IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Spring 2023 Term

FILED
June 15, 2023
released at 3:00 p.m.
EDYTHE NASH GAISER, CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

No. 22-ICA-214

JONPAUL C.,
Petitioner Below, Petitioner,

v.

HEATHER C.,
Respondent Below, Respondent.

Appeal from the Family Court of Barbour County
Honorable Karen Hill Johnson, Judge

No. 19-D-25

REVERSED AND REMANDED

Submitted: April 4, 2023
Filed: June 15, 2023

Amy L. Lanham, Esq.
Family Law Associates,
Clarksburg, West Virginia
Counsel for Petitioner

Jaymie G. Wilfong, Esq.
Wilfong Law Office, PLLC
Elkins, West Virginia
Counsel for Respondent

Christopher M. Wilson
Law Office of Christopher M. Wilson, PLLC
Fairmont, West Virginia
Guardian Ad Litem

JUDGE SCARR delivered the Opinion of the Court.

SCARR, JUDGE:

Petitioner Jonpaul C.[1] appeals the September 29, 2022, order of the Family Court of Barbour County following a two-day final hearing on several pleadings filed by Jonpaul C. and Respondent Heather C. Jonpaul C. argues that the family court abused its discretion by denying his petition to modify the parenting plan and child support; finding that he engaged in parental alienation; ordering him to pay all guardian ad litem fees and a portion of Heather C.'s attorney fees; placing restrictions on his ability to file petitions for modification in the future; and for failing to follow the uncontroverted recommendations of the counselors, therapists, and the guardian ad litem ("GAL") as to what was in the child's best interest.

For the reasons mentioned below, we reverse and remand the September 29, 2022, order of the Family Court of Barbour County.

I. Facts and Procedural Background

The parties are the parents of three children.[2] The parties were divorced by the Family Court of Barbour County, West Virginia, by Decree of Divorce entered March 16, 2020. Pursuant to the final divorce decree, Jonpaul C. was given primary custody of

[1] To protect the confidentiality of the juveniles involved in this case, we refer to the parties' last name by the first initial. *See e.g.*, W. Va. R. App. P. 40(e); *State v. Edward Charles L.*, 183 W. Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

[2] G.C., age 15, E.C., age 14, and K.C., age 11.

G.C. and E.C., with Heather C. receiving primary custody of K.C. Despite the custody arrangement, the parties have at all times shared major decision-making authority for all three children. The oldest child, G.C. is presently fifteen years old and is the focal point of this appeal.

In 2019, while the parties were separated (and divorce pending), G.C. expressed a reluctance to have visitation with Heather C. In response, G.C. began counseling with Jeff Collins, a licensed psychologist. Prior to entry of the final divorce order, the family court heard testimony from Mr. Collins and conducted an in-camera interview of G.C. At that time, Mr. Collins testified that G.C. should begin phased-in visitation with Heather C. During the family court's interview of G.C. (then under fourteen years old), G.C. advised that he would like to have less visitation with Heather C. than the 2-2-3 schedule in place for his two younger siblings, but that he would abide by the visitation schedule ordered by the family court. However, once the family court's proposed findings and conclusions were distributed to counsel, the family court received a letter dated February 14, 2020, from Mr. Collins noting that G.C. had learned of the proposed phased-in visitation schedule and expressed anger at being forced to visit Heather C. Further, the letter stated that Jonpaul C. was initially opposed to the proposed visitation schedule out of concerns for G.C., but that he had grown supportive of Heather C. having visitation with their son.

In the final divorce order, the family court stated its goal was for G.C. to transition to the same 2-2-3 visitation schedule as his siblings and that based on Mr. Collins' recommendation, a phase-in visitation schedule was appropriate. As part of the final divorce order, the family court ordered the following: (1) the parties would continue to share decision-making authority for all major decisions of the children; (2) G.C. should begin the phased-in visitation; (3) that neither Jonpaul C., Heather C., or G.C. had discretion regarding the parenting plan; (4) absent a therapist recommendation, no deviation from the plan was permitted; and (5) both parties were required to fully cooperate with the phase-in visitation schedule and the child's therapist.

On November 5, 2020, Jonpaul C. filed a motion to modify the parenting plan pursuant to West Virginia Code § 48-9-401(a) (2022), alleging that there had been a substantial change in circumstances. As a basis for the change in circumstances, Jonpaul C. argued that while G.C. and Heather C. both continued in counseling, their relationship had not improved, and that preference should be given to G.C.'s desires. Jonpaul C. also sought to change the parenting schedule for E.C. and K.C. because the current 2-2-3 plan was implemented when Jonpaul C. was not working, but now he is employed full-time with designated days off. Heather C. filed her response on November 19, 2020, along with a motion for the appointment of a GAL.

