 131 W.Va. 302[, 47 S.E.2d 221 (1948)]." Syl. pt. 1, *State ex rel. Cash v. Lively,* 155 W.Va. 801, 187 S.E.2d 601 (1972). *See also* Syl. pt. 3, in part, *In re Katie S.,* 198 W.Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal . . . in all family law matters . . . must be the health and welfare of the children."); Syl. pt. 5, Carter v. Carter, 196 W.Va. 239, 470 S.E.2d 193 (1996) ("In visitation as well as custody matters, we have traditionally held paramount the best interests of the child."); David M. v. Margaret M., 182 W.Va. 57, 60, 385 S.E.2d 912, 916 (1989) (The "child's welfare is the paramount and controlling factor in all custody matters." (citations omitted)). Thus, "[t]o justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change

would materially promote the welfare of the child." Syl. pt. 2, *Cloud v. Cloud,* 161 W.Va. 45, 239 S.E.2d 669 (1977) (per curiam)."

In the instant case, the only evidence presented on the issue of the best interests of the child indicated that additional time with the father is appropriate. The mother did not present any evidence as to why additional time with the father would not further the best interests of the child nor did she indicate how restricting the son's access to his father would promote the child's best interests.

It is important to note that this is not a case in which one parent is clearly more aptly suited to care for the child. Both parents are employed in law enforcement positions. Both make comparable incomes, and both are valued members of the community. The parents live within 10 miles of each other and both homes are within the same school district.

Father would argue that absent a showing of unfitness, under the circumstances of this case as it stands today, both parents should be presumed to have equal right to time with the child. This position is not contrary with W.Va. Code §48-9-206 when viewed in light of the circumstances of this case and the remainder of the controlling law. That statute requires that the Court consider the caretaking functions performed by the parents prior to separation. Father agrees that this is an appropriate position in regards to the initial parenting plan. However, this provision, when read in isolation, does not take into consideration the development of the child and a child's changing needs as he ages. To address the changing needs of the child, the legislature allowed for modification of the parenting plan upon a showing of a change in circumstances, W.Va. Code §48-9-401 or if

none, then a showing that the current plan isn't working and is manifestly harmful to the child. This, when combined with the unequivocally stated concern for the best interests of the child, clearly shows the legislatures intent that parenting plans should be fluid enough to accommodate the child's needs as he grows and life changes the circumstances facing all of the parties. This intent is even more clearly indicated when a review of the modification statute shows that there is a mechanism to provide a modification of the parenting plan to accommodate the best interests of the child even when there has been no change in circumstances.

In the development of this case, father would argue that both the mother and the lower courts have focused on the wrong parts of the relevant statutes. Article 9 was not written to protect the parents, nor was it drafted as a means by which to restrict contact between a fit parent and his son. It was drafted as a means to, "...serve the child's best interest..." W.Va. Code §48-9-102. Further, W.Va. Code §48-9-101(b) clearly states that it is the "public policy of this State to assure that the best interest of children is the court's primary concern in allocating custodial and decision-making responsibilities between parents who do not live together." By reading the statute as a bar to modification first, the lower court never considered the overwhelming evidence and recommendations that modification was what the child needed. To read the modification statutes in this manner is to pervert the clearly stated objectives of Article 9.

Father would argue that in the case at hand, the child needed the nurturing of the mother because the child was of such a tender age at the time of separation. However, as the child is now developing into a young man, the father asserts that the child will benefit

and continue in his positive development with additional time spent under the care and guidance of his father.

What is most atrocious in this case is that the mother, without basis, strenuously objects to giving her son the fatherly contact that he so craves. If this refusal were not pursuant to an out of date parenting plan, father argues that it would rise to the level of a limiting factor for withholding sufficient contact with the child. As it is, the mother continues to stand behind an Order designed for a toddler and continues to place a strain on her relationship with her son by refusing his simple requests.

