STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Sara Jane Workman (now Phelps),
Petitioner Below, Petitioner

vs.) No. 11-0795 (Greenbrier County 06-D-280)

Carl Samuel Workman, 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 Greenbrier County, wherein the circuit court denied petitioner's petition for appeal of the Greenbrier County Family Court's order granting, in part, and denying, in part, her petition to modify parenting plan. The appeal was timely perfected by counsel, Timothy R. Ruckman, with petitioner's appendix accompanying the petition. The respondent has filed a response by counsel, Alyson A. Dotson.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix 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.

On appeal, petitioner argues that the circuit court erred in affirming the family court's ruling modifying the parenting plan. Petitioner asserts that the modified plan fails to address in any meaningful fashion the fact that the child's paternal grandmother has assumed a custodial responsibility for the child in place of the Respondent Father, and also that the grandmother continues to interfere with the petitioner's parental rights, thereby causing conflict. Petitioner also argues that the circuit court erred by affirming the family court's adoption of the parenting plan because it does not address the conflict between the petitioner and the grandmother, it does not promote stability for the child, and is also not in the child's best interest. According to petitioner, the Respondent Father has relinquished his role as parent to his mother, who is not a part of the parenting plan approved by any court. Because of the constant conflict between the grandmother and petitioner, it would be in the child's best interest for the petitioner's proposed parenting plan to be approved and adopted in order to promote stability for the family. She further argues that this Court has admonished lower courts to focus on the factors contained in West Virginia Code § 48-9-102 in determining how to serve a child's best interests, and that the circuit court's decision does not promote these factors. *See Storrie v. Simmons*, 225 W.Va. 317, 693 S.E.2d 70 (2010).

In response, Respondent Father argues that the circuit court appropriately addressed the petitioner's concerns by developing a parenting plan that promoted the child's best interest by

maintaining the stability of shared parenting while instituting specific provisions to ensure the participation of the parties and reduce the conflict with the paternal grandmother and other third parties. Respondent argues that both the family court and the circuit court were presented with the evidence upon which petitioner now relies to argue that a substantial change in circumstances has occurred. After hearing that evidence, the family court instituted a plan approved by the guardian ad litem for the child, and the circuit court upheld the same upon review of that same evidence. As such, respondent argues that the family court's order does adequately address petitioner's concerns, and cites to the plan's elimination of contact between petitioner and the paternal grandmother, and the fact that the plan forces both parents to take a more active role in their child's upbringing. Respondent further argues that it is inaccurate for petitioner to state that anyone has confirmed that the grandmother has taken over his parenting responsibilities, as she merely assists with transportation and care at respondent's direction due to his erratic work schedule. Lastly, petitioner's request for modification was done out of her own interest in limiting her interaction with the paternal grandmother, not because of any negative impact upon the child. For these reasons, respondent argues that the circuit court's order should be affirmed.

"'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). The Court has carefully considered the merits of these arguments as set forth in the petition for appeal and in the response, and it has reviewed the appendix designated by the petitioner. The Court finds no error in the circuit court's denial of petitioner's appeal of the family court's order granting, in part, and denying, in part, petitioner's petition to modify parenting plan, and fully incorporates and adopts, herein, the circuit court's detailed order dated April 15, 2011. 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:
Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

NOT PARTICIPATING:
Justice Margaret L. Workman

11-0795

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

IN RE: THE MARRIAGE OF

SARA JANE WORKMAN (NOW PHELPS),
Petitioner/Appellant,

v. CIVIL ACTION NO: 06-D-280

CARL SAMUEL WORKMAN, JR.
Respondent/Appellee.

ORDER

Sara Phelps (hereinafter "Appellant") appeals a February 24, 2011, Order of the Greenbrier County Family Court, Special Judge Scott E. Elswick, which granted in part and denied in part the Appellant's Petition to Modify Parenting Plan.

