IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

January 2023 Term

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INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

No. 22-ICA-52

KATHERINE A.,
Petitioner Below, Petitioner,

v.

JERRY A.,
Respondent Below, Respondent.

Appeal from the Family Court of Ohio County
Honorable Joyce D. Chernenko, Judge
No. FC-35-2022-D-82

REVERSED AND REMANDED

Submitted: March 1, 2023
Filed: June 15, 2023

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JUDGE SCARR delivered the Opinion of the Court.

JUDGE LORENSEN concurs in part, dissents in part, and reserves the right to file a separate opinion.

SCARR, Judge:

Petitioner Katherine A. ("Mother") appeals the August 17, 2022, final order entered by the Family Court of Ohio County, which designates Respondent Jerry A. ("Father") as the custodial parent of the parties' children, M.A. and S.A.[1] On appeal, Mother argues that the family court abused its discretion by failing to properly review the parenting and caretaking functions provided by both parents, by ignoring Mother's testimony that she looked for jobs closer to home, and by failing to adequately consider the best interests of the children.

We find that the family court provided insufficient findings of facts and conclusions of law to support its decision. The final order failed to consider all factors and fully analyze whether reasonable alternatives existed and whether relocation with Mother was in the best interests of the children under West Virginia Code § 48-9-403 (2021). Upon review, we hold that the previous version of West Virginia Code § 48-9-403 (2015), providing that the parent exercising a significant majority of the custodial responsibility would be allowed to relocate with the children if the relocation was in good faith, for a legitimate purpose, and to a reasonable location, is no longer a consideration under the revised, version of West Virginia Code § 48-9-403 (2021). Accordingly, the presumption

[1] Consistent with our practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in the case. See W. Va. R. App. P. 40(e)(1); *Amanda C. v. Christopher P.*, No. 22-ICA-2, ____ W. Va. ____, ____ S.E.2d ____, 2022 WL 17098574 (Ct. App. 2022).

and burden shifting requirement—discussed in *Nicole L. v. Steven W.*, 241 W. Va. 466, 825 S.E.2d 794 (2019) and *Stacey J. v. Henry A.*, 243 W. Va. 150, 842 S.E.2d 703 (2020), applying the previous version of the statute—are no longer applicable. Under the new version of West Virginia Code § 48-9-403 (2021), the burden rests on the relocating parent to prove that "(A) [t]he reasons for the proposed relocation are legitimate and made in good faith"; "(B) that allowing relocation of the relocating parent with the child is in the best interests of the child as defined in § 48-9-102 of this code"; and "(C) 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."

Accordingly, we reverse and remand the family court's final decision for the required, meaningful, and full analysis of the best interests of the children and for a full analysis regarding the existence of reasonable alternatives to Mother's proposed relocation.

I. Facts and Procedural Background

The parties were married on June 21, 2008, and had two children, M.A., born in 2011, and S.A., born in 2017. Throughout the marriage, the parties and their children resided in Wheeling, Ohio County, West Virginia. For sixteen years, Mother was employed, in Wheeling, as a global director of strategic accounts at Williams Lea, a global company that offers business process outsourcing to other companies. There, she made an annual income of $124,304.50. Father was employed as a teacher's aide with the Ohio

County Board of Education and had a gross income of between $16,000 and $20,000 per year.

On April 15, 2022, Mother received a job offer from Mayer Brown, LLC, a global law firm. Mother applied for this position because she had a relationship with the firm, as Mayer Brown was her exclusive client at Williams Lea for seven years. She was offered a base salary of $280,000 per year, plus additional bonuses, benefits, and reimbursement of relocation costs, as this new opportunity was located in Washington, D.C. Mayer Brown also offered her the ability to work from home two days per week, and the position involved limited, overnight travel, as compared to her job at Williams Lea, where she was required to travel four to six nights per month.

Mother accepted the new position and intended to relocate with her family to the Washington D.C. and Northern Virginia area. She testified that she applied for the position several weeks in advance but did not inform Father that she applied until she received a definitive offer. After receiving the offer, she approached Father and asked him to move with her to the D.C. area, as a family unit, but Father declined.