On November 5, 2020, Jonpaul C. filed a motion for contempt against Heather C., arguing that she had failed to comply with the obligation under the divorce

order to pay her one-half share of the costs for the children's extracurricular activities (racing).[3] On November 20, 2020, the family court entered a one-page order dismissing the petition for contempt, finding that upon review, "the [p]etition [did] not state a prima facie case of [c]ontempt."

On February 2, 2021, Jonpaul C. filed a motion for temporary relief regarding the petition for modification, seeking that his proposed parenting plan be implemented by the family court pending a final hearing. This motion requested that the court hear the testimony of G.C.'s counselor, Mr. Collins, in support of the motion. Heather C. filed a response on March 11, 2021, wherein she objected to the temporary relief, as well as the testimony of Mr. Collins noting, that Mr. Collins' testimony would be detrimental to G.C. At an initial hearing on March 11, 2021, the family court granted the motion for the appointment of a GAL and ordered "the parties to work to repair the relationship between the parties and the children." On March 12, 2021, the family court ordered a 65/35 percentage split of the $3,000 GAL deposit between Jonpaul C. ($1,950) and Heather C. ($1,050), that was to be paid in full as a prerequisite to the family court's appointment of a GAL.

[3] The children are involved in four-wheeler racing which has progressed to the national level, which is very costly, time consuming and requires them to travel frequently.

On September 7, 2021, the family court entered an agreed order modifying child support and the parenting plan. As part of the order, the family court found that reunification between G.C. and Heather C. was completed in June of 2020; that G.C. is now following a 50-50 custodial allocation schedule with his siblings; that the new 50-50 arrangement required modification of Heather C.'s child support obligation; and that all other provisions of the final divorce order remain in full force and effect. The family court again noted that it believed that G.C. is misinformed about what he is permitted or able to do.

On July 13, 2021, a status hearing was held for the preliminary report of the GAL. The GAL reported that G.C. refused visitation with Heather C. and exhibited signs of aggression towards her and his other siblings. It was reported that G.C. had been in counseling with Mr. Collins for two years, and that G.C. may benefit from a new counselor and recommended Ms. Terry Sigley. In its order, the family court reiterated that none of the children had discretion on visitation and directed the GAL to inform G.C. that he must comply with visitation with his mother without exception; that G.C. must begin counseling with Ms. Sigley; that "blocking out" Heather C. by not forcing G.C.'s visitation was not an option, and that parental alienation was a serious matter. The family court further noted that it did not believe any child would refuse to visit with one parent if the other parent encouraged the child to go, and that it believed that G.C. has been told he can make these decisions. The family court also noted that Heather C. was losing visitation because of all three children's national racing schedule; that even though the children had been racing for

years and it was accommodated for in the final divorce order, the family court never anticipated the racing would evolve into the time-consuming activity it is now; and if the family court found it necessary, it would end the children's ability to race. The family court ordered that all efforts of the children and their parents be directed at "fixing this family."

A second status hearing was held on October 25, 2021, at which time the GAL proffered an update in the case. The GAL reported that G.C. still believed he had discretion regarding visitation with his mother, and the GAL noted that he was apprehensive about telling the child he was wrong. The family court directed the GAL to inform the child he was to visit as ordered.

A third status hearing was held on January 13, 2022. The GAL reported that G.C. and Ms. Sigley were building a rapport in counseling, but that Ms. Sigley was not ready to offer an opinion on whether G.C. and his mother's relationship could be improved. All three children were doing well in school, and E.C. and K.C. both expressed a desire to alternate weeks between their parents as opposed to the current 2-2-3 schedule. The GAL reported that he did inform G.C. that he could not decline visitation with his mother. The GAL also cautioned the family court to tread lightly with G.C. and to not revert to measures that could cause G.C. to "dig his heels in." The family court granted Heather C. leave to file a counter petition in the matter, and the case was scheduled for a two-day final hearing beginning on April 25, 2022.

