STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Joel K.,
Respondent Below, Petitioner

vs) No. 13-0407 (Harrison County 09-D-358-5)

Tina K.,
Petitioner Below, Respondent

FILED
March 28, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Joel K.[1] ("Husband"), by counsel Daniel R. Grindo, appeals the Circuit Court of Harrison County's "Order Affirming Decree of Divorce and Modifying Equitable Distribution Chart" entered on March 22, 2013. Respondent Tina K. ("Wife"), by counsel Gregory H. Schillace, filed a response.

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 circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

FACTS

Husband and Wife were married in 1994 and separated on or around June 28, 2009. They have two children born of the marriage, a son born in 1998 and a daughter born in 2000.[2] Wife petitioned for and was granted a divorce on the ground of irreconcilable differences by Decree of Divorce entered on April 30, 2012, by the Family Court of Harrison County.

Husband appealed the family court's order to circuit court. On March 22, 2013, the circuit court entered an "Order Affirming Decree of Divorce and Modifying Equitable Distribution Chart," wherein the circuit court affirmed the family court's determination that Wife's custodial time with the two children gradually increase from March 1, 2012, until

[1]Due to the sensitive nature of the facts in this case, we do not utilize the last names of the parties. *See State ex rel. W.Va. Dept. of Human Services v. Cheryl M.*, 177 W.Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987).

[2]The family court appointed a guardian ad litem to represent the interests of the two children.

September 3, 2012, at which time each party would share equal parenting time. Except for one modification related to royalties from mineral rights, the circuit court affirmed the family court's distribution of marital assets and debts. We address the lower courts' rulings with respect to custodial allocation and equitable distribution[3] as follows.

Custodial Allocation

The family court heard testimony from Dr. Edward Baker, who completed psychological examinations on both parties. He testified that he diagnosed Wife as having a personality disorder with borderline and histrionic features and alcohol abuse. With respect to Husband, he testified that he diagnosed him as having a personality disorder (not otherwise specified) with narcissistic and paranoid features. The family court found that

> [t]o place the children primarily in the care of one of their parents would not be in their best interest. The Court fears that if given a majority of the custodial time with the children, that either parent has the potential to cajole and manipulate the children in order to use them as pawns against the other.

The family court also heard from the children's counselor, who opined that the children's trepidation about being left unsupervised with Wife arises from the fact that there has been a long period of separation during the divorce proceedings. Wife testified that prior to the separation, she was primarily responsible for feeding, bathing, and disciplining the children, and that she was solely responsible for the children while Husband was deployed on active military duty. Husband did not testify to his caretaking responsibilities at any time. With these facts in mind, the family court determined that

> [i]t is in the best interests of the children for the Court to work toward a schedule to have frequent and continuing contact with both parents, which ultimately results in equal time with both parents. The need for the gradual increase in the amount of time that the children spend with [Wife] stems from the need to reconcile the children with their mother given the nearly three-year period of reduced custodial time that has taken place during the pendency of this action.

As the circuit court noted in its order affirming the allocation of custody, the family court devoted approximately seven pages of the Decree of Divorce to analyzing the best interests of the children. The family court cited several specific behaviors of each parent, the opinions of expert witnesses, and the recommendations of professional counselors, two of whom were witnesses called by the guardian ad litem. While the circuit court noted that Husband alleged that

[3]We note that the circuit court's order addresses property not specifically challenged by Husband in his appeal to this Court. The only items relevant to Husband's appeal with respect to the distribution of the marital estate are (1) the mineral rights; (2) the GE and NEOM stocks; (3) the Florida condominium; (4) the Ameriprise accounts; and (5) the USAA Credit Cards and checking account.

the family court "blatantly ignored" the recommendations of the guardian ad litem,[4] the circuit court found that the family court weighed those recommendations and based its decision on the evidence before it and what it deemed to be in the children's best interest. Accordingly, the circuit court ruled that Husband failed to show that the family court's decision to gradually increase Wife's parenting time to ultimately be equal to Husband's constituted an abuse of discretion.

Equitable Distribution of Marital Property

A. Mineral Rights

The family court ordered that mineral rights associated with the marital estate be divided equally. The circuit court did not disturb this ruling with respect to equal distribution of the mineral rights, but found that the family court's equitable distribution chart was incorrect with respect to the 2010 mineral rights. Specifically, the circuit court found that the 2010 mineral rights were included twice -- once under the heading "Mineral rights 2010," with $10,000 to Husband, and again under the heading "2010 oil and gas," with another $10,000 to Husband. The circuit court determined that the $10,000 associated with each of the years 2009, 2010, and 2011, on the chart related to royalty checks received by Husband during each of the years of the divorce action. Accordingly, the circuit court modified the family court's equitable distribution chart to more accurately reflect the family court's ruling that the mineral interests be divided equally, rather than allocating an additional $10,000 attributed to Husband. The modification reduced the "equitable distribution needed" under Husband's column by $5,000.

B. The Florida Condominium

The family court determined as follows regarding the Florida condominium:

> [E]ach of the parties is awarded a ½ interest in the marital portion of the Florida condominium.[5] The rights and obligations of the parties shall be preserved and subject to any underlying contracts involving the parties' rights and obligations with respect to that property. No credible evidence was presented at the hearing concerning the value of the Florida condominium and, accordingly, division in kind is the only viable option.

On appeal to circuit court, Husband claimed that he had made the payments on the condominium during the divorce proceedings and requested that the circuit court insert a provision requiring that each party pay one-half of the condominium expenses. The circuit court

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[4]The guardian ad litem recommended a more restrictive visitation schedule for Wife. Specifically, she recommended that Husband be the "sole custodian and primary decision maker for the children," and that Wife be allowed two hours of unsupervised contact per week and five hours of unsupervised contact on the day before or after a holiday.