On May 5, 2022, Mother filed a petition for divorce. Prior to this dispute over which parent would have primary custody, the parties entered into a settlement agreement, where they agreed on certain custody allocations. However, they did not determine who would be the primary custodial parent. On August 13, 2022, a final hearing was held in the

Family Court of Ohio County, West Virginia regarding allocation of custodial responsibility and child support.[2]

The family court entered a final order regarding allocation of custodial responsibility on August 17, 2022, designating Father as the primary custodial parent of the two children. The court also adopted and incorporated the parties' agreed parenting plan.[3]

The family court made several findings of facts regarding the caretaking and parenting functions performed by each parent and their families. At the time of the hearing, S.A., then age five, attended a private preschool three days per week, while M.A., then age ten, attended a private grade school five days per week. As for Mother's caretaking and parenting functions, Mother testified that she pressed and prepared M.A.'s school uniforms; performed laundry ninety-five percent of the time, as compared to Father's five percent; prepared breakfast for S.A. three days per week, while the children's paternal grandfather ("Grandfather") provided him breakfast two days per week; did one hundred percent of the grocery shopping; packed lunch for M.A. or wrote a check for M.A.'s school

[2] The hearing was bifurcated, and the issue of child support was deferred and addressed in a separate final order.

[3] Like the settlement agreement, the parties' parenting plan set forth the parties' agreement as to the allocation of the custodial time and responsibilities given to both the nonprimary parent and primary parent but did not specify which parent was the nonprimary or primary parent.

lunch; wrote checks to pay the children's school tuition; assisted M.A. with his math and science homework eighty percent of the time and assisted him with his school projects; coordinated all of the children's medical care; scheduled all the children's doctor appointments; and signed all consent forms, allowing the children to be treated at doctor and dentist offices.[4] Mother also testified that her mother would be moving to the Washington D.C. area with her to help assist with the children. Further, when preparing for the move, Mother sought out a family liaison in Northern Virginia to assist her with finding activities for the children and found a sports complex near her home that the children could utilize.

As for Father and his family's parenting and caretaking functions, Grandfather testified that he and Father were substantially involved in the children's daily schedules, as caregivers and educators, while providing everyday care to S.A. and honing M.A.'s basketball and baseball skills. Mother testified that Father would take M.A. to Grandfather's house for breakfast ninety-five percent of the time. Typically, Father or Grandfather would pick M.A. up from school and take him to the local high school—where Father and Grandfather were assistant high school basketball coaches—engage in a skills practice with him, take him to the baseball field to practice, or take him to Grandfather's home to play. Further, S.A. would be picked up by the maternal grandmother on days he

[4] Father denied that he did not do any cooking for the children nor attend any of their medical appointments.

attended school, but on days when did not attend school, either Grandfather or Father's sister would care for him.

In designating Father as the primary custodial parent, the family court found that it was in the best interests of the children to remain in Wheeling with Father and that removing the children from Father and his extended family would not be in the children's best interest. First, the court reasoned that Father provided substantially more caretaking functions to the two children than Mother under West Virginia Code § 48-1-210 (2001) because of "his substantial time spent each day with their sons."[5] However, the court also

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[5] West Virginia Code § 48-1-210 (2001) provides:

> (a) "Caretaker" means a person who performs one or more caretaking functions for a child. The term "caretaking functions" means activities that involve interaction with a child and the care of a child. Caretaking functions also include the supervision and direction of interaction and care provided by other persons.
>
> (b) Caretaking functions include the following:
>
> (1) Performing functions that meet the daily physical needs of the child. These functions include, but are not limited to, the following:
>
> (A) Feeding;
>
> (B) Dressing;
>
> (C) Bedtime and wake-up routines;
>
> (D) Caring for the child when sick or hurt;
>
> (Continued…)

found that Mother provided substantial parenting functions for the two children under West Virginia Code § 48-1-235.2 (2001).[6] Thus, the court determined that in terms of caretaking and parenting functions, the parents provided equal parenting during the marriage.

> (E) Bathing and grooming;
>
> (F) Recreation and play;
>
> (G) Physical safety; and
>
> (H) Transportation.
>
> (2) Direction of the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence and maturation;
>
> (3) Discipline, instruction in manners, assignment and supervision of chores and other tasks that attend to the child's needs for behavioral control and self-restraint;
>
> (4) Arrangements for the child's education, including remedial or special services appropriate to the child's needs and interests, communication with teachers and counselors and supervision of homework;
>
> (5) The development and maintenance of appropriate interpersonal relationships with peers, siblings and adults;
>
> (6) Arrangements for health care, which includes making medical appointments, communicating with health care providers and providing medical follow-up and home health care;
>
> (7) Moral guidance; and
>
> (8) Arrangement of alternative care by a family member, baby-sitter or other child care provider or facility, including investigation of alternatives, communication with providers and supervision.