On February 17, 2022, Heather C. filed her counter petition for modification, contempt, and request for a finding of parental alienation. In her pleadings she argued that Jonpaul C. has "deliberately violated multiple provisions of the [final divorce order]," and that since entry of the final divorce order, Jonpaul C. "has acted in a manner . . . designed to alienate [Heather C.] from the minor children – especially, [G.C.]" Heather C. sought sole custody of all three children and asked the family court hold Jonpaul C. solely responsible for the GAL fees, as well as for her own attorney's fees.

In April 2022, the family court held a final hearing. On September 29, 2022, the family court issued an 89-page order,[4] prepared by Heather C.'s counsel, without any corrections or substitutions.[5] There, the family court outlined the procedural history of the case, noting that in the final divorce order it was clear no discretion to deviate from the parenting plan was given to the parties or children. Further, based on the evidence adduced, the family court made several factual findings regarding Jonpaul C. and G.C. With respect to Jonpaul C., the family court found:

1. He had misinformed G.C. that he could express his opinion as to where he wanted to live and visitation with his mother. The child was misinformed

[4] The family court's order includes voluminous pages of witness testimony, which is not required for an order, without any analysis for the findings the court made. We could also summarize all of the testimony taken in this case, however, we find it unnecessary to do so.

[5] The family court's findings are speculative, hyperbolic, or blanketed statements without citing to any evidence in the record to support the findings. The length of a court's order does not make it adequate; court's must still be certain the order embodies all the court's rulings accurately and adequately.

because he hadn't reached fourteen years of age when he was told this information.

2. He lacked any credibility because his responses were not detailed enough for the family court's liking.
3. His inability to answer how he would specifically discipline G.C. for (hypothetically) wanting to date an eleven-year-old and/or refusing to go to school, shows that Jonpaul C. lacks the ability to adequately punish G.C. when necessary, and that his testimony has no credibility.
4. It appears that Jonpaul C. is awarding G.C. for bad behavior by permitting him to get his learner's permit and buying him a truck. He has failed to punish the child.
5. Despite the language in the final divorce order setting forth that missed parenting time may be made up by agreement, Jonpaul C. intentionally uses that language to his advantage by not agreeing to makeup visits for 100% of times racing interferes with Heather C.'s visitation because she chooses not to travel to every event so she can see the children.
6. Jonpaul C. must have had ulterior motives in arranging for G.C. to be picked up in front of the school because preventing a scene between Heather C. and G.C. was not a plausible basis.
7. G.C. refusing visits with Heather C. around his 14th birthday is conclusive evidence that Jonpaul C. had previously told the child misinformation about his ability to state a preference.
8. He has used the language in the final divorce order regarding the parties' responsibilities for the children's extracurricular activities (that expressly included racing) to substantially increase the children's racing activities and does so despite the objections of Heather C.[6] Jonpaul C. has intentionally used racing to infringe upon Heather C.'s parenting time without her consent.
9. Jonpaul C.'s disclosure to the children that Heather C. had an affair is responsible for G.C. and Heather C.'s current difficult relationship.
10. Jonpaul C. is a "laissez faire" parent out to punish Heather C. and it is his fault G.C. acts the way he does.
11. His failure to appeal the family court's final divorce order and instead file the petition for modification less than eight months later was calculated to coincide with G.C.'s 14th birthday. Therefore, his actions were not done in good faith.

Regarding G.C., the family court found that:

1. G.C. is a manipulative child who intentionally created the problems in this case.

[6] There is no evidence of Heather C. voicing an objection prior to the hearings held in April of 2022.

2. G.C. is a manipulative and deceitful child because he lied to the family court and to his therapist, Mr. Collins, when he previously stated he would reluctantly go on visits with Heather C. as the family court ordered.

Ultimately, the family court denied both Jonpaul C.'s and Heather C.'s petitions for modification of the parties' parenting plan, finding no substantial change in circumstance had occurred. Specifically, the family court found:

1. The further deterioration of Heather C. and G.C.'s relationship is not a substantial change in circumstance. Instead, it is evidence of G.C. and Jonpaul C.'s malfeasance.
2. Even though he is now 15 years old, G.C.'s desires and stated preference will not be considered due to his deceitful and manipulative conduct in this case. His desire to "cut out" Heather C. from his life is unacceptable.[7] It is in G.C.'s best interest to have a relationship with Heather C.
3. Jonpaul C. did not comply with the final divorce order by failing to encourage G.C.'s visitation.

