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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Margaret M.,
Petitioner Below, Petitioner

vs.) No. 21-0449 (Greenbrier County 16-D-157)

Laramie M.,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Margaret M., by counsel Anthony R. Veneri, appeals the Circuit Court of Greenbrier County's May 13, 2021, order refusing the appeal from the Family Court of Greenbrier County's February 2, 2021, order on remand in this family court matter. Respondent Laramie M., by counsel Christine B. Stump, filed a summary response brief in support of the orders. Petitioner filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

The parties married on January 31, 2015, in Monroe County, West Virginia, and were divorced by order entered January 2, 2018. The parties had one child stemming from the marriage, L.M., born in 2015. The final divorce order incorporated an agreed parenting schedule for the child.

On March 13, 2018, respondent filed a petition for modification of the parenting plan premised on his belief that petitioner was the source of two Child Protective Services ("CPS") referrals that alleged abuse to the child during a period when respondent was exercising parenting time. The referrals were not substantiated. This initial petition for modification was ultimately dismissed by the family court on August 14, 2018.

On April 11, 2019, respondent filed another motion to modify custody, seeking to decrease petitioner's parenting time. Respondent alleged that petitioner had reported or caused to be reported a number of additional unsubstantiated CPS referrals related to alleged child abuse in

respondent's home. On June 17, 2019, the court entered a temporary parenting order that noted the court would appoint a guardian ad litem by separate order. Pursuant to the temporary parenting order, "[t]he guardian will submit an oral or written report to the Judge . . . so that the [c]ourt or the guardian ad litem may alter the parties['] parenting times by temporary order without a hearing." On that same day, the court appointed a guardian ad litem to represent the interests of the child citing the high conflict between the parties and the allegations of domestic violence or child abuse. Neither party objected to the temporary parenting order, the court's decision to appoint a guardian ad litem, nor the guardian ad litem appointed by the court.[1] On August 29, 2019, the guardian ad litem presented a motion to modify the parenting plan. By its temporary order modifying the parenting plan, the court granted the ex parte motion, finding that petitioner should have visitation the first, second, or fourth weekend of every month, with the child being with respondent at all other times. The court specifically found

> There are a[] distressing amount of unsubstantiated [CPS] abuse and neglect investigations in this matter. All the allegations have been made against [respondent], and people associated with him. [CPS] has not made any finding of abuse o[r] neglect following any investigation in this matter. No less than four [CPS] professionals have investigated this matter and determined the [c]hild is not maltreated.
>
> The [c]ourt believes that continued unsubstantiated [CPS] investigations are harmful to the [c]hild, [p]arents, and a co-parenting relationship. The [c]ourt has taken previous action in an effort to stop unwarranted [CPS] involvement. The prior action of the [c]ourt has been unsuccessful. Therefore, the [c]ourt must take further action to mitigate improper [CPS] involvement.

Over the course of several months, the family court heard evidence on multiple occasions relating to the source, nature, and substance of the CPS referrals and investigations. The referrals alleged that the child was abused while in respondent's home by respondent's fiancé or the fiancé's daughter, who is one year older than the parties' child. Many of the referrals were screened out, while others were unsubstantiated. None of the referrals resulted in a finding of maltreatment. The family court entered an order on November 1, 2019, that designated respondent as the custodial parent and limited petitioner's parenting time to specific weekends and holidays. Petitioner appealed that order to the circuit court. Thereafter, the circuit court granted the petition for appeal. Ultimately, the circuit court remanded the matter to the family court to make additional findings of fact.

On February 2, 2021, the family court entered a final order after remand that designated respondent as the custodial parent, awarded petitioner parenting time on weekends, and set forth a holiday schedule for the child. The family court's order noted that the primary issue in the case is the significant number of unsubstantiated allegations (at least fifteen or sixteen) made to CPS of

[1] This guardian ad litem has been replaced and another attorney has now been appointed by the family court to serve as the guardian ad litem for the child.

abuse in respondent's home.[2] Ultimately, although petitioner claimed that the CPS findings that abuse was unsubstantiated were simply wrong, the court found that petitioner did not present any credible evidence of abuse. After considering all of the evidence and testimony, "the court conclud[ed] that the [petitioner's] refusal to accept that the child is not being abused in the home of [respondent] renders co-parenting nearly impossible." The court further found that the "facts and circumstances of the [petitioner] filing and causing to be filed the numerous unsubstantiated CPS referrals were not known at the time of the prior order" and that petitioner's conduct was a substantial change requiring a modification of the prior order to serve the best interests of the child. Additionally, the court concluded that petitioner's conduct constituted bad faith and dishonesty. Specifically, the court found

> [t]hat the bad faith and dishonest conduct engage in by the [petitioner] to generate and cause to be generated the CPS referrals and investigations constitutes fraudulent reports of domestic violence and child abuse.
>
> Considering all the testimony, the voluminous CPS reports finding the abuse allegations to be unsubstantiated and the investigation and recommendations of the [guardian ad litem], the [c]ourt finds that a change of custody is necessary to protect the best interest of the parties' child.
>
> The court cannot see a resolution of this matter that does not have some serious side effects on the parties and the child.