[6] West Virginia Code § 48-1-235.2 (2001) provides:

Next, the court determined that Mother was the planner, scheduler, and detail person while Father and Father's family spent more quality time with the children "teaching them, instilling sportsmanship, fair play, and engaging in the activities [M.A.] loves; that is basketball and baseball." Thus, the court reasoned that, while Mother's scheduling and planning role was important, Father could assume that role. However, Mother could not assume Father's role of being the nurturing parent who taught the children the concepts of sportsmanship and fair play and instilled discipline and stability into their lives. Further, the court concluded that the role of Father's extended family in engaging in the children's lives and being there when needed, could not be replaced. Specifically, the court noted, "[Mother] can find others in D.C. to help her sign [M.A.] up

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> "Parenting functions" means tasks that serve the needs of the child or the child's residential family. Parenting functions include caretaking functions, as defined in section 1-210. Parenting functions also include functions that are not caretaking functions, including:
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> (A) Provision of economic support;
>
> (B) Participation in decision-making regarding the child's welfare;
>
> (C) Maintenance or improvement of the family residence, home or furniture repair, home-improvement projects, yard work and house cleaning;
>
> (D) Financial planning and organization, car repair and maintenance, food and clothing purchasing, cleaning and maintenance of clothing, and other tasks supporting the consumption and savings needs of the family; and
>
> (E) Other functions usually performed by a parent or guardian that are important to the child's welfare and development.

for sports, but they cannot nurture him in the important areas of development that exist in his sporting activities: fair play, qualities of integrity and discipline, as developed through these activities, in the same way as [Father] and [Grandfather] will."

The court analyzed West Virginia Code § 48-9-403(d)(1) (2021), which provides:

> [T]he relocating parent has the burden of proving that: (A) The reasons for the proposed relocation are legitimate and made in good faith; (B) that allowing relocation of the relocating parent with the child is in the best interests of the child as defined in § 48-9-102 of this code; and (C) 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.

The family court found that Mother met her burden of proving element (A), finding that the reasons for her proposed relocation were legitimate and made in good faith. However, the family court found that Mother did not fulfill the requirements of element (B), holding that she did not prove that relocation of the children with Mother was in the children's best interest, and element (C), finding that she did not prove there was no reasonable alternative available to her other than the proposed relocation.

The court found that Mother did not meet her burden of proving that relocation with her was in the best interests of the children, citing West Virginia Code § 48-9-102 (2022), which defines how a child's best interests are served. However, it did not provide any further analysis beyond that. Additionally, the court quoted *Storrie v.*

Simmons, 225 W. Va. 317, 326, 693 S.E.2d 70, 79 (2010), indicating that the Supreme Court of Appeals of West Virginia ("Supreme Court") determined:

> [T]hat relocation of one parent is not reasonable if "it has a substantial adverse impact on the father's parent-child relationship, the effective stripping away of the bond between father-daughter, the substantial travel between the parties' respective households, the adverse impact upon the children's relationship with extended family, and the adverse impact upon the continuity of the children's schooling."

But, the court did not analyze *Storrie* further.[7]

The court also found that Mother did not present evidence to prove that she looked at reasonable alternatives before taking a position more than five hours away from Wheeling, West Virginia. The court stated that "[n]o evidence was presented to show that she sought employment in larger metropolitan areas, such as Pittsburgh or Columbus, which would have permitted her to earn greater income, commute, and still reside in Ohio County, especially if she were working from home two days a week."

In all, the lower court concluded, based on *Storrie* and West Virginia Code §§ 48-9-102 (2022), 48-9-206 (2022), and 48-9-403(d)(1)(B) (2021), by a preponderance

[7] This Court notes that the court below inappropriately relied on this quotation, as it was not actually a holding of the Supreme Court, but rather was a holding of the lower court in that case, concluding that the relocation of a parent was not reasonable. However, the Court noted that relocation in that case *was* reasonable but did not reverse the lower court's order because relocation was not in the best interest of the child.

of the evidence, that it was in the best interests of the children to remain in Ohio County, West Virginia with Father as the primary custodial parent. It is from the family court's August 17, 2022, order that Mother now appeals.

