No. 22-ICA-52 – *Katherine A. v. Jerry A.*

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OF WEST VIRGINIA

LORENSEN, J., concurring in part, and dissenting, in part:

I concur with the majority's determination that the 2021 amendments to West Virginia Code § 48-9-403(d) (2021) abrogate the former presumption favoring relocation with the parent exercising primary custodial responsibility. The burden to prove by a preponderance of the evidence each statutory element in West Virginia Code § 48-9-403(d) now falls squarely upon the parent seeking relocation. Under the current statute, parents seeking to relocate with the children as primary custodial parent, in cases such as this, face a daunting task.

However, I respectfully dissent from the majority's conclusion that the family court's order was so deficient as to warrant reversal considering our deferential standard of review. I would affirm the family court's August 17, 2022, final order. I disagree with the majority on three points: (1) the family court did not err by failing to consider, request, or develop evidence not before it; (2) the family court's order sufficiently considers all applicable best interest factors; and (3) the family court's determination that Mother had presented no evidence concerning lack of reasonable alternatives to relocation was, at worst, harmless error.

A. The Burden to Address Best Interest Factors

The majority finds error in the family court's failure to consider "the entire situation when evaluating the best interest of the children." *See ante*, at 21. This raises a threshold question: who has the burden of persuasion concerning the West Virginia Code § 48-9-102 (2022) best interest factors in a relocation proceeding? The majority suggests topics for the family court's analysis.[1] I do not dispute that having answers to some of the majority's questions might be helpful in assessing whether relocation promotes the children's best interests, but it was decidedly *Mother's* burden to raise and provide evidence of an answer to those questions if Mother so desired.

The family court was only obliged to evaluate the evidence before it. The parties were both represented by counsel. We must presume that each party presented the evidence that best proved their case. Mother, apparently relying on the abrogated provisions of the previous relocation statute, sought to develop the record to focus on Mother's share of parenting and custodial responsibilities, attempting to take advantage of

[1] For instance, the majority specifically directs the family court to consider whether Mother's significant salary increase would "likely provide significant benefits to the children" and "should be an important consideration in a best interest of the child analysis." *See ante*, at 22. Moreover, the majority expresses concern about the family court's emphasis on Father and Grandfather's involvement in the children's sports, even speculating that the family court did not consider the "many examples of bad behavior being taught in sports throughout the country." *See ante*, at 23. Of course, the family court is not required to unearth and to explore such issues—which stray far beyond the letter of West Virginia Code § 48-9-102—if they are not cogently argued or pursued by a litigant's counsel.

the (now defunct) presumption that favored relocation with the parent exercising primary custodial responsibility. At the hearing, Mother offered little evidence and argument concerning best-interests-of-the-children issues—she failed to carry her burden.[2]

B. Insufficiency of the Order's Best Interest Analysis

Second, the majority takes issue with the sufficiency of the family court's analysis of the best interests of the child, claiming that the family court only applied a single factor of the best interest analysis found in West Virginia Code § 48-9-102. Citing *Stacey J. v. Henry A.*, 243 W. Va. 150, 842 S.E.2d 703 (2020) and *Collisi v. Collisi*, 231 W. Va. 359, 363–64, 745 S.E.2d 250, 254–55 (2013), the majority concludes that the family court's order failed to conduct a meaningful analysis of the children's best interests.

In support of that position, the majority compares the order on appeal in this case to the order the Supreme Court of Appeals addressed in *Stacey J.*, 243 W. Va. at 150, 842 S.E.2d at 703. In *Stacey J.*, the family court order at issue was found to have multiple insufficiencies, but chief among them were the failure to consider more than a single factor in the best interest analysis and the order's disregard for the report and testimony of a guardian ad litem. *Id.* at 157, 842 S.E.2d at 710. The majority believes the order on appeal

[2] Fit parents are presumed to act in the best interests of their children. Syl. Pt. 4, *Lindsie D.L. v. Richards W.S.*, 214 W. Va. 750, 591 S.E.2d 308 (2003). The family court is entitled to rely on this presumption.

in this case makes the same mistake by focusing on a single factor. However, in my opinion, the order before us is easily distinguishable and passes muster. While the family court's order did not adopt a factor-by-factor format to address the best interest statute, the family court's findings and conclusions evince a considered analysis of the applicable West Virginia Code § 48-9-102 factors.[3]

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[3] The first factor—stability of the child—disfavors relocation. The family court made clear findings that: (1) the children have lived in Wheeling, West Virginia, their entire lives; (2) Father's close involvement with the children yielded stability; (3) the paternal grandparents, who the children have a close bond with, live in Wheeling; and (4) relocation would impact the children's established schooling.

The second factor—collaborative parental planning and agreement about the child's custodial arrangement and upbringing—is neutral. The parties agreed to a general parenting plan, except to the issue of which parent would be the primary custodial parent. No evidence was presented that the parents would be unable to collaborate in this regard.