Regarding the children's racing, the family court found as follows:

1. The family court clarified the joint-decision making provision in the final divorce order noting that absent both parties agreeing, neither may act or continue to act on any major decision. It found there was a lack of communication by both parties.
2. Although Heather C. previously agreed to the racing, she now opposes it. Therefore, it must cease.
3. Even if the parties agreed to racing, the family court was ordering it to cease because the relationship between G.C. and his mother has not been fixed, but if the parties could demonstrate great progress, it would consider lifting the prohibition in the future.

[7] This is a mischaracterization of the evidence. G.C.'s consistent preference has been to live with Jonpaul C. and to have reduced parenting time with Heather C.—not to have zero contact.

The family court granted Heather C.'s motion for a finding of parental alienation by Jonpaul C. In doing so, it found the following actions/inactions by Jonpaul C. constituted parental alienation:

1. Making special arrangements for G.C. to be picked up in front of his school.
2. Taking the children racing on Heather C.'s scheduled weekends.
3. Putting food in the bag of clothes he brought G.C. without discussing it with Heather C.
4. Not coming out of his house to assist Heather C. during visitation pickup.
5. Telling Heather C. he cannot fix her problems because he is not Superman.
6. Letting Heather C. go one year without having regular parenting time with G.C.
7. Not agreeing to make-up time for Heather C. for each missed visit.
8. Not telling Heather C. the date/time of G.C.'s school orientation.
9. Letting the children "know too much" about the issues between the parties.
10. Filing the petition for modification less than eight months after entry of the final divorce order.
11. Permitting the children to race nationally, resulting in a lot of time and out of state travel.
12. Not cooperating with Heather C. regarding the phase-in visitation.
13. Permitting G.C. to get his learner's permit, work, and buying him a truck without Heather C.'s permission in addition to failing to make other substantial decisions with Heather C.

The family court granted Heather C.'s motion for Jonpaul C. to pay all the GAL fees finding that it was warranted "[b]ased upon all of the findings of fact herein[.]" It was also ordered that Heather C.'s deposit for GAL fees be returned. The total GAL fees assessed to Jonpaul C. after deduction of his prior deposit was $6,9400. Further, the family court found Jonpaul C. was in civil contempt of the family court, "for the reasons stated in this Order" (but those reasons are not readily set forth therein).

The family court also granted Heather C.'s motion for attorney's fees. In support, the family court concluded that:

1. Jonpaul C. shall be responsible for the $2,500 in attorney's fees incurred by Heather C., associated with her petition for contempt because Jonpaul C. is in civil contempt.
2. Jonpaul C. did not file the petition for modification in good faith because he sought modification when he should have appealed the final divorce order. He intentionally did not appeal and waited until just before G.C. turned fourteen years old to file the petition.
3. G.C. turning fourteen was not some "magic birthday" wherein he could decide his preference regarding with whom he wanted to live and visit. However, Jonpaul C. allowed him to believe the same all to the detriment of Heather C.
4. Pursuant to West Virginia Code § 48-1-305, Heather C. unnecessarily incurred attorney's fees and costs because Jonpaul C. filed a petition for modification of the parties' parenting plan based on "unfounded claims for vexatious, wanton, or oppressive purposes."
5. Heather C. and her counsel were successful in defending the petition filed by Jonpaul C.
6. That Jonpaul C.'s monthly income was $4,129.08 and Heather C.'s was $7,474.13, with a monthly child support obligation to Jonpaul C. of $689.21.
7. The family court found that both parties had incurred significant attorney's fees in this case, however because the family court has ended the children's racing, Jonpaul C. now has significant excess funds to pay Heather C.'s attorney's fees without impacting either party's standard of living.
8. The family court ordered that Jonpaul C. was responsible for an additional $13,000 of Heather C.'s attorney's fees for a total of $15,500. Jonpaul C. was ordered to pay Heather C. a minimum of $350 per month effective October 1, 2022. In lieu of direct payment, the family court ordered this amount be offset to reduce Heather C.'s child support obligation until paid in full.

Further, the family court found that it would restrict Jonpaul C.'s ability to file any further petitions for modification of the parties' parenting plan without submitting evidence and affidavits with specific information regarding the relationship between Heather C. and G.C.[8] The family court entered its final order on September 29, 2022, and

[8] Presumably, the family court based this on their finding that Jonpaul C. had filed this petition for modification within eight months after the parenting plan was entered, and in doing so, he filed this petition for modification in bad faith.

this appeal followed. On April 4, 2023, the parties appeared before this Court for oral argument.

