The New “50/50” Law: Rebutting the Presumption in Theory and Practice

Family Court Judge Encounters and Interactions, Predictions, and Conclusions Regarding Senate Bill 463

The New “50/50” Law: Rebutting the Presumption in Theory and Practice

(Only available if Parents **NOT** living together. WV Code 48-9-101[a].)

I. Judicial Allocation of Custodial Responsibility and Decision Making in Contested Child Custody Cases for West Virginia Jurisdiction

- *"Nothing endureth but change"*

- The venerable child custody codification embodied within West Virginia **Code** §48-9-101 ***et seq.***, time-honored and fully functional since 2001, underwent a fundamental if not extreme change during the 2022 West Virginia Legislature.

- Identified as Senate Bill (SB) 463 (or the 2022 Best Interests of the Child Act)

- The objective of this exercise will attempt:
  - to identify specific alterations, additions and recissions wrought by SB 463 to Article 9;
  - to offer means and methods whereby the “rebuttable presumption of 50/50 custody” *can be* rebutted;
  - to report the judicial experience since the June 10, 2022 effective date of SB 463;
  - and to advance some predictions of the SB 463’s implications for the future of family law litigation in West Virginia.

II. History

- Child custody determinations intrinsic to controverted marital dissolutions and non-marital allocations alike, have undergone something of a cyclical and legal metamorphosis in West Virginia.
- Prior to 1986, courts, as a general practice rule, often placed children with the mother party, until the latter date, when the supposedly “gender-blind” primary caretaker rule was legislatively adopted, along with the then revolutionary ideas of child support based upon a mathematical formula (Melson) and the equitable distribution of marital property.

II. History

- One of the reasons for this particular change concerning custody issues was ***David M. v. Margaret M***., 182 **W.Va.** 57, 385 **S.E.2d** 912 (1989), which recognized the "kids for cars" reality in hotly contested divorces; e.g. "*I won't fight you for the kids, honey, as long as, you give me the house and the Corvette*" scenario. More on this type of uneven and leveraged negotiation, using the threat of a custody fight as a "bargaining chip" in divorce, will be mentioned later in this work.

II. History

- Next, came the primary residential parent concept, with its genesis in the 2001 Acts, that was guided by a more involved and time-limited evidentiary based custody determination, drawn factually from which parent had historically performed more statutorily defined caretaking and parenting functions. Inside v. outside, male v. female, 1 year v. 2 years.
- This notion was predicated upon the premise that an allocation to such parent would be promotive of the stability and best interests of the affected child. See, for example, pre-2022 West Virginia **Code** §§48-9-210, 235.2, 102, 204 and 206.

II. History

- Finally, notwithstanding the parental gender-equalizing provisions of ***existing*** West Virginia **Code** §§48-1-235.2, 48-9-102(a)(4) and 48-9-206(c), SB 463, in establishing the 50/50 presumption, effectively restricted and re-routed judicial discretion at the beginning, in the interim, and through final decision of a custody fight, until such time as the evidence supported the Family Court Judge (hereafter 'FCJ') in finding a negative; ***viz.***, the presumption should **NOT** be applied and therefore controlling because of superceding rebuttal criteria.
- In a 2021 amendment to old 48-9-206(c), the Legislature had exalted the so-called male "parenting functions" over the alleged female "caretaking functions" of 48-1-210. NOTE: **Caretaking Functions are still part of Parenting Functions by statutory definition!!!!**
- The 2021 amendment also forbid final hearings conducted solely by proffer. Old 48-9-206(e).

III. Amended Definitions

A. **"Best Interests" under 48-9-102(a)(4)** is the first reference to "rebuttably presumed" (hereafter 'the presumption'), adding to the old 102(a)(4), " … and which is rebuttably presumed to be equal [50-50] custodial allocation of the child;"

- **BUT this is qualified and limited by** existing (a)(5) which is "[parents who] know how to provide for the child's needs and who place a high priority on doing so".

B. **48-9-102a Presumption in favor of equal (50/50) custodial allocation**

- This entirely new statute affirmatively establishes a preponderance of the evidence rebuttable standard that would militate against the presumption.
- Note "that equal [50-50] custodial allocation is in the best interests of the child.", BUT the same statute **limits application of the presumption** to a schedule that is "**consistent with ensuring the child's welfare**".