II. Standard of Review

The parameters of appellate review of family court orders are well-settled:

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, 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., *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004); *see also Amanda C. v. Christopher P.*, No. 22-ICA-2, ____ W. Va. ____, ____ S.E.2d ____, 2022 WL 17098574 (Ct. App. 2022).

III. Discussion

On appeal, Mother argues that the family court erred by not designating her the primary custodial parent, and by denying her the ability to relocate with the children. Mother argues that the record clearly demonstrates she performed the majority of caretaking and parenting functions and that her relocation was legitimate, in good faith, and reasonable in light of the circumstances. She asserts three assignments of error on appeal: 1) the family court erred by making a gender-based conclusion that Father provided substantially more caretaking functions than Mother due to the substantial time he spent

each day with the children; 2) the family court abused its discretion in concluding that relocation was not reasonable under the circumstances, arguing that Mother did present evidence of other employment opportunities closer to home that still required significant travel; and 3) the family court abused its discretion by prohibiting Mother from relocating with the children, naming Father the custodial parent, and misapplying the principles of *Storrie* in this case. Further, Mother asserts that the court abused its discretion by incorrectly placing the burden of proof on Mother.

Conversely, Father argues the family court did not commit error when it granted Father custodial responsibility. Father asserts that family courts have wide discretion in awarding custody of minor children, Mother did not prove that relocating the children would be in their best interests, and Mother was not able to prove by preponderance of the evidence that she looked for employment opportunities closer to home.

In deciding child custody cases, a family court must first turn to West Virginia Code § 48-9-102a (2022) stating, "There shall be a presumption, rebuttable by a preponderance of the evidence, that equal (50-50) custodial allocation is in the best interest of the child." Therefore, under West Virginia Code § 48-9-206(a) (2022), "unless otherwise resolved by agreement of the parents under § 48-9-201 or unless harmful to the child, the court shall allocate custodial responsibility so that, . . . the custodial time the child spends with each parent shall be equal (50-50)." However, in the event of a parent's relocation,

"[t]he court shall apply the principles set forth in §48-9-403 of this code if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the amount of custodial responsibility that would otherwise be ordered under this section." W. Va. Code § 48-9-206(b) (2022).

A. Significant Majority of Custodial Responsibility and Burden Shifting under the Revised Version W. Va. Code § 48-9-403(d) (2021)

Prior to revisions made in 2021, West Virginia Code § 48-9-403(d)(1) (2015) stated that a parent exercising a significant majority—seventy percent or more—of the custodial responsibility, was allowed to relocate with the children if the relocation was "in good faith for a legitimate purpose and to a location that is reasonable in light of the purpose." *See also Storrie*, 225 W. Va. at 317, 693 S.E.2d at 70. The Supreme Court then created a burden shifting test, holding in Syl Pt. 3, *Nicole L.*, 241 W. Va. at 466, 825 S.E.2d at 794,

> Pursuant to West Virginia Code § 48-9-403(d)(1) (LexisNexis 2015), if a parent who is exercising a significant majority of the custodial responsibility for a child proves that a proposed relocation is in good faith for a legitimate purpose, the location of the proposed move will be presumed to be reasonable. To overcome this presumption, the opposing parent must prove that the purpose of the move is substantially achievable without moving or by moving to a location that is substantially less disruptive of the opposing parent's relationship to the child.

See also Stacey J., 243 W. Va. at 150, 842 S.E.2d at 703. However, if neither parent was exercising a significant majority of custodial responsibility, or if the proposed relocation was not for a legitimate purpose, the parenting plan was to be modified according to the

child's best interests. W. Va. Code §§ 48-9-403(d)(2) to (3) (2015); *Storrie*, 225 W.Va. at 323, 693 S.E.2d at 76.

Mother argues that the family court abused its discretion by applying the wrong burden. Mother contends that the court should not have placed the burden on her to prove that relocation of the children was appropriate because she presented evidence showing that she exercised a significant majority of the custodial responsibilities, i.e., at least seventy percent. Thus, she argues the court should have shifted the burden to Father to prove that the purpose of the move was substantially achievable without moving or by moving to a location that was substantially less disruptive. We disagree.