[5]Husband and Wife owned a 50% interest in the condominium. Therefore, each received a 25% interest as a result of the divorce.

declined to address the issue of condominium expenses as it was not raised and presented before the family court.

C. The Ameriprise Accounts

The family court ruled that two Ameriprise accounts were marital property, despite Husband's assertion that they were his separate property. Specifically, the family court found:

> Although [Husband] argued that the accounts were separate property, the Ameriprise account documentation introduced as evidence at the final hearing did not prove the separate nature of the account. The documentation showed that [Husband] had a pre-marital condominium in Florida; that he wrote a check to Ameriprise for $264,000 on July 24, 2004; and that the two Ameriprise accounts in question existed as of the date of separation. The source of funds that were placed into the Ameriprise accounts on July 24, 2004 was not shown. July 24, 2004 [] was ten years into the marriage. Therefore, the court finds the accounts are marital. [Wife] is awarded the Ameriprise account ending in 8004. [Husband] is awarded the Ameriprise SPS account.

An Ameriprise representative testified that he did not have documentation to support Husband's assertion that he put separate property into the accounts. On appeal, the circuit court found that the family court did not abuse its discretion in its ruling that the accounts were marital property.

D. The GE and NEOM Stock

The family court awarded certain GE and NEOM stock to Husband and assigned their respective value in the equitable distribution chart. Husband argued to the circuit court that the GE stock was sold in 2006 and the NEOM stock is "virtually worthless." The circuit court determined that because the stocks were listed in "[Wife's] Proposed Equitable Distribution Plan" and her testimony as to the stock's value was not challenged by Husband, the family court did not abuse its discretion in including them in the equitable distribution.

E. The USAA Credit Cards and Checking Account

With respect to the USAA checking account first, the family court had previously ordered in 2009 that $7,500 be transferred from the account to Wife for payment of attorney fees. The family court's final distribution chart references a deduction of $7,500 from the same account for Wife's attorney fees. Husband contended on appeal to the circuit court that an additional $7,500 should have been deducted from the account, thereby reducing its value attributable to him, and a corresponding increase in $7,500 should have been attributed to Wife. The circuit court rejected his argument and found that the reference in the family court's chart was simply to the 2009 award of fees, not an additional award. Accordingly, the circuit court did not amend the chart as Husband requested.

Concerning the USAA credit cards, the family court ruled that all of the credit cards owned by the parties as of their separation were marital. The equitable distribution chart showed two cards with a debt amount of $3,641.00 assigned to Wife. Husband contended on appeal to the circuit court that the evidence proved that he paid off that debt as of the date of the final divorce hearing and he should have been credited for that payment. Wife disputed Husband's payment of the credit card debt before the family court and argued that the time period to evaluate the debt is at separation. The family court assigned the amount to Wife, and on appeal, the circuit court found no abuse of discretion in that ruling given the disputed testimony.

Husband now appeals the circuit court's order to this Court, and raises two assignments of error. First, he argues that the circuit court erred in its allocation of custodial responsibility. Second, he argues the circuit court erred in its distribution of marital debts and assets.

DISCUSSION

Our standard of review for this appeal 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.*" Syl., *Carr v. Hancock,* 216 W.Va. 474, 607 S.E.2d 803 (2004).

Syl. Pt. 1, *Melinda H. v. William R. II,* 230 W.Va. 731, 742 S.E.2d 419 (2013). "[F]indings of fact made by a trial court in a divorce proceeding based on conflicting evidence will not be disturbed unless they are clearly wrong or are against the preponderance of the evidence." *Sellitti v. Sellitti,* 192 W.Va. 546, 551, 453 S.E.2d 380, 385 (1994).

With regard to the allocation of custody, Husband agrees that there has been significant turmoil between the parties preceding and during the divorce proceeding below. Husband contends that the lower court should have followed the recommendation of the guardian ad litem, and not awarded Wife equal parenting time, as doing so was not in the best interests of the children. The record demonstrates the family court received and considered substantial input from the guardian ad litem. However, the record also demonstrates that the family court heard testimony from several expert witnesses, two of whom were called to testify by the guardian ad litem. Based on all of the evidence presented, including the diagnoses of each parent, the family court determined that the best interests of the children would be served by gradually increasing Wife's custodial time until each party shares equal parenting time. The family court is not obligated to follow the guardian ad litem's recommendations and is free to give whatever weight and credibility it chooses to her report and testimony. *See Storrie v. Simmons*, 225 W.Va. 317, 326, 693 S.E.2d 70, 79 (2010). Moreover, we cannot agree with Husband that the lower court disregarded the best interests of the children. Given the testimony concerning the negative behaviors of both parties, we are hard-pressed to find an abuse of discretion in the lower court's allocation of equal custodial time to each parent.

Turning to the distribution of the marital property, our review of the record reflects no clear error or abuse of discretion by the circuit court. Having reviewed the circuit court's "Order Affirming Decree of Divorce and Modifying Equitable Distribution Chart" entered on March 22, 2013, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to Husband's second assignment of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 28, 2014

CONCURRED IN BY:

Chief Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

IN RE: THE MARRIAGE AND CHILDREN OF:
Tina M[redacted]K[redacted]

Petitioner,

v. Civil Action No. 09-D-358-5

Joel W[redacted]K[redacted]

Respondent.

Order Affirming Decree of Divorce and Modifying Equitable Distribution Chart

Pending before the Court is a petition for appeal, filed by Respondent Joel W[redacted]K[redacted] The Court held a hearing on the petition for appeal on September 21, 2012. Petitioner appeared at the hearing in person and through counsel Afton L. (Hutson) Aman and Jamison H. Cooper. Respondent appeared in person and through counsel James Wilson Douglas. Mary Elizabeth Snead, Esq., guardian ad litem ("GAL") for the children, also appeared at the hearing.

