

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Aaron H.,
Respondent Below, Petitioner**

vs.) No. 11-0450 (Randolph County 10-D-4)

**Victoria H.,
Petitioner Below, Respondent**

FILED

**September 4, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Aaron H. appeals the circuit court's February 12, 2011 order denying his appeal from the family court's order that, *inter alia*, granted the parties a divorce.¹ Petitioner argues that the family court erred when the court continued its supervised visitation with the parties' minor children, ordered an equitable distribution of marital property that he believes is unfair to him, ordered him to pay Victoria H. \$3,000 toward her attorney's fees, and sanctioned him \$500 for disobeying a prior directive of the court. Upon consideration of the standard of review, the record on appeal, and the briefs of the parties, the Court finds no substantial question of law has been presented. For these reasons, a memorandum decision is appropriate under Rule 21(d) of the Revised Rules of Appellate Procedure.

The parties were husband and wife, and last cohabited together on December 19, 2009. They have two children, V.S.H. (July 25, 2004) and E.J.H. (April 17, 2008). After Victoria H. filed for divorce, a Guardian ad litem was appointed for the children.

The Guardian ad litem issued a report on October 29, 2010, in which she recommended that there was "no compelling reason for the minor children to be placed in the care of [Aaron H.]" and that "there should be a continuation of [Aaron H.]'s supervised visitation." The Guardian ad litem reported that the parties' oldest child loved her father very much but that the child "now has fear of [Aaron H.], because he yelled at her and told her that he would not take her home to her mother." The Guardian ad litem further reported that based upon Aaron H.'s criminal history and statements he had made to her, it is her belief that "[Aaron H.] is still continuing to use alcohol, as his 'stress' relief, which is further evidence of an alcohol addiction," and recommended that the family court may want to

¹ "We follow our past practice in . . . cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dept. of Human Services v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987).

require Aaron H. to take a Breathalyzer test prior to visitation “to ensure the safety of the minor children and to reinforce the seriousness of sobriety and visitation.” The Guardian ad litem recommended that “because [Victoria H.] is the primary caretaker, it is in the minor children’s best interest to continue in her care.”

Also on October 29, 2010, the family court conducted a final hearing, where Aaron H. appeared in person and by counsel and where Victoria H. appeared in person and by counsel.² The children’s Guardian ad litem was also present. Testimony was heard from numerous witnesses called by each party.³ One of the witnesses who testified was Dr. Klein, a psychologist who evaluated Aaron H. The family court found that “as modified by his testimony,” it was Dr. Klein’s recommendation that “[Aaron H.] should have personal therapeutic counseling with a well qualified counselor” if the family court concluded, “as it has, [Aaron H.] has a serious problem with the abuse of alcoholic beverages.”

In its order entered on January 4, 2011, the family court granted the parties a divorce.⁴ The family court also continued Aaron H.’s supervised visitation with the parties’ minor children, ordered an equitable distribution that Aaron H. believes is unfair to him, ordered Aaron H. to pay Victoria H. \$3,000 toward her attorney’s fees, and sanctioned Aaron H. \$500 for disobeying a directive from the court.

The family court awarded primary residential care of the parties’ minor children to Victoria H. and ordered that for a period of at least six months, Aaron H. shall have supervised visitation every Wednesday from 4:30 p.m. to 7:30 p.m. and every Saturday from 9:00 a.m. to 7:30 p.m. Aaron H.’s mother and stepfather shall supervise the visitation. Aaron H. may petition for unsupervised visitation. He must have “proof that he has completed his treatment program.”⁵ For three months after Aaron H. petitions for unsupervised visitation, and if the family court approves, Aaron H. shall have the children for one overnight visit per month from Friday after school to Saturday morning at 9:00 a.m.

² The hearing was continued on November 10, 2010, via a telephone conference.

³ This Court has viewed the DVD recording of the final hearing.