Understandably, there has been only limited interpretation of the revised version of West Virginia Code § 48-9-403(d)(1) (2021). However, the revised version no longer requires that the parent exercising seventy percent or more of the custodial responsibilities be allowed to relocate with the child if the relocation is in good faith, for a legitimate purpose, and to a reasonable location. Thus, there is no longer a presumption that the move is reasonable if the parent exercising the majority of the custodial responsibility proves that relocation is in good faith for a legitimate purpose. Further, the opposing parent no longer has to overcome this presumption by proving that the purpose of the move is substantially achievable without moving. The revised statute makes clear that the relocating parent has the burden of proving three things: "(A) [t]he reasons for the proposed relocation are legitimate and made in good faith"; "(B) that allowing relocation

of the relocating parent with the child is in the best interests of the child as defined in § 48-9-102 of this code"; and "(C) 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." Thus, the presumption and burden shifting test required by the old version of the statute, as established and discussed by the Supreme Court in *Nicole L.* and *Stacey J.*, are no longer applicable. The burden rests solely on the relocating parent to prove each element of the revised statute. However, the previously described body of case law regarding child custody and relocation of a parent continues to be applicable in other aspects, as discussed below.

Further, while this Court notes that an argument can be made that portions of the revised edition of West Virginia Code § 48-9-403(d) (2021) are unclear or ambiguous. However, we find that, under the revised version of the statute, the relocating parent is clearly required to prove each element of § 48-9-403(d)(1) (2021). If the relocating parent can not prove one of those three, required elements, she fails to meet her burden under the statute.

Accordingly, we find the lower court did not err by not shifting the burden to Father to prove that the purpose of Mother's move was achievable without relocation and by placing the burden on Mother to prove the elements of the revised version of West Virginia Code § 48-9-403(d)(1) (2021).

In addition, although the best interest of the child remains the polar star guiding the court in the exercise of its discretion, in most family and custody situations and disputes, in those situations specifically involving parental relocation, at a distance which would impair or make difficult the ability of a parent to exercise the amount of custodial responsibility that would otherwise be allocated by the court, the principles and requirements set forth in West Virginia Code § 48-9-403 control. Although the best interests of the child remains a key element in the analysis, its role has changed. In that context, the best interests of the child standard is expressly contained in two of the three requirements of that provision. Specifically, in Section 48-9-403(d)(1)(B) the relocating parent has the burden of proving that the relocation is in the best interests of the child, and in Section 48-9-403(d)(1)(C), the relocating parent has the burden proving that there is no reasonable alternative available that would be in the child's best interests and less disruptive to the child. Obviously, such an analysis is necessarily very fact specific and requires the court to exercise its discretion by carefully considering the totality of the evidence and conducting a full and meaningful analysis, thereby allowing meaningful appellate review.

B. Best Interests of the Child Analysis

We next turn to a discussion of the second element under West Virginia Code § 48-9-403(d)(1)(B) (2021) and the lower court's holding in this case that Mother did not prove that relocation of the children with her was in their best interest. We find that the family court's order lacked a meaningful analysis of the best interests of the children.

Throughout West Virginia history, the best interests of the child standard has always been the polar star for child custody issues. The West Virginia Supreme Court of Appeals noted:

> For a century-and-a-half, the courts of this State have been guided by the fundamental rule that, when addressing custody issues involving children, the best interests of the child trump all other considerations. It is the polar star that steers all discretion. As we said in 1925, 'we must not lose sight of the rule that obtains in most jurisdictions at the present day, that the welfare of the child is to be regarded more than the technical legal rights of the parents.' *Connor v. Harris*, 100 W.Va. 313, 317, 130 S.E. 281, 283 (1925).

Brooke B. V. Donald Ray C., 230 W. Va. 355, 738 S.E.2d 21 (2013). *See also State v. Kimberly S.*, 233 W. Va. 5, 11, 754 S.E.2d 581, 587 (2014) ("As long settled, the best interests of the child is the 'polar star' by which decisions must be made which affect children.").