Upon request of Respondent's counsel, the Court took judicial notice of the Family Court orders from the underlying proceedings. After conducting the aforementioned hearing on September 21, 2012; reviewing the Decree of Divorce, entered April 30, 2012, the video/discs from the Family Court proceedings on October 11 and 13, 2011, and the record; and analyzing pertinent legal authority, the Court concludes that the Family Court's Decree of Divorce should be **AFFIRMED** but the equitable distribution chart should be **MODIFIED.**

Procedural History

The parties were married to each other on July 27, 1994. They separated on June 28, 2009. Petitioner filed a Petition for Divorce in the Family Court of Harrison County, West Virginia, on July 10, 2009. On April 30, 2012, the Family Court entered a Decree of Divorce, with attached exhibits, including an equitable distribution chart marked as Exhibit A. Respondent filed a petition for appeal on May 18, 2012, asserting errors with the Family Court's rulings with regard to custodial allocation, equitable distribution, and child support.

On May 25, 2012, this Court entered an "Order Granting Motion for Stay in Part and Denying Motion for Stay in Part and Scheduling Hearing on Appeal," pursuant to 50 U.S.C. App. § 522 ("Stay of proceedings when servicemember has notice"). This federal statute requires a court to enter a stay of proceedings for at least 90 days upon proper application by a servicemember. The Court also found good cause to justify not entering a timely final order under Rule 34 of the West Virginia Rules of Practice and Procedure for Family Court. The Court found good cause due to Respondent's active military status until August 15, 2012, and Respondent's pending motion to reconsider in Family Court, which was scheduled to be heard on August 27, 2012. An "Agreed Order Withdrawing Motion for Reconsideration" was filed on March 8, 2013.[1] Accordingly, the Court now has jurisdiction to rule on the petition for appeal.

[1] Upon discovering the pending motion for reconsideration in Family Court, this Court entered an order finding that it did not have jurisdiction to rule on the petition for appeal until the motion to reconsider had been formally withdrawn or ruled on by the Family Court. See syl. pt. 7, in part, Burton v. Burton, 223 W. Va. 191, 672 S.E.2d 327 (2008) (internal citation omitted) ("A motion for reconsideration filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal."). The order withdrawing Respondent's motion for reconsideration was subsequently filed on March 8, 2013.

The hearing on the petition for appeal was originally set for September 19, 2012; however, on September 18, 2012, upon motion by Petitioner, the Court rescheduled the hearing for September 21, 2012.[2]

Standard of Review

West Virginia Code § 51-2A-14(a) provides that "[t]he 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 for further hearing before the family court judge." The standard of review of findings of fact made by the family court is clearly erroneous and the standard of review for the application of the law to the facts is an abuse of discretion standard.

Discussion

Petitioner raises several allegations of error in the Decree of Divorce. The Court will address each of these allegations below. Any allegation raised on appeal that is not specifically addressed in this order is either within the sound discretion of the Family Court or is a harmless error.

I. Custodial Allocation

The Court reviewed the video of the final divorce hearing in its entirety and considered each of the following allegations of error regarding the Family Court's findings and conclusions surrounding custodial allocation. The Court **FINDS** that the Family Court did not abuse its discretion in determining that, based on the children's best interest, Petitioner's custodial time with her children should

[2] This Court also held a hearing on February 20, 2013, on a "Motion for Leave to Withdraw," filed by James Wilson Douglas, counsel for Respondent. The Court granted Mr. Douglas's request to withdraw as counsel for Respondent by order entered on March 19, 2013.

gradually increase from March 1, 2012, through September 3, 2012, at which time the children were to begin spending equal time with their parents.

1. A family court is free to give whatever weight and credibility it chooses to the GAL's report and recommendations.

On July 23, 2009, by order of the Family Court of Harrison County, West Virginia, Mary Elizabeth Snead was appointed as GAL to represent the interest of the parties' two minor children. Ms. Snead filed a GAL Report on December 16, 2010, and an addendum to the report on October 21, 2011. Ms. Snead was present during the final divorce hearing and participated in the proceedings.

In the Decree of Divorce, the Family Court devotes approximately seven pages to analyzing what is in the best interest of the children. In establishing a parenting plan, the Family Court cites specific behaviors of both parents, the opinions of expert witnesses, and the recommendations of professional counselors. Two of these witnesses--Dr. Edward Baker, a clinical psychologist, and Nancy Rush, a court-appointed therapist--were called as witnesses by Ms. Snead. Furthermore, in the Decree of Divorce, the Family Court commends the GAL for her extensive service in the underlying divorce proceedings and for agreeing to continue her services *pro bono*.

Respondent contends that "the Family Court blatantly disregarded the GAL's report and recommendations." However, it is apparent from a review of the record that the Family Court received and considered substantial input from the GAL during the lengthy and complex divorce proceedings.

Furthermore, the Family Court is not obligated to follow the GAL's recommendations and is free to give whatever weight and credibility it chooses to such report and testimony. n. 6, Storrie v. Simmons, 225 W. Va. 317, 326, 693 S.E.2d 70, 79 (2010). On appeal, this Court may only consider whether the Family Court's findings of fact were clearly erroneous or whether it abused its discretion in applying West Virginia Code § 48-9-403. Accordingly, this allegation of error has no merit.

2. The Family Court's findings of fact regarding the parties' behavior, as demonstrated in the June 28, 2009, video are not clearly erroneous and the Family Court did not abuse its discretion in applying the law to these facts.

A 2009 incident at the parties' marital home, which occurred in the presence of the minor children, was mentioned by nearly every witness at the final divorce hearing. This incident was videotaped and presented as evidence by Respondent. In the petition for appeal, Respondent defends his decision to videotape the incident.