IV. The All-Important Temporary Parenting Plan of 48-9-203

A. Parenting Plan (hereafter 'PP') must be based on:

1. "**relevant evidence**" 9-203(a) (not new)
2. can be limited by any of **48-9-209 former or new limiting factors** or "**considerations**" (hereafter '209') 9-203(a)(4) (not new, but substituted language)
3. can be limited by evidence that "**otherwise warrant limitation**" 9-203(a)(4) (new)

IV. The All-Important Temporary Parenting Plan of 48-9-203

B. A PP shall be made "upon the evidence presented at the (temporary) hearing" 9-203(c) (new)

- In my opinion, this is significant in view of the potential ICA interlocutory appeal of a temporary allocation order. FCJs must **prevent the temporary hearing from becoming a final hearing in disguise**. Abridged testimony taken from the two parties at a temporary hearing is "evidence", and thus satisfies the new statute,
- Rule 16 also says FCJs can limit the duration of a temporary hearing, and that does include the number of 3rd party witnesses
- a temporary allocation order remains in force and enforceable pending appeal, per new 9-203(f) interlocutory appeal
- Parties or the FCJ can amend temporary allocations to something other than 50/50, based on 209 criteria AND the "best interests of the child". 9-203(g). (not new)

V. Temporary PP Criteria of 48-9-204:

A. Must be based on:

1. "relevant evidence" (not hearsay) **AND** the "best interest of the child" 9-204(a) (not new);

2. Which parent has taken greater responsibility during last 12 months for performing **PARENTING FUNCTIONS (NOT** 'caretaking functions'--- compare 48-1-210 and 235.2) 9-204(a)(1) (NEW);

3. Limited also by which parenting arrangements will cause the "**least disruption to the child's emotional stability while the action is pending**" (not new);

V. Temporary PP Criteria of 48-9-204:

B. Temporary order limiting or denying access to a child can be achieved upon the lower standard of "**credible evidence**" from 209(a)(possible error in coding: 209a could be intended, as well) factors, or to facilitate the protection of "***the other party pending adjudication of the underlying facts***"(!) 9-204(c)(not new); **BUT** 9-204(e) **inconsistently says that the standard** to defeat or limit a 50/50 Temporary Order under 209 (not 209[a]) is "**preponderance of the evidence**". (NEW)

VI. 48-9-206: Allocation of custodial responsibility at final hearing

A. **This Section 206 has been almost entirely REWRITTEN**. A 50/50 PP can be avoided if it is "**harmful to the child**" or limited by 209 factors. 9-206(a) (not new);

B. The FCJ cannot consider the previous temporary order unless the parties agree; meaning…., a FCJ can't say "*let's use the temp order since it appears to be working well*". 9-206(c). I suggest that a FCJ just use his or her previous factual findings and conclusions of law and make NO reference to the temporary order

VI. 48-9-206: Allocation of custodial responsibility at final hearing

C. Subparagraph (c) again requires the "presentation of evidence at the final hearing" (not proffer), and Findings of Fact and Conclusions of Law. Just the use of those two paragraph headings will be of value to FCJs and Parties in protecting allocation orders.

D. Also, I strongly suggest use in Final Orders of the variations of the word "CREDIBILITY" will reinforce rulings on custody allocations.

VII. **48-9-207: Allocation of significant decision making at any hearing:**

A. Limitation of the presumption at either hearing due to "***the ability or inability" of either or both parents to work together*** on behalf of the child AND the existence of 209 factors. 9-207(a)(new);

B. Presumption invoked ***IF*** **(Trigger)** ***each*** ***of the child's parents has been exercising "a reasonable share of the parenting functions***"; or if not in the child's best interests based on 209, as shown by a preponderance of the evidence. 9-207(b)(new language re presumption and proof only). This 207 section could manifest an unintended result; i.e., if mother and father have 50/50 custody, or if they agree that it is equal, or FCJ ruled it to be equal, one may lose any substantial decision making by not doing a reasonable share of **Parenting Functions**(!). NOTE: **Caretaking Functions are still part of Parenting Functions by statutory definition!!!!**

C. Does this new 207 mean that decision making has been legislatively elevated in importance over custodial responsibility?

VIII. **48-9-209 Parenting Plan (formerly limiting factors, now) considerations:**

A. This section of 48-9-209, which used to be centered on domestic violence, has undergone the most drastic, severe and substantive revisions, outside of 9-206 changes, but it also has the most "teeth" and universal applications to counter the presumption. Not to be overlooked is the **removal** of the "**credible information**" standard of proof for substantiation of 209 allegations that appeared in the previous 209(a) version;

VIII. **48-9-209 Parenting Plan (formerly limiting factors, now) considerations:**

B. A careful and thorough inspection of 209(a)(4) exhibits the previous factors of parental alienation and obstruction added by the 2016 and 2021 amendments. Now, sub-paragraphs (b) and (c) have added "*a person **regularly** in the household*" to the mix, **BUT** I predict that the new supplement of sub-paragraph (f) will cause generally Family Courts and domestic attorneys the most prolific litigation problems regarding physical custodial determinations, within the context of whether or not the presumption has been rebutted.