The Legislature has also made clear that all child custody decisions should revolve around the best interests of the children. "The 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." W. Va. Code § 48-9-101(b) (2001). Additionally, West Virginia Code § 48-9-403(d)(4) (2021) itself seems to indicate that the best interest of the child is the guiding standard when a move is made for a legitimate purpose and in good faith. "When the relocation is for a legitimate purpose, in good faith, . . . the court shall

modify the parenting plan in accordance with the child's best interests." W.Va. Code § 48-9-403(d)(4) (2021).

Further, although the existing body of case law regarding West Virginia Code § 48-9-403(d)(4) (2021), may be inapplicable to the burden shifting and custodial allocation provisions, such law is still relevant in other respects, including its application of the best interests of the child standard. In *Stacey J.*, 243 W. Va. at 156, 842 S.E.2d at 709, the Supreme Court of Appeals of West Virginia held that, under the old version of West Virginia Code § 48-9-403(d) (2021), regardless of which subsection was used concerning whether or not the relocating parent was exercising a majority of custodial responsibility, the parenting plan had to be "modified in accordance with the child's best interest." The Court found that a child's best interest "must always be considered" under the long-standing, polar star principle. *Id.* Although *Stacey J.* discusses the old version of West Virginia Code § 48-9-403(d) (2021), this decision is still relevant to the new, revised version of the statute in terms of the best interests of the child standard and analysis. Accordingly, we find a parenting plan concerning relocation of a parent, must be created or modified in accordance with the best interests of the child under West Virginia Code § 48-9-403(d) (2021).

Here, Mother argues that the family court abused its discretion by only considering one of the factors of West Virginia Code § 48-9-102 (2022) that a family court must consider in determining the best interest of the children. We agree.

West Virginia Code § 48-9-102(a) (2022) provides:

> (a) The primary objective of this article is to serve the child's best interests by facilitating:
> (1) Stability of the child;
> (2) Collaborative 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, and which is rebuttably presumed to be equal (50-50) custodial allocation of the child;
> (5) Caretaking and parenting 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;
> (7) Expeditious, predictable decision making and avoidance of prolonged uncertainty respecting arrangements for the child's care and control; and
> (8) Meaningful contact between a child and his or her siblings, including half-siblings.

In *Stacey J.*, the Supreme Court of Appeals of West Virginia reversed a family court order denying a mother's motion to relocate with the children, reasoning that the family court's best interest analysis was inadequate. *Stacey J.*, 243 W. Va. 150, 842 S.E.2d 703. The Court found that the order only contained one, brief paragraph regarding the children's best interests and gave no indication that the factors of West Virginia Code § 48-9-102 (2022) were considered. *Id.* at 155, 842 S.E.2d at 708. The Court noted that "it is the best interests of the children that must guide the decision of the court," and held that "all relevant factors must be considered." *Id.* at 158–59, 842 S.E.2d at 711–12.

Upon review, we find that the family court erred by not conducting a full and proper analysis under the best interests of the child standard. While the family court's order

cited the factors in West Virginia Code § 48-9-102 (2022), it gave no indication that each of these factors was considered and gave no indication as to the nature and scope of the analysis conducted, like in *Stacey J.* In addition, in its conclusions of law, the family court defined caretaking functions as given by West Virginia Code § 48-1-210 (2001), and it then noted the caretaking functions Father provided under that definition. However, this is the only element of West Virginia § 48-9-102 (2022) the court analyzed regarding facilitation of the children's best interests. It failed to apply the facts to the law for any of the other factors.

Moreover, the court's final order only discussed caretaking functions performed by Father in its conclusions of law. Despite substantial evidence of Mother's involvement, it failed to discuss the specific caretaking and/or parenting functions Mother performed. Mother argues that the record clearly demonstrates that she provided a greater percentage of both caretaking and parenting functions to the children in this case, and the lower court completely disregarded the evidence of her caretaking and parenting roles. Additionally, Mother asserts the family court blatantly focused its decision solely on fairness to Father, a secondary analysis under West Virginia Code § 48-9-102 (2022), which states, "[a] secondary objective of this article is to achieve fairness between the parents consistent with the rebuttable presumption of equal (50-50) custodial allocation." We agree with Mother's arguments. In its order, the family court only focused on Father's caretaking functions under West Virginia Code § 48-1-210 (2001). It gave no indication that Mother's caretaking or parenting functions were considered or analyzed in accordance

with West Virginia Code §§ 48-1-210 (2001) and 48-1-235.2 (2001) and gave no indication as to how those factors were weighed.