The Court acknowledges that the behavior exhibited in the video by both parties received a great deal of attention during the final divorce hearing and by the Family Court in the Decree of Divorce. However, the Court **FINDS** that, in the petition for appeal and at the hearing before this Court, Respondent did not present any argument as to why the Family Court's findings regarding the video recording of the June 28, 2009, incident are clearly erroneous or how the Family Court abused its discretion in applying the law to these facts.

3. The Family Court's findings of fact regarding Petitioner's caretaking role between June 28, 2007, and June 28, 2009, were not clearly erroneous.

Respondent argues that there was no evidence presented to the Family Court that Petitioner was the primary caretaker during the two-year period prior to the parties' separation. However, at the final divorce hearing, Petitioner testified that she was primarily responsible for feeding, bathing, and disciplining the children prior to the parties' separation and that she was solely responsible for parenting during periods when Respondent was deployed on active military duty. These are all proper factors for a court to consider when determining which parent is the "primary caretaker." See syl. pt. 3, David M. v. Margaret M., 182 W. Va. 57, 385 S.E.2d 912 (1989). On the other hand, Respondent did not testify as to his caretaking responsibilities at any time. In addition, Julie Love, whose children are close in age to the parties' children, testified that both Petitioner and Respondent were involved with their children's extracurricular activities prior to separation. Therefore, the Court **FINDS** that the Family Court's findings of fact were not clearly erroneous.

4. The Family Court did not abuse its discretion with regard to its findings and conclusions surrounding Petitioner's behavior, Petitioner's psychological diagnoses, and the best interest of the children.

In the petition for appeal, Respondent highlights that Petitioner's limited parenting time during the pendency of the proceedings was due to "Petitioner's abuse, drinking, etc[.] and the recommendations of the GAL." Respondent further contends that "[t]he Family Court puts great emphasis in her Order on the fact that the Petitioner has had limited parenting time with the minor children, and

Judge Jackson infers in said Order that the reason therefor was the conflict between the parties." Respondent also asserts that the Family Court "gives little mention of the Petitioner's alcohol abuse and Borderline Personality Disorder diagnosis," highlights that Dr. Baker's testimony corroborated these diagnoses, and contends that a court is not free to arbitrarily disregard unrefuted expert testimony.

As Respondent stated in the petition for appeal, during the three years of the divorce proceedings, the Family Court substantially limited Petitioner's parenting time, particularly in the early months of the proceedings, due to her issues with alcohol. The Court also notes that there was a great deal of evidence presented at the final divorce hearing regarding **both parties' personality disorders and diagnoses**.

The Family Court discussed these diagnoses in the Decree of Divorce, relying primarily on the testimony of Dr. Baker, who completed psychological examinations on both of the parties. Other expert witnesses and therapists testified about their respective diagnoses, treatment, and recommendations regarding the parties and their children, including two rebuttal witnesses called by Petitioner. Finally, Petitioner also testified regarding her own treatment and improvement.

The Court **FINDS** that the Family Court considered and addressed all of this evidence in the Decree of Divorce and established a parenting plan based on the best interest of the children. The Court **FURTHER FINDS** that Respondent

failed to show how the Family Court abused its discretion in making its determination.

5. The Family Court based its decision on the best interest of the children.

In the petition for appeal, Respondent contends that "the Court is not free to disregard the stability, general welfare and best interests of the minor children." The Court **FINDS** that the Decree of Divorce repeatedly refers to the best interest of the children in determining custodial allocation, and Respondent failed to provide any argument as to how the Family Court abused its discretion.

In addition, Respondent argues that the children's preferences should be considered. As of the date of the final divorce hearing, the minor children were thirteen and eleven years old. Neither child testified during the final divorce hearing; however, their interests were represented through their court-appointed GAL, Ms. Snead, who has been actively involved with the children since their parents' divorce proceedings commenced in 2009. Furthermore, according to testimony presented to the Family Court, in the past, the children were given some say regarding the amount of visitation with their mother. In fact, the children were free to contact Kim Haws, Nancy Rush, or Ms. Snead if they wished to increase visitation time with their mother. The children did, in fact, request a couple more hours per week in visitation on one occasion prior to the final divorce hearing and this request was granted.

6. The Family Court did not abuse its discretion in ordering the removal of the interlock device from Petitioner's vehicle because, under West Virginia law, Respondent was not eligible to participate in the program in the first place.

Harrison County Family Court Judge Cornelia Reep ordered the installation of an interlock device in Petitioner's vehicle. In December 2010, the underlying matter was transferred from Family Court Judge Reep to Family Court Judge Jackson. Around the same time that the case was transferred, Petitioner removed the interlock device from her vehicle. By order entered April 26, 2011, Judge Jackson ordered Petitioner to cause an interlock device to be reinstalled in her vehicle as soon as possible after April 4, 2011. It appears that the interlock device remained in Petitioner's vehicle until the Decree of Divorce was entered on April 30, 2012, at which time Family Court Judge Jackson ordered the immediate removal of the interlock device. Respondent challenges the removal of the device because, according to Respondent, the circumstances that led to the installation of the device have not changed.

First, West Virginia Code § 51-2A-2 sets forth various matters over which family courts exercise jurisdiction and makes clear that family courts are courts of limited jurisdiction. Furthermore, West Virginia Code § 17C-5A-3a established a Motor Vehicle Alcohol Test and Lock Program for specific eligible participants, namely, "for persons whose licenses have been revoked pursuant to this article or the provisions of article five of this chapter or have been convicted under section two, article five of this chapter, or who are serving a term of a conditional probation pursuant to section two-b, article five of this chapter." W. Va. Code §

17C-5A-3a(a)(1). W. Va. Code § 17C-5A-3a(b) also addresses eligibility to participate in the program.