The action came on for hearing before the Family Court on November 5, 2010. The Appellant appeared at the hearing in person and by her counsel, Timothy Ruckman. Carl Workman (hereinafter "Appellee") appeared at the hearing in person and by his counsel, Alyson A. Dotson. The Guardian ad LItem, Britt Ludwig, also appeared at the hearing.

The Appellant filed a Petition for Appeal on March 23, 2011. The Appellee filed a Response to Petition for Appeal on April 7, 2011.

As discussed below, this Court finds that the Appellant's Petition for Appeal should be denied.

Standard of Review

West Virginia Code § 51-2A-14(c) provides that findings of fact made by the family court judge are reviewed by the circuit court under the clearly erroneous standard and the application of law to the facts under an abuse of discretion standard. "A finding

is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Syl. pt. 1, *In re Elizabeth A.*, 217 W.Va. 197, 617 S.E.2d 547 (2005)(*quoting* Syl. pt. 1, *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)). "However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the [lower] court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.*

West Virginia Code § 51-2A-14(b) provides that the circuit court may only consider the record, which consists of the recording of the family court hearing and the exhibits, together with all documents filed in the proceeding. West Virginia Code § 51-2A-14(a) provides that the circuit court may refuse to consider the petition for appeal, may affirm or reverse the order, may affirm or reverse the order in part, or may remand the case with instructions.

Facts and Procedural History

The parties were granted an absolute divorce by Order dated December 18, 2006. One child was born to the parties. A Parenting Plan was entered by the Family Court on December 30, 2008. The Appellant filed a Petition for Modification of Parenting Plan on June 29, 2009. In her petition, the Appellant made several allegations. First, she asserted that the paternal grandparents had made disparaging remarks about her and used foul language in front of the child; that the child resides primarily at the home of his paternal grandparents when he is in his father's custody; the grandparents scheduled activities for the child while he would be in the custody of the Appellant; the paternal grandparents change his clothes after he leaves his mother's home and before he goes to school, and

that the paternal grandparents have behaved so inappropriately that they have been banned from her apartment complex. For these reasons, the Appellant asserted that it was in the child's best interest to find her the primary custodian of the child.

The Family Court appointed Brett Ludwig to act as Guardian ad Litem in this matter. The Guardian ad Litem submitted a report on February 12, 2010. In this report, the Guardian ad Litem recommended that the permanent parenting plan should be amended to allocate parenting time for specific holidays and vacations between the parties to avoid future difficulties. It was further recommended that the parenting plan should be amended to minimize the amount of interaction between the families. The Guardian ad Litem concluded that there was no reason why the parties should not continue to share parenting time with the child on a more or less equal basis.

The parties appeared before the Family Court on November 5, 2010. The Family Court heard testimony and received evidence. By Order of February 24, 2011, the Family Court determined that it was in the child's best interest to allocate custodial responsibility on an equal basis between the parents. However, the Family Court did make some modifications to the Parenting Plan. First, the Family Court determined that a holiday schedule should be established. Further, the Family Court ordered that the parties and not their designees should be responsible for attendance at parent-teacher conferences and medical appointments. Additionally, the Family Court found that the parties should reasonably accommodate the child's preference with regard to his participation in extra-curricular activities. Finally, the Family Court determined that the parties should create an account on OurFamilyWizard and should purchase a folder for

the child to allow for easier communication and transportation of documents between the parties.

Appellant's Argument

The Appellant asserts several grounds for appeal. The Appellant first argues that the Family Court erred in failing to address in any meaningful fashion the fact that the grandmother of the minor child has assumed custodial responsibility of the minor child in the place of the Respondent father and interfered with the parental rights of the Petitioner.

The Appellant further argues that the Family Court erred in adopting a parenting plan that does not address the conflict between the Petitioner and the paternal grandmother; does not promote stability for the minor child and is not in the best interest of the minor child of the parties.