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[2] The family court noted,

> The [sixteen] referrals resulted in [six] full investigations all reaching the same result, finding the referrals to be unsubstantiated.
>
> Testimony revealed that the [petitioner] herself, had made one referral.
>
> On three other occasions, the [petitioner] presented the child to two of her long-term personal friends, . . . (both nurses), knowing they were mandatory reporters, [and] reported physical and sexual abuse. One of these reports is very troubling to the [c]ourt in that the allegations were a swollen vagina and allegations of sexual abuse. Rather than contact law enforcement or go to the emergency room, the [petitioner] had her friend . . . come to her home to hear about the allegations and then report the allegations to CPS.
>
> On at least [three] other occasions, the [petitioner] took the child to Robert C. Byrd Clinic, knowing the medical providers to be mandatory reporters.

The family court opined that "[fifteen] or [sixteen] CPS referrals is entirely out of hand especially since the referrals that were investigated were all found to be unsubstantiated."

Petitioner again appealed the family court order to the circuit court. The circuit court issued an extensive fourteen-page order that denied the appeal and affirmed the family court order issued after remand.[3] In its order, the circuit court noted that

> [t]he record, including [petitioner's] own testimony clearly supports the [f]amily [c]ourt's finding in ¶35 of the [o]rder on [r]emand that she "was fully aware of the numerous CPS investigations being unsubstantiated, yet she continued to involve mandatory reporters in the allegations" and that, knowing a CPS referral had been made and found to be unsubstantiated, she "continued to report the same conduct to mandatory reporters without informing the mandatory reporter that the conduct had been investigated by CPS and found to be unsubstantiated." The [f]amily [c]ourt did not clearly err in making these findings.
>
> Petitioner now appeals.

We note that

> [i]n 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., *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

In light of that standard of review, we consider petitioner's arguments. While this matter was pending before the circuit court, that court astutely noted

> [petitioner] takes issue with several findings of fact and conclusions of law found in the order on remand. While set forth as several different assignments of error, the bulk of her petition for appeal takes issue with the family court's conclusion that [petitioner] is responsible for the high number of CPS referrals, which 'constitutes fraudulent reports of domestic violence and child abuse,' and the findings of fact leading thereto.

The circuit court noted that the "ultimate question before the family court at that time was one of determining whether or not the CPS referral system was being abused by [petitioner]." Similarly, while petitioner raises several assignments of error to this Court, her current petition for appeal is largely focused on the family court's findings as to whether the high number of CPS referrals constituted fraudulent reporting that could be attributed to petitioner.

[3] Petitioner moved to strike respondent's brief to the circuit court as untimely. The circuit court granted this motion and struck respondent's brief. Notwithstanding the granting of the motion to strike, the circuit court noted that petitioner bore the burden of establishing that she was entitled to the relief sought in her petition for appeal. Further, the circuit court found that the family court did not err "in any manner raised by the petitioner in her petition for appeal."

Respondent maintains that it was not an abuse of discretion for the family court to conclude that petitioner's "continued reporting to mandatory reporters, conduct which she knew had already been investigated by CPS and found to be unsubstantiated, amounted to fraudulent reporting of domestic violence or child abuse within the meaning of [ ]W. Va. Code § 48-9-209(a)(5)." Alternatively, respondent maintains that if this Court should find that numerous reports made to mandatory reporters do not rise to the level of fraudulent reporting as contemplated by statute, then the family court did not abuse its discretion in modifying the parenting plan based on the record before the court.

West Virginia Code § 48-9-209(a)(5) provides, in pertinent part, that

> a) If either of the parents so requests, or upon receipt of credible information thereof, the court shall determine whether a parent who would otherwise be allocated responsibility under a parenting plan:
>
> . . . .
>
> (5) Has made one or more fraudulent reports of domestic violence or child abuse: *Provided*, That a person's withdrawal of or failure to pursue a report of domestic violence or child support shall not alone be sufficient to consider that report fraudulent.