The Court **FINDS** that, under these provisions, Petitioner, a party in a divorce proceeding whose license was never revoked, was not an eligible person to participate in the program; accordingly, the Family Court did not have authority to order the installation of the interlock device in Petitioner's vehicle. To be clear, the Family Court judges abused their discretion in ordering the installation of the interlock device; the removal of the device was not an abuse of discretion.

7. The Family Court did not abuse its discretion by ordering that Petitioner have custody of the children during Respondent's periods of deployment.

Respondent challenges the Family Court's ruling that Petitioner have custody of the children if Respondent is deployed for a period of 72 hours or longer because, according to Respondent, such ruling is not in the best interest or general welfare of the children. As support, Respondent cites Petitioner's alcohol abuse, Borderline Personality Disorder diagnosis, and the recommendations of the children's counselors and GAL. Accordingly, Respondent requests that the deployment provision be modified to provide that, if Respondent is deployed overseas, then the children shall reside with Respondent's designated alternative caretaker, continue their court-ordered counseling requirements, and maintain frequent contact with the GAL.

The exercise of discretion by the Family Court in awarding custody of the minor children will not be disturbed on appeal unless that discretion has been abused. "A parent has the natural right to the custody of his or her infant child

and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty . . . the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syl. pt. 7, In re Antonio R. A., 228 W. Va. 380, 719 S.E.2d 850 (2011) (citing syl., Whiteman v. Robinson, 145 W. Va. 685, 116 S.E.2d 691 (1960)). The Court has already addressed the best interest of the children in section 5 above and there has been no finding that Petitioner is an unfit person or parent. Accordingly, the Court FINDS that the Family Court did not abuse its discretion.

8. The Family Court did not abuse its discretion by ordering that the parties share equally in custodial responsibilities.

Respondent contends that insufficient evidence was presented during the divorce hearing for the Family Court to order a "50/50 parenting plan" and that the Family Court incorrectly determined that "the children would be subjected to nothing short of brainwashing tactics by the Party designated as the residential parent."

The Court assumes that Respondent is referring to paragraph 16 of the Decree of Divorce, which states as follows:

> To place the children primarily in the care of one of their parents would not be in their best interest. The Court fears that if given a majority of the custodial time with the children, that either parent has the potential to cajole and manipulate the children in order to use them as pawns against the other.

As previously stated, the exercise of discretion by the Family Court in awarding custody of the minor children will not be disturbed on appeal unless that discretion has been abused. Upon review of the lengthy divorce hearing, it is clear that there was sufficient evidence presented for the Family Court to order a

gradual increase in Petitioner's parenting time, ultimately culminating in a 50/50 parenting plan by September 2012. In addition, the Family Court's concern "that either parent has the potential to cajole and manipulate the children in order to use them as pawns against the other" was supported by the expert testimony of Dr. Baker, who completed psychological examinations on both parties.

9. The Family Court's requirement that each child call the non-custodial parent each night before bedtime is a moot issue.

In the petition for appeal, Respondent challenges the Family Court's ruling that each child must make a nightly telephone call to the non-custodial parent ten minutes prior to bedtime because the requirement is overly burdensome and restrictive. This assignment of error is moot because the Family Court ordered that the Decree of Divorce be modified to exclude the non-custodial telephone call requirement in the "Order Following Hearing on Petition for Contempt," entered on September 14, 2012.

II. Equitable Distribution

Preliminarily, the Court notes that the Supreme Court of Appeals of West Virginia has "consistently indicated that findings of fact made by a trial court in a divorce proceeding based on conflicting evidence will not be disturbed unless they are clearly wrong or are against the preponderance of the evidence." Sellitti v. Sellitti, 192 W. Va. 546, 551, 453, S.E.2d 380, 385 (1994).

1. Mineral Rights

In paragraph 39 on page 12 of the Decree of Divorce, the Family Court

ordered that the mineral rights associated with the marital estate be divided equally and for the parties to provide each other with pertinent documentation regarding the mineral rights.

Respondent argues that the Family Court erred in including the 2009 and 2011 oil and gas rights in the equitable distribution chart because, according to Respondent, the 2009 rights were already divided between the parties prior to the separation and the 2011 oil and gas rights do not exist because the three-year contract ran from 2008-2010, therefore, there are no mineral rights to divide.

Petitioner asserts that Respondent did not pay Petitioner for her share of the mineral rights in 2010 because Respondent testified before the Family Court that he paid Petitioner's share to her as court-ordered support payments.

The Court **FINDS** that the Family Court's equitable distribution chart, attached to the Decree of Divorce, is incorrect with regard to the 2010 mineral rights. These rights are included as "Mineral rights 2010," with $10,000.00 to Respondent, and then again as "2010 oil and gas," which again credits Respondent with $10,000.00. In paragraph 39 of the Decree of Divorce, the Family Court ordered that the mineral interests associated with the marital real estate be divided equally between the parties. However, the $10,000.00 associated with each of the years 2009, 2010, and 2011 on the equitable distribution chart relates to royalty checks received by Respondent during each of the years of the divorce action.

Accordingly, the Court **ORDERS** that the equitable distribution chart be modified with regard to "Mineral rights 2010." First, the language "Mineral rights

2010" should be replaced with "Mineral interests in marital real estate." Second, based on the language in the Decree of Divorce, which orders that the mineral interests be split 50/50, the mineral interests should be divided in kind, rather than as an additional $10,000.00 attributed to Respondent. The language in the Decree of Divorce controls over the equitable distribution chart. This modification reduces the "equitable distribution needed" under "Husband's" column by $5,000.00. These modifications are reflected in the attached amended equitable distribution chart.

As for the other allegations of error, the Court cannot find that the Family Court abused its discretion based on the evidence presented at the final divorce hearing. Specifically, the Court **FINDS** that there was no evidence presented to the Family Court that the mineral rights associated with the marital estate only ran from 2008 to 2010 or that the payments were made to Petitioner. Respondent's 2010 tax return shows the $10,000.00 royalty payment for the oil and gas.