Appellee's Argument

The Appellee asserts that the Family Court was not in error as the Court appropriately addressed the paternal grandmother's role in the minor child's life and adequately considered the same in developing a parenting plan that promoted the child's best interests.

The Appellee further argues that the Family Court followed the recommendation of the Guardian ad Litem concerning custodial responsibility of the child, as well as the paternal grandmother's role in the child's life.

Finally, the Appellee maintains that the Court's findings were not clearly erroneous based upon the evidence presented and there was no abuse of discretion in the Family Court's application of laws to the facts.

Analysis

The West Virginia Supreme Court of Appeals has held that there is a difficult balance which must be fashioned between the rights of the parent and the welfare of the child. As such, the Court has found that the paramount and controlling factor must be the child's welfare. In *David M. v. Margaret M.*, 182 W.Va. 57, 60, 385 S.E.2d 912 at 916 (1989), the Supreme Court held, "[A]ll parental rights in child custody matters are subordinate to the interests of the innocent child."

The Supreme Court of Appeals has further held:

> The Legislature finds and declares that it is the public policy of this state to assure that the best interest of the children is the court's primary concern in allocating custodial and decision-making responsibilities between parents who do not live together. In furtherance of this policy, the Legislature declares that a child's best interest will be served by assuring that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children, to educate parents on their rights and responsibilities and the effect their separation may have on children, to encourage mediation of disputes, and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or divorced. *Keith Allen A. v. Jennifer J.A.*, 200 W.Va. 736, 500 S.E.2d 552 (1997).

West Virginia Code § 48-9-401(a) provides in part:

> A court shall modify a parenting 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.

The Family Court's Final Order considered the report of the Guardian ad Litem, in which the guardian determined that the custodial responsibility should remain divided equally. Further, the Family Court determined that the parties were to be responsible for

attending medical appointments and other important conferences involving the child. This demonstrates the Court's understanding of the Appellant's issues with the paternal grandparents, who had previously attended appointments with the child. Additionally, the Family Court's Final Order demonstrates that the Family Court did take into consideration the communication issues that were raised by the Appellant in her Petition for Modification.

During the hearing on November 5, 2010, the Appellant acknowledged that prior to the parties' separation, they lived with their child in the home of the child's paternal grandparents. She further acknowledged that she knew that the Appellee lived at his parents' home after the parties' divorced and until he remarried approximately two years ago. Upon cross-examination by counsel for the Appellee, the Appellant stated that she was aware at the time of the agreed Parenting Plan that the child would reside at the paternal grandparents' home. As such, this Court cannot determine that there has been a substantial change in circumstances based upon the fact that the child stays at the paternal grandparents' home while in the custody of his father.

This Court cannot find that the Family Court was clearly erroneous or abused its discretion in its Final Order. There was evidence presented to justify the continuation of equal custodial responsibility, including the report of the Guardian ad Litem. The Family Court did take into consideration the Appellant's concerns regarding her problems with the child's paternal grandparents. As such, this Court must deny the Petition for Appeal.

Decision

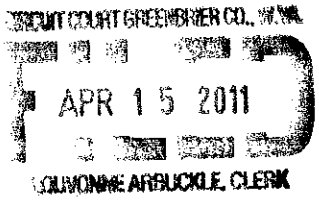
This Court has reviewed the record in this case, which consists of the recording of the family court hearing, together with all documents filed. This Court cannot find that

the Family Court was clearly erroneous or that it abused its discretion by Ordering the Petition for Modification granted in part and denied in part. As such, this Court must **AFFIRM** the Family Court Order and **DENY** the Petition for Appeal.

The Clerk of this Court is hereby **ORDERED** to forward a copy of this Order to counsel for each of the parties at their respective addresses of record.

Entered this 15th day of April, 2011.

James J. Rowe, Judge
Eleventh Judicial Circuit



A True Copy:
ATTEST:
Lavonne Arbuckle
Clerk Circuit Court
Greenbrier County, WV
C. Blue
Deputy