⁴ Subsequent to the family court’s entry of the final divorce order, Aaron H. filed a motion for the family court judge’s disqualification. By an administrative order entered on September 7, 2011, the Chief Justice ordered the family court judge to continue presiding in the parties’ case. Therefore, that issue has previously been adjudicated.

⁵ The family court ordered Aaron H. to undergo anger management classes and personal therapeutic counseling.

After this three month period, the family court ordered that Aaron H. shall have parenting time with the children every other weekend commencing Friday after school to Sunday at 6:00 p.m. The family court further ordered that Aaron H. shall have Schedule II holiday visits with the children subject to the limitations contained in its order. The family court set Aaron H.'s child support obligation at \$780 per month.

Victoria H. desired to relocate to North Carolina for employment. The family court found that Victoria H. performed at least 70% of the care-taking functions for the parties' children, but also found that "[this] is only the first hurdle to relocation." The family court found that "[Victoria H.] has not met her burden" and "does not have employment waiting for her in her chosen field." If such circumstances change, the family court found that "[Victoria H.] has the right to file an appropriate Notice relative to a relocation outside of the State of West Virginia."

In regard to the equitable distribution, the family court awarded the 1994 Jeep Wrangler to Aaron H., who shall be responsible for any debt on it, and awarded the 2004 Kia Spectra to Victoria H., who shall be responsible for any debt on the Spectra. The family court ordered that Aaron H. had the option of having the 1988 Mustang GT appraised and then paying Victoria H. for her share or selling the Mustang and splitting the proceeds with Victoria H. equally. The family court awarded Victoria H. household furnishings and marital personal assets totaling \$3,000 and awarded Aaron H. household furnishings and marital personal assets totaling \$400. The family court ordered that Victoria H. shall be responsible for \$2,872.14 in debt and that Aaron H. shall be responsible for \$800 in debt. The family found that Aaron H. received federal and state tax refunds totaling \$6,934 that constituted marital property. The family court awarded Victoria H. one half of that amount, or \$3,467, plus \$500 as a sanction for Aaron H.'s spending the refunds even though there was a directive from the court that the proceeds not be spent. The family court found the equitable distribution resulted in a difference of \$62.68 in Victoria H.'s favor but determined that "this amount is more than offset by [Aaron H.]'s behavior in spending the majority of the parties' tax refund, and is therefore set at \$0.00" The family court also awarded Victoria H. \$3,000 towards her attorney's fees. Aaron H. appealed the family court's order to the circuit court, which denied his appeal.

STANDARD OF REVIEW

The standard of review for a family court's order is as follows:

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*.

Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

EQUITABLE DISTRIBUTION OF MARITAL PROPERTY

Aaron H. argues that Ms. Harner's Kia Spectra was not financed by her father and that the Next Card debt, originally listed as \$800, was actually \$1,500. Aaron H. argues that a \$1,600 debt to a Richard Shyrock should have been included in the equitable distribution of marital property. In the proceedings below, each party filed a financial statement, listing what each thought were the parties' marital assets and debts. Each party testified at the final hearing regarding the equitable distribution. The family court's factual findings and its application of the law to the facts are entitled to deference under *Carr*, supra. Each party's financial statement lists the Next Card debt as \$800. On appeal, Aaron H. indicates that the actual bill shows that the Next Card debt was \$1,500; however, Aaron H. does not include the bill in his appendix. The parties had two vehicles that were functional. The family court gave Aaron H. the 1994 Jeep Wrangler and the debt on it, owed to his stepfather. Victoria H. received the 2004 Kia Spectra and the debt on it, which the family court found was owed to her father. This Court concludes that the family court did not abuse its discretion in its equitable distribution of the parties' marital property.⁶

PARTIAL AWARD OF ATTORNEY'S FEES TO VICTORIA H.