II. Standard of Review

"In reviewing…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*." Syl. Pt., in part, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004); *see Amanda C. v. Christopher P.*, No. 22-ICA-2, __ W. Va. __, __ S.E.2d __, 2022 WL 17098574 at *3 (Ct. App. Nov. 18, 2022); *accord* W. Va. Code § 51-2A-14(c) (2005) (specifying standards for appellate court review of family court orders).

III. Discussion

As a preliminary matter, this Court would be remiss if we failed to caution lower courts from automatically adopting and entering orders outright as prepared by counsel. In this case the family court entered an eighty-nine-page order that was entirely prepared by respondent's counsel, without any corrections or revisions of any kind. While it is the common practice of family courts' and other courts to request and rely on counsel to prepare an initial draft of a proposed order, it remains incumbent on lower court's to carefully review such an order and "determine if the submitted order accurately reflects the court ruling given that it is well-established that '[a] court of record speaks only through its orders[.]'" *See Taylor v. Dept. of Health and Human Res.*, 237 W. Va. 549, 558, 788

S.E.2d 295, 304 (2016) (citation omitted). Here, length does not equal adequacy, and courts must caution themselves from adopting wholesale orders without determining that the order adequately and accurately reflects the court's findings, analysis, and rulings.

Jonpaul C. argues numerous assignments of error,[9] which will each be addressed in turn.[10]

A. Modification of the Parenting Plan

First, Jonpaul C. argues that the family court abused its discretion by not modifying the parenting plan based on the firm and reasonable preference of a child over the age of fourteen-years-old. Specifically, Jonpaul C. argues that the GAL found G.C. to be mature and that he made a firm and reasonable preference regarding his desires concerning visitation with Heather C. Further, the family court ignored the uncontroverted expert testimony of Mr. Collins, Ms. Sigley, and Dr. Worth, whom all stated forced contact with Heather C. was contrary to G.C.'s best interest and/or that the modification was in G.C.'s best interest. We agree.

---

[9] We have reordered Jonpaul C.'s assignments of error to accord with our analysis. *See, e.g., Harlow v. E. Elec., LLC*, 245 W. Va. 188, 195 n.25, 858 S.E.2d 445, 452 n.25 (2021).

[10] The GAL in this case filed a summary response and agreed with Jonpaul C. that the family court erred by not modifying the parenting plan, finding Jonpaul C. in parental alienation, not following the recommendations of the experts in this case and ceasing the children's participation in racing.

In response, Heather C. argues that there is no evidence that the modification was in G.C.'s best interest. Specifically, there is no evidence regarding any preference of G.C. because he did not testify, and without his testimony there is no preference for the family court to consider.[11]

1. Preference of a Child over the Age of Fourteen

West Virginia Code § 48-9-401(a) (2022) provides:

> Except as provided in § 48-9-402 or § 48-9-403 of this code, a court shall modify a parenting plan if it finds, on the basis of facts that were not known or have arisen since the entry of the prior order and were not anticipated in the prior order, that a substantial change has occurred in the circumstances of the child or of one or both parents a modification is necessary to serve the best interests of the child.

Additionally, West Virginia Code § 48-9-402(b) (2022), in part, provides:

> The court may modify any provisions of the parenting plan without the showing of the changed circumstances required by § 48-9-401(a) of this code if the modification is in the child's best interest, and the modification (3) [i]s necessary to accommodate the reasonable and firm preferences of a child, who has attained the age of 14[.]

The Supreme Court of Appeals has set forth guidelines for the court to consider which may have an effect on the weight placed on the child's decision:

---

[11] The Court notes that while Heather C. makes this argument, based on the hearing transcript, Heather C.'s counsel objected when Jonpaul C.'s counsel raised the issue of G.C. testifying at the hearing. Further, the family court indicated that the GAL could speak for G.C.

> (1) The trial court should give greater weight to the wishes of a child which are expressed with strength, clearness, or with great sincerity; (2) A child's preference should be given less weight where it appears that the preference is based on a desire for less rigid discipline or restraint; (3) The trial court should investigate whether the statement of preference by the child was induced by the party in whose favor the preference was expressed. If so, said statement of preference should be accorded little, if any, weight; and (4) Where an otherwise intelligent child makes an illogical decision based on unimportant factors, the trial court may disregard the child's statement of preference.

