IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1997 Term

No. 24032

CHERYL V.,
Plaintiff Below, Appellant,

V.

JIMMY V.,
Defendant Below, Appellee.

Appeal from the Circuit Court of Wayne County
Honorable Robert G. Chafin, Judge
Civil Action No. 94-D-349

REVERSED AND REMANDED

Submitted: September 17, 1997
Filed: August 2, 2023

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The opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal." Syl. Pt. 2, *Funkhouser v. Funkhouser*, 158 W.Va. 964, 216 S.E.2d 570, (W.Va. 1975)

2. "Under West Virginia Code Sec. 48-2-15 [1996], a circuit court may, in the divorce order, provide for joint custody of minor children when the parties so agree and when, in the discretionary judgment of the circuit court, such an agreement promotes the welfare of the child." Syl. Pt. 1, *Lowe v. Lowe,* 179 W.Va. 536, 370 S.E.2d 731 (1988).

3. "In determining if joint custody is appropriate, a court must make a sufficient factual inquiry to insure that such an arrangement is, indeed, in the best interest of the child." Syl. Pt. 3, *Lowe v. Lowe,* 179 W.Va. 536, 370 S.E.2d 731 (1988).

4. "A cardinal criterion for an award of joint custody is the agreement of the parties and their mutual ability to co-operate in reaching shared decisions in matters affecting the child's welfare." Syl. Pt. 4, *Lowe v. Lowe,* 179 W.Va. 536, 370 S.E.2d 731 (1988).

5. "When the parties to a divorce action propose shared custody, they should submit to the Court a joint parenting agreement specifying each parent's powers, rights, and responsibilities and proposing procedures for making changes to the agreement or for mediating or otherwise resolving disputes and alleged breaches." Syl. Pt. 5, *Lowe v. Lowe,* 179 W.Va. 536, 370 S.E.2d 731 (1988).

Per Curiam:[1]

This appeal arises from an order of the Circuit Court of Wayne County denying a request by Cheryl V, appellant/plaintiff, to modify a joint custody order previously entered in this case. Cheryl V. contends on appeal that it was error for the circuit court to refuse to modify the custody order.

I.

The relevant facts in this case show that Cheryl V. and Jimmy V., appellee/defendant, were granted a divorce by a final order entered April 6, 1995. The divorce decree incorporated a recommendation by the family

[1]We point out that a per curiam opinion is not legal precedent. *See Lieving v. Hadley*, 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n 4. (1992) ("Per curiam opinions ... are used to decide only the specific case before the Court; everything in a per curiam opinion beyond the syllabus point is merely obiter dicta.... Other courts, such as many of the United States Circuit Courts of Appeals, have gone to non-published (not-to-be-cited) opinions to deal with similar cases. We do not have such a specific practice, but instead use published per curiam opinions. However, if rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a per curiam opinion.").

law master that the parties have joint custody of their two children. Cheryl V. filed a petition for modification of child custody in 1996, seeking sole custody of the children. During the modification proceeding the evidence showed that Cheryl V. did not agree to the joint custody arrangement, no joint parenting agreement was made and that Cheryl V. and Jimmy V. do not communicate. By order entered October 1, 1996, the circuit court denied Cheryl V.'s request to grant her sole custody of the children. On appeal Cheryl V. contends the circuit court failed to follow the criteria for determining the appropriateness of joint custody. We agree and therefore reverse and remand this case.

II.

We set out the standard of review applicable to divorce child custody matters in Syl. Pt. 2, *Funkhouser v. Funkhouser*, 158 W.Va. 964, 216 S.E.2d 570 (1975). *See also* Syl. Pt. 1, *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995). In reviewing the record in this case we are convinced that the circuit court failed to follow the well-established criteria for a joint custody order. *See Lowe v. Lowe*, 179 W.Va. 536, 370 S.E.2d 731 (1988); Syl. Pt. 8 & 9, *David M. v. Margaret M.*, 182 W.Va. 57,

385 S.E.2d 912 (1989). We, therefore, reverse and remand this case, with directions that the circuit court appoint a guardian ad litem for the children and hold a hearing on the modification petition consistent with this opinion, within sixty days of this decision.[2]

Reversed and Remanded.

[2]"A child has ... right to independent representation on matters affecting his or her substantial rights and interests." Syl. Pt. 3, *Cleo A. E. v. Rickie Gene E.*, 190 W.Va. 543, 544, 438 S.E.2d 886, 887 (1993).