When the facts of this case are considered in the light of the stated objectives of Article 9, the lower court clearly abused its discretion in refusing to consider the best interests of the child and denying the father's petition to modify.

Change of Circumstances Due to an After-born Sibling and Maturation of the Child

In the instant case, the Family Court found that no change in circumstances existed even though there was a sibling born of the Father with whom the child in question has a significant bond. The lower Court also rejected the testimony and argument that the child was much older than when the original plan was enacted and his needs had changed.

Petitioner would argue that a significant difference in age of a child would constitute a change in circumstances that would warrant a modification under the statute. In this case, the parenting plan was established while the child was an infant. Now the

child is twelve-years old, and by all accounts, strongly wanting additional time with his father. Clearly the needs and best interests of the child will evolve as the child ages. It is easily argued that an infant will need the nurturing of a mother, and as the child ages will benefit from the influence of a caring father.

W.Va. Code §48-9-401 require that a "substantial change has occurred in the circumstances of the *child*, or of one or both parents and a modification of a parenting plan is necessary to serve the best interest of the child." The lower court has focused entirely on a change of circumstances with the parents. However, the reality is that there have been significant changes in this child's life since the original parenting plan was enacted. There was testimony that he had a sibling with whom he has a significant bond and counsel would inform the court that a second sibling has been born to Mr. Skidmore during the pendency of this action.

In light of the addition of a sibling, and the growth and evolving needs of the child, the Family Court's finding that nothing had changed since 2002 was clearly erroneous and in direct conflict with its factual findings.

Father would argue that this Court should recognize the birth of siblings and the development of the child as at least factors to consider in determining whether a modification of a parenting plan is appropriate.

Definition of Manifest Harm

In the proceedings in the lower court, the Petitioner asserted that even if there was no change in circumstances, the parenting plan was clearly not working as contemplated.

The Court found that the parties were in dispute as to whether the plan was working. The Father, the child, and the Guardian ad Litem all asserted that the current plan was not working and the Guardian ad Litem opined that the current arrangement could be harmful to the child and could affect the child's relationship with his parents. Further, the Guardian ad Litem asserted that the Best Interests of the child dictated that additional time with the Father was needed.

The Family Court found that even though there was a strong recommendation by the Guardian ad Litem that the Best Interests of the child dictated that the child needs additional time with his Father; the Court did not have the statutory authority to make the modification because the Court could not make a finding of Manifest Harm. In looking to the other findings set forth in the Order, the Court clearly made sufficient findings that could have supported a finding that a change in circumstances did occur or alternatively that the plan is not working and is harmful to the child and that the best interests require a modification. Any number of the Court's findings and the Guardian's recommendations would rise to a level of violating the factors set forth in W. Va.Code § 48-9-102 (2001) (Repl.Vol.2004) that are essential to promoting and safeguarding the best interests of the child, especially the factors of "continuity of existing parent-child attachments," and "meaningful contact between a child and each parent." However, the Court ignored the facts, and its own findings, and made an incredible finding that a harmful parenting plan must rise to the level of abuse or neglect to warrant modification.

Petitioner would argue that to interpret this term as meaning a situation approaching abuse and neglect ignores the situations of most families. That standard would also nearly negate the role of the Family Court in modifications of parenting plans

because if the Court suspects that abusive behavior is occurring, it would be required to file an Overlap referral pursuant to W.Va. Code §49-6A-2, and it is possible that an Abuse and Neglect petition would be filed as a result, thereby placing the matter in the hands of the Circuit Court for disposition. Further, that standard approaches the limiting factors set forth in West Virginia Code §48-9-209. Clearly, if the legislature had meant that a modification of a parenting plan required the existence of a limiting factor, it would have so stated and not provided separate procedures for the existence of those limiting factors.

As such, the Father would argue that the lower court has clearly abused its discretion in denying the Father's motion on this reading of the relevant statute.