The third factor—continuity of existing parent-child attachments—disfavors relocation. The order finds that Mother was frequently absent from the household due to work, "anywhere from [four to six] nights per month, sometimes more and sometimes less." Also, her new out-of-state job carries more responsibilities. The family court's order clearly addressed this factor.

The fourth factor—meaningful contact between a child and each parent, which is rebuttably presumed to be equal custodial allocation of the child—is neutral. The family court noted that, due to the relocation, the equal custody presumption was rebutted. In any event, consideration of this factor certainly does not favor relocation.

The fifth factor—caretaking parenting relationship by adults who love the child, know how to provide for the child's needs, and who place high priority on doing so—disfavors relocation. The order makes findings concerning the paternal grandfather and aunt, with whom the children have a continuing and close bond. They reside in Wheeling.

The seventh factor—expeditious, predictable decisionmaking and avoidance of prolonged uncertainty respecting arrangements for the child's care and control—disfavors relocation or is at minimum neutral. The order notes that Mother's previous (and possibly future) employment involved significant overnight travel.

As a result, the family court's order provides substantial analysis of every relevant factor[4] contemplated in West Virginia Code § 48-9-102, and the findings are squarely within the sound discretion of the family court. Accordingly, I respectfully disagree with the majority's reliance on *Collisi* and *Stacey J.*[5]

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[4] Two West Virginia Code § 48-9-102 best-interests-of-the-child factors are not expressly addressed in the family court's order. However, both appear irrelevant. The sixth factor—security from exposure to physical or emotional harm—is neutral. From the bench, the family court ruled that nothing presented had raised any concerns for the children's safety. The eighth factor—meaningful contact between a child and his or her siblings, including half-siblings—is neutral, because both children are remaining together under the order, and neither party argued to separate the children.

[5] On appeal, we ought to be mindful of the context in which the order was crafted. Less than a month after Mother proposed relocation, Mother initiated the divorce. Twenty-one days later, Father filed his answer to the divorce petition. The family court bifurcated the issue of custody, and within two months of Father's answer, issued a final order on the issues of relocation and custody after an extensive hearing. At that hearing, Mother had the opportunity to offer all the evidence supporting relocation she desired. Considering the condensed timetable, the family court did a commendable job in swiftly navigating a difficult case involving two fit parents who love their children, all in time to provide stability for the children's 2022–23 school year. This is the nature of family court, specifically tasked with "creat[ing] remedies which best serve complex familial relationships, all in compliance with applicable law." *In re L.M.*, 245 W. Va. 328, 346, 859 S.E.2d 271, 289 (Wooton, J., concurring).

While to facilitate meaningful appellate review, we must have orders that allow us to understand the facts and reasons underpinning a lower court's decision, we must likewise recognize the demanding reality of family court practice. I also note, as did the majority in *Stacey J.*, "our findings today with respect to the family court's order should not be construed as an indication that Mother's motion to relocate should be granted." *Stacey J.*, 243 W. Va. at 160, 842 S.E.2d at 713.

C. The Family Court's Failure to Consider Evidence of Reasonable Alternatives

Finally, the majority concluded that the family court committed reversible error by finding that Mother had "presented no evidence" that she considered reasonable alternatives before accepting employment in Washington, D.C. I write separately to state that, even if the court erred in making that finding, any error on this issue was harmless. *See Storrie v. Simmons*, 225 W. Va. 317, 327, 693 S.E.2d 70, 80 (2010) (finding any error in a family court's findings of fact regarding a proposed relocation harmless on the basis it was not prejudicial). Mother was not prejudiced by the family court's finding because, ultimately, she presented virtually no evidence to meet the burden imposed on her by West Virginia Code § 48-9-403(d)(1)(C).[6] I would hold that Mother was not prejudiced by any

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[6] The record's only mention of Mother's search for alternatives was her testimony that, six months ago, she had interviewed for another position in the Wheeling area:

> Q. Are you aware that your mother said certainly maybe it was February or March that you knew -- she knew you were applying for this job?
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> A. I'm not aware of that.
>
> Q. But the -- my point is: For months, can we agree you knew you were looking to make a change, and you didn't tell your children's father?
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> A. **He knew I was in the process of looking for other job opportunities. I had applied for another position about six months before that never came to fruition, and it was local.** And he did know about that, because he was-- he wanted me to stay local, and he wanted me to make more money. And **that job didn't work out for many reasons.**

error on this finding, because a single, unfruitful, nonspecific job interview is not enough to prove, by a preponderance of the evidence, "that there is no reasonable alternative, other than the proposed relocation, available to the relocating parent that would be in the child's best interests and less disruptive to the child" when a parent is attempting to relocate five hours away. W. Va. Code § 48-9-403(d)(1)(C).

Accordingly, with respect to the majority's reversal and remand of the family court's order of August 17, 2022, I respectfully dissent.

(Emphasis added).