Furthermore, the Family Court is the proper court to address whether Respondent paid Petitioner her share of the 2010 minerals or, as Respondent testified at the Family Court hearing, whether he paid Petitioner her share as court-ordered support payments. However, the Court notes that, pursuant to W. Va. Code § 48-2-32(c), which was recodified in 2001 as § 48-7-103, "the portion of the marital distribution statute which governs the distribution of assets in cases such as the present one, does not state that temporary alimony payments can be offset against marital assets." Sellitti v. Sellitti, 192 W. Va. at 549, 453 S.E.2d at

383. Therefore, Respondent's assertion that Petitioner's share of the 2010 mineral rights were paid to Petitioner as court-ordered support payments is contrary to law.

2. Florida Condominium

In paragraph 41 on page 13 of the Decree of Divorce, the Family Court ordered the following with respect to the currently-owned Florida condominium:

> each of the parties is awarded a 1/2-interest in the marital portion of the Florida condominium. The rights and obligations of the parties shall be preserved and subject to any underlying contracts involving the parties' rights and obligations with respect to that property. No credible evidence was presented at the hearing concerning the value of the Florida condominium and, accordingly, division in kind is the only viable option.

The Decree of Divorce gives each party a 25% share in the condominium; however, it does not specifically address who is to pay the expenses associated with the condominium moving forward. In the petition for appeal, Respondent argues that he has made the payments associated with the Florida condominium throughout the divorce proceedings and asks that a provision be added to the Decree of Divorce requiring each party to pay half of those expenses. The Court **FINDS** that the issue of condominium expenses was not raised before the Family Court and is not an appealable issue.

3. Ameriprise Accounts

In paragraph 45 on page 13, the Family Court ordered that the Ameriprise accounts ending in 8004 and 7021 are marital property:

> Although Respondent argued the accounts were separate property, the Ameriprise account documentation introduced as evidence at the final hearing did not prove the separate nature of the account. The documentation showed that Respondent had a pre-marital condominium in Florida; that he wrote a check to Ameriprise for $264,000 on July 24,

> 2004; and that the two Ameriprise accounts in question existed as of the date of separation. The source of funds which were placed into the Ameriprise accounts on July 24, 2004 was not shown. July 24, 2004[ ] was ten years into the marriage. Therefore, the Court finds the accounts are marital. Petitioner is awarded the Ameriprise account ending in 8004. Respondent is awarded the Amerprise SPS account.

On appeal, Respondent argues that he presented evidence that a portion of the 8004 account is his separate property.

"The party seeking to exclude property from the marital estate that is presumptively marital property, has the burden of persuasion on that issue." Syl. pt. 4, in part, Mayhew v. Mayhew, 205 W. Va. 490, 519 S.E.2d 188 (1999).

During the divorce hearing, Respondent testified that $50,000.00 of the 8004 account was funded from the sale of a condominium that Respondent acquired prior to marriage and another $50,000.00 came from a separate account that was set up for Respondent when he was a child. Respondent also testified that he has not added funds to the accounts since opening them in 2001.

In addition to the Family Court's explanation of the evidence presented during the divorce hearing, the Court notes that Kyle Walker, the Ameriprise financial advisor for these accounts, testified that he did not recall whether Mr. K[redacted] brought any accounts with him when the K[redacted]s opened the Ameriprise accounts. Mr. Walker also stated that he did not have any documents or notes in front of him to support Respondent's assertion that he put separate property into the accounts. Thus, some documents regarding the accounts were not admitted by the Family Court because Kyle Walker, who entered the information on such documents, could not authenticate them. Accordingly, the Court **FINDS** that the Family Court did not abuse its discretion in finding that the two Ameriprise

accounts in question are marital because Respondent did not meet his burden to prove that the accounts were his separate property.

4. Hawaii Timeshare

Respondent requests that he be given a Conrad credit for $1,600.00 (i.e., $400.00 each year for the four years since the date of separation) that he paid in fees associated with the timeshare. In response, Petitioner cites to the "K[redacted] Spreadsheet Financials," which was a part of "Respondent's Second Voluntary Disclosure," filed on September 19, 2011. On the first page of the "K[redacted] Spreadsheet Financials," which includes information from the date of separation through October 2011, Respondent includes "Timeshare HI" for 2009 and 2011 in a section that states, "[t]his section annotates expenses I paid from a joint account so they are not credits to me." Thus, Respondent admitted that he paid timeshare expenses for 2009 and 2011 from a joint account. Furthermore, Respondent failed to present any other evidence regarding such expenses during the final divorce hearing. Therefore, the Court **FINDS** that Respondent has failed to prove that the Family Court abused its discretion and there are no credits due to him.

5. GE and NEOM Stock

In paragraph 48 on page 14, the Family Court awarded the stock held in GE and NEOM to Respondent and assigned a value to those shares in the equitable distribution chart. On appeal, Respondent contends that the GE stock was sold in 2006 prior to the parties' separation "and that the NEOM stock has been rendered virtually worthless." Respondent argues that, because there was

no evidence presented at the final divorce hearing regarding the current value or the existence of these two stocks, the stock should be deleted from the equitable distribution chart.

In response, Petitioner argues that the stock was listed on financial statements that were submitted to the Family Court prior to the final hearing. Furthermore, Petitioner argues that she testified regarding the value of the stock at the final hearing and this testimony was not challenged by Respondent.

The values of the GE and NEOM stocks are listed in "Petitioner's Proposed Equitable Distribution Plan." Based on this document and Petitioner's unrefuted testimony at the final divorce proceeding, the Court **FINDS** that the Family Court did not abuse its discretion.