Rose v. Rose, 176 W. Va. 18, n.4, 340 S.E.2d 176, n.4 (1985)

Here, the family court's order is clearly wrong in finding that modification of the parenting plan was not in the best interest of G.C. Further, this finding is contrary to the evidence. G.C., now a fifteen-year-old, stated a reasonable and firm preference to reside with Jonpaul C., and the family court did not give any deference to G.C.'s preference in deciding to force further visitation with Heather C. The GAL in this case found G.C. to be mature for his age and that he made a firm and reasonable preference regarding his desires for future visitation with Heather C. Additionally, the family court did not provide or explain its analysis in determining that it was not in the best interest of G.C. to modify the parenting plan based on G.C.'s stated preference along with the GAL's recommendation and the other experts of record. Therefore, the family court was clearly wrong in finding

that modification of the parenting plan was not in the best interest of G.C. and abused its discretion by not giving any deference to G.C.'s stated preference.[12]

2. Disregarding Expert Testimony

Next, Jonpaul C. argues that the family court abused its discretion by not modifying the parenting plan and failing to follow the recommendation of the GAL and G.C.'s counselors/therapists. Precisely, Jonpaul C. argues that the GAL, counselors, and therapists were all consistent in their expert opinions that a forced relationship between G.C. and Heather C. by the family court was contrary to the child's best interest. We agree.

In response, Heather C. argues that the family court correctly observed that G.C.'s conduct had created the situation between he and Heather C. Specifically, Heather C. argues that the family court correctly found that G.C.'s desire for less contact with Heather C. was not in his best interest.

Here, the family court arbitrarily ignored, and failed to discredit or find uncredible, the expert testimony of the counselors/therapists and the recommendation of the GAL in rendering its decision; completely ignoring such testimony, and failing to

[12] Jonpaul C. also argues that the family court abused its discretion by not modifying the child support to a split custody arrangement rather than a 50-50 parenting plan. However, since this Court is reversing on numerous assignments of error and remanding for an order which is consistent with this opinion, a recalculation of the child support will need to be entered, and it is unnecessary to further address that argument in this opinion.

explain any reason to do so, is an abuse of discretion. *See Nathan H. v. Ashlee R.*, No. 21-1019, 2023 WL 245344 at *2 (W. Va. Jan. 18, 2023) (memorandum decision) (holding that the family court abused its discretion by failing to issue a modification that accommodated and the stated preference of a child who was over fourteen years old; and the family court abused its discretion by wholly disregarding and giving no weight to the testimony of the child's therapist, who had been qualified as an expert by the family court). Additionally, the family court failed to explain or provide any meaningful analysis on why a modification of the parenting plan was not in the best interest of G.C. Therefore, the family court abused its discretion by ignoring the testimony of the counselors, therapists, and GAL, and further by not providing any analysis as to why a modification of the parenting plan was not warranted.

B. Parental Alienation

Third, Jonpaul C. argues that the family court erroneously found that there was parental alienation when the GAL and counselors testified that they did not believe that G.C. had been coached by Jonpaul C., and that Jonpaul C. had done everything he could do to encourage a relationship between G.C. and Heather C. Specifically, Jonpaul C. argues that the uncontroverted expert testimony from the counselors, therapists and GAL is that Jonpaul C. did everything he could to promote a relationship between G.C. and Heather C. We agree.

In response, Heather C. argues that the family court did not err in finding parental alienation, because the family court properly reviewed the evidence presented and correctly identified and delineated sixteen reasons to support this finding.

A finding of parental alienation is very significant. Parental alienation has an everlasting effect on both the child and the parents involved, and courts should not make such a finding without very clear evidence to support that finding. To date, neither the Legislature nor the Supreme Court of Appeals of West Virginia has set forth specific factors for courts to use in determining parental alienation. Nonetheless, making such a finding is so significant that it is incumbent on the lower courts to conduct a detailed, logical, common-sense analysis based on the evidence adduced, and make such findings which either support or do not support a finding of parental alienation.[13]

[13] Although neither the West Virginia Legislature nor the Supreme Court of Appeals has adopted any factors in determining parental alienation, there are commonly accepted factors that are used by experts in the field of child and adolescent psychiatry that may be used by lower courts when analyzing parental alienation: (1) the child manifests contact resistance or refusal (i.e., avoids a relationship with one of the parents); (2) the presence of a prior positive relationship between the child and the rejected parent; (3) the absence of abuse and neglect, or seriously deficient parenting on the part of the rejected parent; (4) the use of multiple alienating behaviors on the part of the favored parent; and (5) the child exhibits behavioral manifestations of alienation. *See* William Bernet & Laurence L. Greenhill, *The Five-Factor Model for the Diagnosis of Parental Alienation*, J. Am. Academy of Child & Adolescent Psychiatry, Vol. 61 (May 2022); *see also* Gardner RA, *The Parental Alienation Syndrome*: *A Guide for Mental Health and Legal Professionals*, Cresskill, NJ: Creative Therapeutics, 1992:63-92 (discussing the eight factors used in determining behavioral manifestations by a child).