Mother also argues the family court simply failed to consider the entire situation when evaluating the best interest of the children. Again, we agree. The family court's order focused solely on the impact that removing the children from Wheeling, Father, and his family would have on the children. The court said nothing about the impact on the children if they were removed from Mother and nothing about the impact upon Mother and her family if the children were removed from her. It also did not consider several other factors revolving around the children's best interests. For example, it did not consider the educational opportunities available to the children in the Washington D.C. area. Further, the court quickly dismissed Mother's substantial pay increase, stating, "More money doesn't prove that said relocation is in the best interest of the child. More money alone is not enough." The court speculated as to whether earning around $125,000 in Wheeling was that much less than earning $280,000 in the D.C. area, given the greater cost of living.[8] While we agree that more money alone is probably not enough when analyzing

[8] After doing research on the differences in the cost of living between Wheeling and the Northern Virginia area, we found that Mother would have a significant increase in her gross salary despite her increased cost of living. One, online cost-of-living calculator found that the cost of living in Annandale, Virginia—a town outside of Washington D.C.—was around fifty percent higher than that of Wheeling and that Mother would have to earn a salary of around $188,000 to maintain her current standard of living. Salary.com, Cost of Living Calculator, https://www.salary.com/research/cost-of-living (last visited June 8, 2023). Being that Mother's salary was increased to $280,000, this would leave $92,000 in additional salary for Mother and the children to utilize.

the best interests of the children, Mother's salary more than doubled and was likely far more than necessary to pay for her increased cost of living. Such an increase would likely provide significant benefits to the children and should be an important consideration in a best interest of the child analysis.

Additionally, the lower court placed a heavy emphasis on Father and Grandfather's involvement in sports, without also considering the role Mother played in the children's lives outside of sports. The court appeared to decide that it was in the best interests of both children to stay with Father, because Father and Grandfather spent time related to sports with M.A., and M.A. loved sports. However, the court did not appear to address or consider whether S.A. was as involved and interested in sports as M.A. and did not appear to consider or discuss whether staying with Father was in S.A.'s best interests specifically. This raises the concern that the court focused primarily on one child's best interests when making its decision, while not considering the best interests of the other.[9] Also, the court seemed to focus on the amount of time being spent with children by Father,

[9] Although it is, generally, in the best interests of the siblings to remain together, the differences in the impact of relocation on both children individually must be considered. Such considerations may include the individual child's age, relationship with each parent, interests, etc. For example, the children here are five years apart in age and likely have different needs and interests. If the children were to have different best interests, such considerations should be calculated in the analysis of which parent should be the primary, custodial parent of each child or both children. Additionally, this Court notes that, while it is rarely optimal for siblings to be separated and to go with separate parents, such an option is not unheard of and should be addressed by the court when the best interests of each child vary.

primarily in the context of sports, rather than the quality of the time spent together. Being in the same room with the children does not equate to a greater percentage of custodial care or caretaking functions, and the amount of time being spent with the children does not automatically equate to meaningful interaction with the children. The court presumed that, because the children were involved in sports with Father and Grandfather, they were learning positive things, like sportsmanship and fair play. This appears to be based on the general presumption that being involved in sports teaches a child such positive behavior, when there are many examples of bad behavior being taught in sports throughout the country. Also, it would appear that, at times, Father or Grandfather were in the same room as the children during high school basketball games or practices but may have been primarily focused on their duties as coaches to other children. In all, the family court failed to fully consider and discuss the best interests of both children outside of or beyond the context of sports and the amount of time spent with each child.

Therefore, we find the family court erred by failing to conduct and include in its order a full and proper analysis of the facts and law regarding the best interests of both M.A. and S.A., respectively. An appropriate best interests of the child analysis must be conducted.

C. No Reasonable Alternative Provision under W. Va. Code § 48-9-403(d)(1)(C) (2021)

We next turn our discussion to the family court's finding that Mother did not meet her burden of proving that there was no reasonable alternative other than the proposed relocation under West Virginia Code § 48-9-403(d)(1)(C) (2022). The court determined that she did not present evidence to show she looked at reasonable alternatives before taking a position over five hours away from Wheeling. Specifically, the court found that Mother failed to meet her burden because she did not present any evidence that she searched for employment in a larger metropolitan area closer to Ohio County, West Virginia. Mother argues that this finding was an abuse of discretion because Mother did present evidence of other employment opportunities that were closer to home but did not provide the opportunity to eliminate travel. Mother testified that she had applied for a local position, six months prior to receiving this offer, that did not come to fruition. Father argues that Mother did not prove beyond a preponderance of the evidence that there was no reasonable alternative to relocation because she provided little evidence that she attempted to look for jobs closer to home.