6. Four-Wheeler

In paragraph 49 on page 14, the Family Court awarded Respondent exclusive ownership, use, and possession of the four-wheeler, along with its $1,000.00 value. Respondent asserts that the four-wheeler was purchased by him after the parties' separation and is, therefore, separate property. Accordingly, Respondent asks that the $1,000.00 value attributed to the four-wheeler be deleted from the equitable distribution chart. Petitioner highlights that Respondent did not testify to this during the divorce hearing and even submitted a personal property appraisal for the four-wheeler.

According to testimony before the Family Court, the four-wheeler was purchased in 2006 while the parties were temporarily separated. The parties reconciled and remained together until 2009. Furthermore, the four-wheeler was

not listed on the appraisal of the personal belongings of Joel K[redacted]; however, the Family Court appears to have taken the $1,000.00 value from "Respondent's Proposed Equitable Distribution Plan" and "Respondent's Proposed Financial Stipulations," which were filed as exhibits in the underlying matter. Accordingly, the Court **FINDS** that, on appeal, Respondent cannot complain of an error he may have created. Respondent listed the four-wheeler on his proposed equitable distribution plan and the Family Court considered it marital property.

7. Ford F-150

In paragraph 49 on page 14, the Family Court awarded Respondent exclusive ownership, use, and possession of the Ford F-150, along with its $18,723.00 value and $12,000.00 debt. Respondent argues that the evidence elicited during the Family Court hearing supports that the Ford F-150 is a leased vehicle and does not, therefore, have any attributable value to Respondent. Petitioner provided no response to this argument.

The Court agrees with Respondent that there is no equity in a leased vehicle. However, Respondent did not present any evidence to the Family Court that the truck was leased. In fact, the Family Court appears to have taken the figures for the value and debt on the vehicle from "Respondent's Proposed Equitable Distribution Plan" and "Respondent's Proposed Financial Stipulations," which were filed as exhibits in the underlying matter. Petitioner also testified to the same value of the vehicle according to Kelly Blue Book. Accordingly, the Court **FINDS** that Respondent is arguing contrary to the facts that he presented to the Family Court.

8. Navy Federal Credit Union Account

In paragraph 54 on page 15, the Family Court awarded Respondent exclusive ownership, use, and possession of the Navy Federal Credit Union ("FCU") account. On appeal, Respondent asserts that the Navy FCU account is the account attributable to the Florida condominium, in which the parties own a 50% marital share. Therefore, Respondent requests that the value attributed to Respondent (i.e., $708.16 as of 9/28/09, according to the testimony elicited during the Family Court hearing) on the equitable distribution chart should be cut in half (i.e., $359.00) because Petitioner and Respondent each own a 25% share in the condominium.

In response, Petitioner argues that Respondent failed to present any evidence of the account being associated with the condominium at the final divorce hearing. Regardless, Petitioner asserts that this account was owned by Respondent during the course of the marriage and that the Family Court's treatment of the account for equitable distribution purposes was appropriate.

The Court **FINDS** that Respondent failed to present any evidence of the account being associated with the condominium at the final divorce hearing; accordingly, this argument is not supported by the record.

9. Bank of America, Disney, and Chase Credit Cards

The Family Court found that all credit cards owned as of the date of separation, and the debt thereon, were marital. In paragraph 59 on page 16 of the Decree of Divorce, the Family Court judge found that "Respondent argued that some portion of that debt should have been attributed solely to Petitioner,

but he did not present sufficient evidence to overcome the presumption that credit card debt existing as of the date of separation is marital." The Family Court also explained its reasoning in paragraph 60 in the Decree of Divorce.

On appeal, Respondent argues that he presented "unrefuted evidence" that Petitioner continued using the above-stated credit cards after the date of separation and that such debt should have been classified as the separate debt of Petitioner.

The debt that Respondent alleges that Petitioner accumulated after separation is in reference to a prior temporary separation in 2006 and not the final separation that ultimately culminated in the underlying divorce proceeding. Based on the evidence presented to the Family Court, the parties reconciled following their initial separation in December 2006 and remained together until June 28, 2009, the date of separation. Respondent also testified that he became aware of the debt after the couple reconciled.

However, Petitioner did admit to putting $3,000.00 on a credit card on August 18, 2009, for attorney fees after the parties separated on June 28, 2009. Therefore, the Court FINDS that $3,000.00 of the debt should be attributed to Petitioner as her separate property. The amended equitable distribution chart, attached to this order, reflects the $3,000.00 adjustment.

10. USAA Checking Account

Respondent listed the value of the USAA checking account at separation at $33,492.00. In its September 8, 2009, order, the Family Court ordered that Petitioner receive $7,500.00 in attorney fees from the USAA checking account,

thereby, leaving a balance of $25,992.00, which is the value listed on the Family Court's equitable distribution chart.

In paragraph 51 on page 15 of the Decree of Divorce, the Family Court awarded Petitioner $7,500.00 from the USAA checking account, "which Respondent shall immediately transfer to her," and the remainder of the balance was awarded to Respondent. Respondent argues that, if Petitioner is to receive an additional $7,500.00 from the account, then the remaining balance should be reduced, leaving $18,492.00. Thus, Respondent requests that the equitable distribution chart, which is attached to the Decree of Divorce, list the value attributable to Respondent as $18,492.00, not $25,992.00, and the value to Petitioner as $15,000.00, not $7,500.00.

Petitioner did not respond to this argument in her "Reply to Equitable Distribution Issues Contained in Petition for Appeal."

According to the equitable distribution chart, the $7,500.00 referred to in paragraph 51 on page 15 is referring to the attorney fees that Petitioner was to receive from the USAA checking account in 2009 and is not an additional $7,500.00 payment to Respondent from the account. Therefore, the Court **FINDS** that the values attributed to each of the parties in the equitable distribution chart is correct.