VIII. **48-9-209 Parenting Plan (formerly limiting factors, now) considerations:**

- Specifically, **to name a few but not all** tools to rebut the presumption:
  - the child's medical condition, chronic illness, special needs, or other serious medical condition, and more appropriate care under a different (other than 50/50) PP;
  - whether the child will be separated from siblings;
  - a nursing child who receives substantial nutrition through nursing;
  - a parent's non-compliance regarding the payment of child support (big one);

VIII. **48-9-209 Parenting Plan (formerly limiting factors, now) considerations:**

- Specifically, **to name a few but not all** tools to rebut the presumption, con't:
  - the parent has a chronic illness or other condition rendering him or her unable to provide proper care for the child;
  - a parent does not have stable housing (big one);
  - a parent who has avoided or refused involvement or not been ***significantly*** involved in the child's life prior to litigation, unless prevented by the other parent;

VIII. **48-9-209 Parenting Plan (formerly limiting factors, now) considerations:**

- Specifically, **to name a few but not all** tools to rebut the presumption, con't:
  - a parent who repeatedly leaves a child with a 3rd party (e.g., grandparents?- could be a big one);
  - a parent who has a 3rd party living in or regularly at the parent's household that has a criminal, domestic violence or addiction record
  - a parent who is addicted to a controlled substance or alcohol;

VIII. **48-9-209 Parenting Plan (formerly limiting factors, now) considerations:**

- Specifically, **to name a few but not all** tools to rebut the presumption, con't
  - whether a 50/50 PP is impractical because of distance, cost of transporting a child, *the child's **AND** each parent's daily schedules(??)*, disruptive of a child's education, and contrary to a 14 year old's reasonable preference; (obviously a super big one) and,
  - whether the parents can work together or encourage a positive relationship between the child and the other parent. (always a big one).

Finally, aside from no standard in proving any of these 209 factors, there appears to be NO REAL TIME RESTRAINTS or time limits in adducing evidence in support of or in defense to these criteria!!!! Is it to be one year, two years, ten years, before the break-up?

IX. **Modifications under the New 50/50 statute:**

A. The effect of the presumption on post-operative date litigation is conjectural at this point. Modifications under 9-401, which are governed by the two qualifiers of "substantial change of circumstances", which were "unknown" or otherwise not in contemplation of the parties in the prior order, appear to tie *all* 209(f) considerations, to a parent's remarriage or cohabitation.

B. The occurrence or worsening of a 209(a) consideration *only*, after a PP has been ordered, is grounds for modification. 9-401(d) (new).

C. Application of the presumption is NOT available to modify PPs in existence prior to June 10, 2022. See the new 48-9-603(b).

X. **Taxation and dependency:**

- If a 50/50 custodial allocation is ordered under the new statute, then the FCJ must specify which parent may claim federal and state income tax deductions and exemptions; however, the FCJ **MAY** divide the deduction(s) and exemption(s) on a "year to year" basis. See the new 48-9-602.
- NEWS FLASH: 50/50 is about MONEY: Child Support and Tax Exemptions

XI. **Miscellaneous:**

With respect to which law controls in the June 10, 2022 transition, **I believe**:

1. If a case is filed before 6/10/22, and any evidence regarding custody, temporary or otherwise, has been taken, then the old standards apply. WRONG!!. See *Amanda C. v. Christopher P.*, 22-ICA-2, 11/18/22.

2. If a case has been filed before 6/10/22, and no evidence regarding custody, temporary or otherwise, has been taken, then the new standards apply;

3. If a case is filed before 6/10/22, and evidence on any other issue *except* evidence regarding custody, temporary or otherwise, has been taken, then either standard may apply; i.e., flip a coin.

XII. Judicial Experience, Predictions and Conclusions:

- **FCJ encounters** and interactions regarding the embryonic 50/50 statute have, of course, been attenuated due to the limited time that the statute has been in force and effect. My initial observation, based on a minimum number of case exposures, is that all but a few seasoned domestic relations practitioners are unaware of its provisions and their far-reaching impact, **let alone *pro se* parties.** Conversely, the surfeit of the rebuttable components and their attendant proof dynamics, have possibly led to a noticeable uptick in settled cases.

- **Predictions** are another matter, which may be as unfounded, speculative and unforthcoming, as they are freely made. I am, nevertheless, confident that the following envisioned events will occur in short order, once lawyers and lay parties learn the nuances in the statute; to-wit: **(a)** domestic violence filings will increase exponentially in order to avail party antagonists of the freshly empowered and expanded 209; **(b)** once again, negotiations, mediations and compromises on custody issues will become unfairly fixed to equitable distribution and alimony issues, or the bad faith "bargaining chips" and despicable "kids for cars" trade-offs; and **(c)** 209 features will emerge as a larger aspect in custody modification cases when a party has remarried or commenced cohabitation.

Conclusions may be as thinly grounded as predictions, but I think it apparent that the new custodial allocation universe will be evidence driven at the expense of judicial discretion, and unnecessarily so. My most weighty inference is that the inception of the Intermediate Court of Appeals, together with its undiminished and unmitigated procedural complexities, along with its geographically removed access, will make the decisions of FCJs sacrosanct. In short, judicial review of FCJ rulings will be a reality recourse, or rather a luxury, reserved only to the affluent.

THE END

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