Here, although the family court provided many reasons why it was finding parental alienation, it did not provide any analysis at all, rather the court just stated reasons, which were provided by respondent in this case, as to why it was finding parental alienation. Further, this finding of parental alienation was clearly against the weight of the evidence. The GAL, counselors, and therapists all stated it was not in G.C.'s best interest for the court to continue to force a relationship with Heather C., and Jonpaul C. had done everything he could to try and reconcile a relationship between Heather C. and G.C. Additionally, none of the experts in this case found that Jonpaul C. had coached G.C. in anyway.

Even before the divorce, G.C. has shown resentment toward Heather C. and stated he does not want to have more visitation with her. There was never a prior positive relationship between G.C. and Heather C. Further, Jonpaul C. has not engaged in any alienating behavior as concluded by the experts in this case. Therefore, the family court abused its discretion in finding Jonpaul C. engaged in parental alienation, as the experts in this case stated they do not believe he engaged in such activity, and it is clear that there was never a positive relationship between G.C. and Heather C.

C. Proffer

Fourth, Jonpaul C. argues that the family court abused its discretion by making findings of allegations made at temporary and status hearings that were only

conducted by proffer and only relied on the uncorroborated proffer of Heather C.'s counsel that had no facts or evidence to support some of the findings. We disagree.

The family court did not exclusively rely on proffer to make such findings. Rather, the family court took testimony from multiple witnesses and based their findings off that testimony. There was far more than just proffer that the family court relied on in making their findings, albeit against all the evidence. Therefore, the family court did not abuse its discretion by making findings at temporary and status hearings because those findings were based on witness testimony and arguments provided by counsel.

D. Restrictions on Future Filings

Fifth, Jonpaul C. argues that the family court abused its discretion by placing restrictions on Jonpaul C. before he can file any future petitions for modification. Specifically, that the family court's refusal to consider any future petitions for any type of modification from Jonpaul C. was designed to punish him based on the family court's negative view towards him. We agree.

In response, Heather C. argues that the family court did not err in setting forth such limitations on Jonpaul C.'s future filings with the court. Jonpaul C. stated no authority which prevented the family court from setting forth prerequisites before Jonpaul C. could make future filings.

While such limitations have been upheld by the Supreme Court of Appeals of West Virginia, here, there is no evidence that Jonpaul C. is a vexatious litigator or engaged in such other conduct as to warrant placing restrictions on his ability to file petitions in the future. *See S.U. v. C.J*, 2021 WL 4936476, at *5-6 (W. Va. Oct. 13, 2021) (memorandum decision) (finding the family court's restrictions on S.U.'s future filings were warranted based on his continued vexatious filing of numerous pleadings against C.J. in an attempt to divest her of her parental rights to the children, and S.U.'s willful refusal to follow the family court's basic directions, resulting in him being held in contempt at least six times). Further, the family court's order does not contain any analysis as to why it is restricting Jonpaul C. from filing future petitions for modification. [14] Therefore, the family court abused its discretion by placing restrictions on Jonpaul C. before he can file any future petitions for modification.

E. Children's Participation in Racing

Sixth, Jonpaul C. argues that the family court abused its discretion by ceasing the children's participation in racing that they had been doing since prior to the divorce

---

[14] Presumably, the family court's order contains two reasons, one without any explanation, and the other as an "alternative" which is not an alternative. First, the family court states in one section of the order that Jonpaul C. filed this petition for modification within eight months after the parenting plan was entered and this constitutes bad faith with no further analysis. Second, the family court states that because it cannot enforce the current parenting plan in regard to visitation between Heather C. and G.C., it instead "can and will" enforce restrictions on Jonpaul C. before he can file any future petitions for modification, thereby preventing a change of the existing, unenforceable visitation requirement.

because Heather C. now does not agree to the participation, and this was against the recommendations of the GAL and the child's licensed psychologist. The experts and GAL all opined that stopping racing was not in the best interest of the children, and that they should continue racing because it was important to them. Further, the experts also opined that if the family court were to order racing to stop, the relationship between Heather C. and her children would be detrimentally affected. Again, we agree.