Further, the Legislature has afforded West Virginia courts discretion in fashioning appropriate parenting plans. Specifically, West Virginia Code § 48-9-209(b) provides, in pertinent part, that

> [i]f a parent is found to have engaged in any activity specified by subsection (a) of this section, the court shall impose limits that are reasonably calculated to protect the child or child's parent from harm. The limitations that the court shall consider include, but are not limited to:
> (1) An adjustment of the custodial responsibility of the parents, including but not limited to:
> (A) Increased parenting time with the child to make up for any parenting time the other parent lost as a result of the proscribed activity;
> (B) An additional allocation of parenting time in order to repair any adverse effect upon the relationship between the child and the other parent resulting from the proscribed activity; or
> (C) The allocation of exclusive custodial responsibility to one of them;
> (2) Supervision of the custodial time between a parent and the child;
> (3) Exchange of the child between parents through an intermediary, or in a protected setting;
> (4) Restraints on the parent from communication with or proximity to the other parent or the child;
> (5) A requirement that the parent abstain from possession or consumption of alcohol or nonprescribed drugs while exercising custodial responsibility and in the twenty-four hour period immediately preceding such exercise;

(6) Denial of overnight custodial responsibility;

. . . .

(10) Any other constraints or conditions that the court deems necessary to provide for the safety of the child, a child's parent or any person whose safety immediately affects the child's welfare.

On remand, the family court made detailed findings of fact as directed by the circuit court and astutely noted that the primary issue in this case was that there have been at least fifteen or sixteen referrals to CPS since 2018. Further, the circuit court found that a substantial change had occurred since the entry of the prior order and that modification was appropriate pursuant to West Virginia Code § 48-9-401.[4] Based upon our review of the record, we find that the findings made by the family and circuit courts were not clearly erroneous. Moreover, the courts did not abuse their discretion in the application of law to the facts of this case.

Petitioner also argues that the family court abused its discretion by relying upon the findings, investigation, testimony, and recommendations of the initial guardian ad litem.[5] Petitioner argues that family court relied on the guardian ad litem's recommendations in formulating both the November 1, 2019, and February 2, 2021, orders. However, as noted in petitioner's brief, the family court's February 2, 2021, order specifically provides that the court

[4] West Virginia Code § 48-9-401(a) provides, in pertinent part, that

a court shall modify a parenting plan order 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 therein, that a substantial change has occurred in the circumstances of the child or of one or both parents and a modification is necessary to serve the best interests of the child.

Here, the court found that due to petitioner's conducting in filing and causing to be filed numerous unsubstantiated CPS referrals alleging abuse, that a substantial change had occurred and modification of the prior order was necessary to serve the best interests of the child.

[5] Petitioner criticizes the guardian ad litem's qualifications and argues that the guardian ad litem failed to comply with the requirements established by Rule 47 of the West Virginia Rules of Practice and Procedure for Family Courts. Upon our review of the record, however, petitioner failed to timely object to the appointment of the guardian ad litem and any objection that petitioner might have had to his qualifications or appointment were, therefore, waived. Further, the guardian ad litem was replaced by the family court prior to its order on remand. Although petitioner takes issue with the family court's decision not to take additional evidence or seek an opinion from the new appointed guardian ad litem, the family court was under no obligation to do so. To the contrary, the circuit court specifically found that "[i]t w[as] up to the family court as to whether or not he wants to take additional evidence."

considered much more than the guardian ad litem's testimony and recommendations.[6] Accordingly, we refuse to disturb the family court's order where the court considered all of the testimony and evidence, including the guardian ad litem's recommendations, in issuing its order.

Further, petitioner argues that she was denied due process of law when the guardian ad litem sought ex parte relief from the court. Based upon our review of the record, however, it appears that the guardian ad litem was merely attempting to comply with the court's temporary parenting order, which ordered the guardian ad litem to submit an oral or written report, reserving the right to alter the parties' parenting time by temporary order without a hearing. Moreover, the temporary order modifying the parenting plan stated the grounds for the modification and noted that the continued, unsubstantiated CPS investigations are harmful to the child, parents, and a co-parenting relationship. As we have explained, "the best interests of the child is the polar star by which decisions must be made which affect children." *Kristopher O. v. Mazzone*, 227 W. Va. 184, 192, 706 S.E.2d 381, 389 (2011) (citation omitted). Following the "polar star," and appreciating that the court conducted numerous evidentiary hearings on this matter, we refuse to find that the court erred in issuing the temporary order modifying the parenting plan without holding a hearing or that the guardian ad litem's oral motion to the court violated petitioner's due process rights.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton

NOT PARTICIPATING:

Justice C. Haley Bunn

[6] The court found that a change of custody was necessary to protect the best interests of the parties' child after "considering all of the testimony, the voluminous CPS reports finding the abuse allegations to be unsubstantiated and the investigation and the recommendations of the guardian ad litem."