

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

D.G.L., Petitioner Below, Petitioner

vs.) No. 11-0763 (Hampshire County 08-D-146)

D.K.L., Respondent Below, Respondent

FILED

March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Hampshire County, wherein the circuit court denied petitioner's petition for appeal of the Family Court of Hampshire County's order determining that petitioner's son H.L.'s¹ primary residence would be with Respondent Mother. The appeal was timely perfected by counsel, Royce B. Saville, with the entire record from the family court and the circuit court accompanying the petition. No response to the petition has been filed.

This Court has considered the petitioner's brief and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, the Court is of the opinion that this case is appropriate for consideration under the revised rules. The facts and legal arguments are adequately presented in the petitioner's written brief and the record on appeal, 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 is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

After almost fifteen years of marriage, respondent herein filed for divorce from petitioner on August 11, 2008, and subsequently moved to Winchester, Va. The couple had three children; R.L., C.L., and H.L. Following proceedings in family court, a final order was entered which granted petitioner custodial allocation on the first, second, and fourth weekends each month from Friday after school until Monday before school. Additionally, petitioner was granted custodial allocation on Thursdays from 4:00 p.m. until 8:00 p.m. on those weeks that he does not have weekend allocation, and the first two weeks of June, July, and August each summer. Holidays were ordered to be allocated according to the standard custodial allocation schedule, and spring break was subject to alternating years. On July 6, 2010, petitioner filed a petition for modification of shared parenting agreement, seeking to be the primary custodian of both C.L. and H.L. Per the final order entered on August 24, 2010, the family court awarded petitioner primary custody of C.L., but denied the same in regards to H.L., citing the child's special needs and a lack of a significant change in circumstances

¹Because this matter concerns issues related to a minor child, the Court will refer to the parties herein by their initials in keeping with its policy of protecting the identity of minor children.

regarding the child. On October 4, 2010, petitioner appealed this final order to the circuit court, which refused the appeal by order entered on November 4, 2010.

On appeal, petitioner alleges the following assignments of error: (1) that the circuit court erred by failing to consider that the rights of the minor child take precedence over procedural rules; (2) that the family court erred by basing its decision on the final custody issue upon recommendation of the guardian ad litem by (a) ignoring the firm and reasonable preference of the minor child who has not reached the age of discretion, and (b) being bound by the recommendation of a court-appointed guardian ad litem on the ultimate issue of custody modification; (3) that the family court abused its discretion by delegating its authority to the guardian ad litem; (4) that the family court abused its discretion by allowing its personal bias towards the Respondent Mother to interfere with its judicial responsibilities, thereby denying petitioner his due process rights to a fair and impartial trial under the State and Federal Constitutions; (5) that the guardian ad litem did not conduct an independent, balanced, and impartial investigation, well documented and supported by the facts, which allowed her bias in favor of the Respondent Mother to affect her custodial recommendation; (6) that the family court's in camera interview with the child constituted a fact finding inquiry not preserved in the record; (7) that the family court failed to order a psychological evaluation of the minor child for the purpose of determining whether said minor child had the intelligence and maturity to articulate his custodial preference and the rationale for his preference; and, (8) that the West Virginia Supreme Court of Appeals failed to clearly define and establish standards for the role of the guardian ad litem in this private custody case as is done in abuse and neglect proceedings.

“‘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).” Syl. Pt. 1, *Storrie v. Simmons*, 225 W.Va. 317, 693 S.E.2d 70 (2010). To begin, the Court finds no merit in petitioner’s first assignment of error, being that the circuit court refused to consider that the rights of the minor child take precedence over procedural rules. Petitioner cites no mandatory authority dictating that the circuit court should have disregarded prior precedent that an appellate court cannot consider for the first time issues not raised and ruled on below. Instead, he cites to case law from South Carolina to argue that the duty to protect the rights of a minor child takes precedence over procedural rules that otherwise limit the scope of review, and further urges this Court to consider his arguments *ex mero motu*. However, the Court declines to find error in the circuit court’s decision to deny ruling on issues not properly preserved below. This is especially true in light of the fact that petitioner argued in the circuit court that the guardian ad litem appointed for the family court proceeding was biased against him, yet failed to present evidence or challenge the guardian on the topic of any alleged bias. As such, the circuit court was correct to hold that it could not speculate as to certain events about which no testimony was presented.

The Court next addresses the fact that several other of petitioner’s alleged assignments of error concern issues that allegedly occurred during the pendency of the family court matter, but that petitioner failed to raise on appeal to the circuit court. This Court has held that “[i]n the exercise

of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.’ Syl. Pt. 1, *Mowery v. Hitt*, 155 W.Va. 103, 181 S.E.2d 334 (1971).” Syl. Pt. 4, *In re Richard P.*, 227 W.Va. 285, 708 S.E.2d 479 (2010). Upon review of the record, the Court finds that assignments of error numbers two, three, four, and six were not raised at the circuit court level, and, as such, this Court declines to review these issues. Further, the Court declines to address petitioner’s allegation that it has erred by failing to clearly define and establish standards for the role of guardian ad litem in private custody cases as is done in abuse and neglect proceedings.

As to assignments of error five and seven, the Court has carefully considered the merits of these arguments as set forth in the petition for appeal, and it has reviewed the record from the circuit court. The Court finds no error in the denial of petitioner’s petition for appeal to the circuit court, and fully incorporates and adopts, herein, the circuit court’s detailed order dated November 4, 2010. The Clerk of Court is directed to attach a copy of the same hereto.

For the foregoing reasons, we affirm the circuit court’s order.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

NOT PARTICIPATING:

Justice Margaret L. Workman