Improper Assignment Of Medical Support

In this matter, the Family Court Ordered that the Mother was to carry medical insurance for the child. Because of this, the Mother had to go to a higher level plan for family coverage. By her own pleading, this would require an additional $290.23 per month for the medical coverage with an additional $78.14 for dental coverage.

At the hearing on the Mother's motion, the Court heard that the Father was able to provide essentially the same medical coverage and dental at no additional cost to him. When the Court ran the child support calculation with the Father carrying the insurance, the difference would have made the deviation of child support less than 15% and would have resulted in no modification.

Using the figures the Family Court calculated, allowing the mother to carry the health insurance would cause the Father's child support to increase in the amount of $130.02 per month, while allowing the Father to carry the health insurance would have resulted in no increase in the Father's child support obligation and would provide the mother with a net gain in her monthly income in the amount of $238.35. This is money that could easily be spent for the care of the child and is nearly double the increase in child support by allowing the mother to carry the insurance.

The Court further found that there was no substantial difference in the quality of coverage as the mother's insurance is through the Federal Employee's program and the Father's is through the West Virginia State PEIA.

W.Va. Code §48-12-102(1) requires that "If such insurance exists, the court shall order the appropriate parent to enroll the child in that coverage..." Although the statute does not define who the appropriate parent is, logic tells us that the Court should consider the quality of coverage and the financial impact of the coverage to the parties. Further, throughout §48-12, there are references as to the court considering the impact of the cost of providing this coverage. In particular, §48-12-101(12) defines "Reasonable costs" as the child's portion of the medical insurance premiums not exceeding five percent of the gross income of the parent who provides the coverage.

When the Mother's stated cost of insuring the child is compared to her monthly income as presented in the child support formula she provided as an exhibit, the coverage costs her approximately 8.9% of her monthly gross income. In contrast, the additional cost of insuring the child by the Father's insurance is 0% of his gross monthly income.

Therefore, the cost of the mother carrying the insurance is not reasonable as defined and the Court has erred in not allowing the Father to carry the health insurance. Further, as the Court found that the coverage was substantially the same, and no evidence was presented to show the father has ever been dilatory in the medical care for the child, requiring both parties to incur significantly greater costs at the detriment of the child simply defies all logic.

CONCLUSION

Father argues that the lower court erred in refusing to grant his Petition to Modify the parenting plan in the face of overwhelming evidence that the same was in the best interests of the child. The Court utilized the statutes in question in a way that was contrary to their clearly defined purpose of protecting the best interest of the child. The Court ignored the change in circumstances of the child and focused instead on using the language of the statutes to avoid doing what was in the best interests of the child.

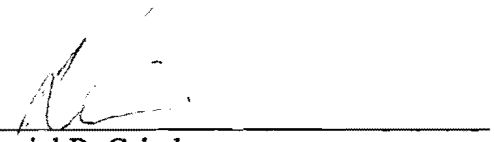
In so doing, the lower court brought into question the interpretation of the term "manifestly harmful," and in the opinion of the father, applied a definition that goes well beyond the intended meaning and one that is contrary to other provision within Article 9.

As a secondary issue, the Court refused to allow the father to carry the health insurance for the child and deny the mother's motion for increased child support when such a denial would ultimately create a substantial financial benefit to all parties.

As such, the Father is respectfully requesting that this Court overturn the lower court's ruling and that it grant his Petition to Modify the Parenting Plan and grant him a

parenting plan consistent with the recommendations of the Guardian ad Litem. The Father requests such other relief as the Court deems appropriate.

Appellant, by Counsel:

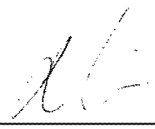


Daniel R. Grindo
624 Elk St.
Gassaway, WV 26624
(304) 364-4178
(304) 364-4404 fax
WVSBN 9131

CERTIFICATE OF SERVICE

I hereby certify that I have, on this the 1st day of October, 2010 provided a true copy of the Appellant's Brief to the following individual by regular mail.

James Douglas
181B Main Street
Sutton, WV 26601



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