In response, Heather C. argues that there was no evidence presented that specifically opined that racing was in the children's best interest. Rather, the testimony was that if racing was ordered to stop, the children would hold Heather C. responsible, and their relationship would be further damaged.

Here, the family court abused its discretion by ceasing racing altogether. The GAL, counselors, and therapist in this case all stated that ceasing racing would be detrimental to the children, and to the relationship between G.C. and Heather C. Before the divorce both parties were fine with the children racing, and it is a natural progression that as the children get older, they would engage in more time-consuming competitions. Although Heather C. might be losing parenting time, the court can order that all time lost due to racing be made up with Heather C., which would permit equal parenting time in accordance with the parenting plan. Therefore, it was an abuse of discretion for the family court to cease racing altogether as it is clearly against the recommendations of the experts and children's best interest in this case.

F. GAL and Attorney's Fees

Lastly, Jonpaul C. argues that the family court abused its discretion by ordering him to pay all the GAL's fees and abused its discretion by order him to pay a percentage of Heather C.'s attorney fees when his income is lower than hers. Again, we agree.

In response, Heather C. argues that the family court did not abuse its discretion in finding that pursuant to West Virginia Code § 48-5-504,[15] Jonpaul C.'s conduct was for a "vexatious, wanton, or oppressive purpose," warranting the imposition of the GAL and attorney's fees.

Here, the family court failed to set forth how Jonpaul C.'s petition for modification was unfounded, as well as what conduct of Jonpaul C. was vexatious, wanton, or oppressive. The Supreme Court of Appeals of West Virginia has previously found vexatious, wanton, or oppressive conduct to warrant an award of attorney's fees. *See, e.g.,*

---

[15] W. Va. Code § 48-5-504(c) (2001) provides:

> If it appears to the court that a party has incurred attorney fees and costs unnecessarily because the opposing party has asserted unfounded claims or defenses for vexatious, wanton or oppressive purposes, thereby delaying or diverting attention from valid claims or defenses asserted in good faith, the court may order the offending party, or his or her attorney, or both, to pay reasonable attorney fees and costs to the other party.

Michael C. v. Teressa D., No. 13-1077, 2014 WL 4930191, at *6 (W. Va. Oct. 2, 2014) (imposition of attorney's fees was proper for vexatious, wanton and oppressive conduct where the record was replete with evidence demonstrating the adoptive parents' ongoing quest to falsely and maliciously accuse the paternal grandparents of sexually abusing the minor child despite the lack of evidence). In the case *sub judice*, however, there is no evidence that Jonpaul C. is a vexatious, wanton, or oppressive litigant, or otherwise abused the process as stated above. Therefore, the family court's award of attorney's fees on such basis was an abuse of discretion.

Further, the family court's order is unclear with respect to the civil contempt. If the entire award of attorney's fees is due to contempt, then the contempt sanction violates the mandatory language of West Virginia Code § 51-2A-9(b) (2012), requiring an opportunity to purge. *See Dietz v. Dietz*, 222 W. Va. 46, 58, 659 S.E.2d 331, 343 (2008) ("[w]hen imposing sanctions for contempt [under W. Va. Code § 51-2A-9(b)], a court must afford the contemnor an opportunity to purge him/herself of the contempt."). Here, the family court imposed $22,440 in attorney's fees against Jonpaul C., including $15,500 in attorney's fees due to Heather C. with a minimum monthly obligation of $350 per month. The family court order fails to set forth any language identifying how Jonpaul C. may purge himself of the contempt. All the order contains is a debt with a payment plan. In addition, the family court failed to set forth sufficient findings of fact to support its holding of contempt. In fact, the only reference to a finding of contempt are two sentences in the family court's order. Further, the family court failed to set forth how the penalty it is

imposing was the "least possible power adequate to the end proposed," which is also required by West Virginia Code § 51-2A-9(b).

Accordingly, the GAL fees should be split equally by both the parties and not solely imposed on Jonpaul C. This Court notes that Heather C. was the one who requested a GAL be appointed in this case, and therefore Jonpaul C. should not have to pay all of the GAL fees. Further, each party is responsible for their own attorney fees as there is no evidence that Jonpaul C. filed the petition for modification in bad faith or is a vexatious litigator.

IV. Conclusion

For the aforementioned reasons, this Court reverses and remands the Family Court of Barbour County's final order dated September 29, 2022. The Clerk is hereby directed to issue the mandate contemporaneously.

Reversed and Remanded.