Aaron H. argues that he did not have an opportunity to respond before the \$3,000 in attorney's fees were assessed at the final hearing. He also argues that the restrictions placed upon sanctioning a party by Rule 11 of the West Virginia Rules of Practice and Procedure for Family Court apply to the family court's partial award of attorney's fees to Victoria H. Rule 11 addresses the representations parties make in their pleadings and places certain conditions upon when the family court can sanction a party for an incorrect representation. It is not clear whether either Victoria H.'s or Aaron H.'s request for attorney's fees relates to an incorrect representation the other party made in a pleading; accordingly, it is not clear whether Rule 11 applies to this case. Furthermore, each party alleged that the other engaged in conduct that increased his or her attorney's fees. Each party requested attorney's fees at

⁶ Aaron H. also argues that certain expenses he incurred as a result of the divorce proceedings should be included in the equitable distribution, but those expenses are court costs, not marital debts.

the final hearing. Each testified as to why he or she thought being awarded attorney's fees would be justified. When the hearing was continued on November 10, 2010, via a telephone conference, the family court decided to award Victoria H. \$3,000 toward her attorney's fees because the court found there were occasions when Aaron H.'s behavior had caused the parties to have to come into court. It is obvious from both the DVD recording of the final hearing and the record that Aaron H. had notice and an opportunity to be heard on Victoria H.'s request for attorney's fees. Therefore, this Court concludes that the family court did not abuse its discretion in ordering Aaron H. to pay \$3,000 to Victoria H. toward her attorney's fees.

SANCTION FOR AARON H.'S DISOBEYING PRIOR COURT DIRECTIVE

Aaron H. again cites to Rule 11 and argues that he was entitled to notice that he could possibly be sanctioned for disobeying a prior directive of the family court. Rule 11 does not apply to the family court's sanctioning of Aaron H. because he was not sanctioned for making an incorrect representation in a pleading but for spending the parties' federal and state tax refunds even though there was a directive from the family court that the proceeds not be spent. At the final hearing, each party testified regarding the circumstances surrounding the filing of the tax refunds. The refunds totaled \$6,934. Victoria H. argued that she was entitled to her half of the refunds and also argued that she should be awarded Aaron H.'s half of the refunds as part of her claim that he pay her attorney's fees. The family court awarded Victoria H. her half of the refunds and sanctioned Aaron H. \$500 for disobeying its prior directive. (As previously discussed, the family court made a separate decision to partially grant Victoria H.'s request for attorney's fees by ordering Aaron H. pay her \$3,000.) Given that both parties testified regarding the circumstances surrounding the filing of the refunds at the final hearing, Aaron H. had notice and an opportunity to be heard on the issue. Therefore, this Court concludes that the family court did not abuse its discretion in sanctioning Aaron H. \$500 for disobeying one of its prior directives.

CONTINUATION OF AARON H.'S SUPERVISED VISITATION

Aaron H. argues that the family court abused its discretion in continuing his supervised visitation instead of awarding him unsupervised visitation. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996); *see also Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children."). The family court's continuation of Aaron H.'s supervised visitation with the parties' minor children was consistent with the report of the children's Guardian ad litem, who recommended that "there

should be a continuation of [Aaron H.]’s supervised visitation.” The Guardian ad litem reported that based upon Aaron H.’s criminal history and statements he had made to her, it is her belief that “[Aaron H.] is still continuing to use alcohol, as his ‘stress’ relief, which is further evidence of an alcohol addiction.” Aaron H. asserts that the reports from where he had undergone evaluations were favorable to him. However, the family court found that “as modified by his testimony,” Dr. Klein’s opinion was consistent with requiring Aaron H. to undergo personal therapeutic counseling. The family court ordered that Aaron H. may petition for unsupervised visitation and that he must have “proof that he has completed his treatment program.” This Court concludes that the family court did not abuse its discretion in ordering the continuation of Aaron H.’s supervised visitation.⁷

For the foregoing reasons, we affirm the circuit court’s order denying petitioner’s appeal from the family court’s order that, inter alia, granted the parties a divorce.

Affirmed.

ISSUED: September 4, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

⁷ Aaron H. further argues that the family court erred in “encouraging” Victoria H. to work toward her goal of relocating with the parties’ children to North Carolina. As reflected in the family court’s order, however, the family court is not allowing Victoria H. to relocate at this time.