We find, based upon our review of the record, that the family court erred in ruling that Mother presented no evidence that she looked at any reasonable alternatives before taking the position in the D.C. area. Mother did testify that she had applied for another, local position six months earlier. Thus, the court erred in finding that she presented no evidence that she searched for alternative positions in the Wheeling area when there

was at least some evidence that she did. Further, the court erred by not considering whether this evidence was sufficient to fulfill Mother's burden of proving that there were no reasonable alternatives other than the proposed relocation under West Virginia Code § 48-9-403(d)(1)(C) (2021). There is clearly a question as to the nature and scope of what a relocating parent must show to meet this burden, and as a result, it is uncertain if Mother satisfied her burden. However, this Court will not decide whether the evidence presented by Mother was sufficient to fulfill this requirement until sufficient examination of the evidence is performed by the lower court. Accordingly, we remand this matter to the family court for a meaningful analysis of the evidence presented by Mother in relation to the reasonable alternative element.

D. Sufficiency of the Order

The Supreme Court noted in *Stacey J.* that "the family court must make adequate findings of fact and conclusions of law to support its decision and to allow for meaningful appellate review." The Court reversed the family court's order in *Stacey J.*, finding it contained insufficient findings of fact and conclusions of law to support its decision regarding the children's best interests.

Family courts are required to include a detailed analysis of their findings of facts and conclusions of law so that other parties, other potential judges at the trial level, and other judges on the appellate level can understand the facts considered by the family courts and how they were weighed in the courts' evaluation and decisions. It is not an

appellate court's position to speculate, assume, or infer what the family court may or may not have considered in its final decision. Although this Court is required to give a certain level of deference to the family court's factual findings and applications of law to fact, it is difficult to do so if the family court fails to articulate in its order the factors it considered and how they impacted the court's decision. The Supreme Court has repeatedly held, "to properly review an order of a family court, '[t]he order must be sufficient to indicate the factual and legal basis for the family court]'s ultimate conclusion so as to facilitate a meaningful review of the issues presented.'" *Collisi v. Collisi*, 231 W. Va. 359, 363–64, 745 S.E.2d 250, 254–55 (2013) (quoting *Province v. Province*, 196 W.Va. 473, 483, 473 S.E.2d 894, 904 (1996)); *see also Nestor v. Bruce Hardwood Flooring, L.P.*, 206 W. Va. 453, 456, 525 S.E.2d 334, 337 (1999) ("[O]ur task as an appellate court is to determine whether the circuit court's reasons for its order are supported by the record. This task is impossible without sufficient factual and legal findings."); *Province v. Province*, 196 W. Va. 473, 483, 473 S.E.2d 894, 904 (1996) ("Where the lower tribunals fail to meet this standard–*i.e.* making only general, conclusory or inexact findings–we must vacate the judgment and remand the case for further findings and development."). In its order, a family court must identify and discuss the facts considered, how those facts were weighed, and the impact those facts had on its decision.

Here, as outlined above, the family court made general and conclusory findings regarding the best interests of the children. The court failed to adequately examine the best interests of the child factors given in West Virginia Code § 48-9-102(a) (2022), as

well as the parenting and caretaking roles of both parents; failed to include in its order a meaningful review and analysis indicating the factual and legal basis for its decision; failed to adequately consider the evidence presented by Mother regarding her search for other jobs; and failed to properly analyze if Mother's evidence fulfilled her burden of proving that there were no reasonable alternatives to her proposed relocation.

IV. Conclusion

Accordingly, for the reasons set forth above, we reverse the August 17, 2022, final order of the Family Court of Ohio County, which allocated primary custodial responsibility to Father. We remand this case to the family court for a full and meaningful analysis of the best interests of the children and a full and meaningful analysis as to whether reasonable alternative to Mother's relocation existed.

Reversed and Remanded.