11. USAA Credit Cards

In the Decree of Divorce, the Family Court held that all of the credit cards

owned by the parties as of the date of separation were marital. In the equitable distribution chart, the Family Court listed two USAA credit cards in Petitioner's column with debt in the amount of $3,641.00.

Respondent argues that the evidence presented to the Family Court showed that the two credit cards had already been paid off by Respondent as of the time of the final divorce hearing; therefore, Respondent requests that the $3,641.00 debt listed in Petitioner's column be moved to Respondent's column so as to properly credit Respondent with the payments that he made towards the USAA credit cards.

In response, Petitioner argues that no evidence was presented at the divorce hearing regarding these payments and that the relevant time period to evaluate the debt is the date of separation. Based on the conflicting testimony presented during the final hearing, the Family Court decided to assign the debt to Petitioner. The Court **FINDS** that the Family Court did not abuse its discretion.

III. Child Support and Alimony

Respondent argues that the Family Court should have made two child support calculations: one with Respondent paying alimony and one without. The Court **FINDS** that Respondent can petition the Court for a change in child support when he begins paying alimony to Respondent and that the parties can adjust support payments at that time based on their incomes, which is explained by the Family Court in paragraph 35 on page 11 of the Decree of Divorce.

The Court is compelled to respect the sound discretion of the Family Court with regard to its findings and conclusions. The Court is not permitted to overturn

a finding simply because it would have decided the case differently and the ultimate guidance in cases of this nature is derived from an evaluation of the best interest of the child.

Orders

The Court **ORDERS** that the Decree of Divorce is **AFFIRMED.** However, the Court **FURTHER ORDERS** that the equitable distribution chart is modified to correct the clerical errors, as follows:

(1) By deleting "Mineral rights 2010" and substituting therein "Mineral interests in marital real estate," which is to be divided in kind;

(2) By reducing the total amount in Husband's column by $10,000.00 because this monetary value was incorrectly attributed to both "Mineral rights 2010" and "2010 oil and gas;" and

(3) By reducing the equalizing equitable distribution payment to be paid by Respondent to Petitioner from $23,251.65 to $15,251.65, after the correction of the $3,000.00 adjustment for Petitioner's separate credit card debt and the aforementioned mineral interests.

The Court **FURTHER ORDERS** the parties and counsel to be mindful of their obligations to see that the appropriate documents are prepared to transfer any real estate and/or mineral interests by deeds and to establish the qualified domestic relations order on any pension-related assets.

The Court **FURTHER ORDERS** that neither party nor anyone associated with this matter shall be permitted to disclose to any third-parties any documentary, audio, visual, or testimonial information regarding issues

associated with this action, including but not limited to any comments on the custody and visitation aspects of this case, about the parties' children, or about the parenting skills or actions of either party. Such restriction is in the best interest of the children.

This is a final order from which any party may appeal by filing a notice of appeal and attachments with the Office of the Clerk of the Supreme Court of Appeals of West Virginia within thirty days of the entry of this order and by serving a copy on all parties and attorneys who have appeared in this action, the Clerk of the Circuit Court of Harrison County, and the court reporter. In addition, within four months of the entry of this judgment, any person wishing to appeal must file a petition for appeal with the Clerk of the Supreme Court of Appeals of West Virginia and serve copies upon all parties, attorneys, and the court reporter.

The Court **DIRECTS** the Circuit Clerk to forward certified copies of this order to the following:

Jamison H. Cooper
240 W. Main St.
Bridgeport, WV 26330

James Wilson Douglas
PO Box 425
Sutton, WV 26601

G. Thomas Smith
Afton Aman
516 W. Main St.
Clarksburg, WV 26301

Joel K[redacted]
RR 1 Box 73D
Bridgeport, WV 26330

Jeffrey Culpepper, Family Court Judge
430 Spruce Street, Suite 3
Morgantown, WV 26505

Mary Elizabeth Snead
PO Box 128
Clarksburg, WV 26302

ENTER: 03/22/2013

Chief Judge James A. Matish

1361

Amended
03/22/2013

K[redacted]09-D-358-5
Equitable distribution

	Husband	Wife
Marital home	352000	
Debt	-324000	
Florida condo	In kind	In kind
Post-separation debt payments	-20200	
Time share in Hawaii		6160
Mineral rights	In kind	In kind
Improvements to pre-marital condo		0
Household goods	3042	1375
Bissell carpet cleaner	50	
Coin collection	0	
Gun	0	
GE stock	2900	
NEOM	1743	
2003 Ford Explorer		5578
2004 F150	18723	
Debt	-12000	
Kubota Tractor	11500	
Debt	-14000	
ATV	1000	
USAA checking	25992	
BB & T checking		7500
BB & T savings		235
BB & T checking		60
K[redacted]'s BB & T account		145
K[redacted]s BB & T account		0
Guns (2 Hulu shot guns)	0	
Military pension	300	
TSP	In kind	In kind
Military points	In kind	In kind
Mineral rights ~~2010~~ Real Estate	In kind ~~10000~~	In kind JM 03/22/2013
Navy Federal CU	JM 03/22/2013 708	
USAA Asset MGMT		1167
USAA Roth IRA		9636.17
Roth IRA	3240.53	5998.22
Post-separation withdrawals		4500
Ameriprise Annuity 8004		91904.14
Ameriprise SPS	73766.25	
2009 oil and gas	10000	
2010 oil and gas	10000	
2011 oil and gas	10000	
Bank of America credit card		-17943
Disney credit card		-2140
Chase credit card		-2000
USAA credit cards (2)		-3641
	154,764.78 JM 3/22/13 ~~JM 3/22/13 164764.78~~	108534.53
Equitable distribution needed	-23,115.13 -28115.13	~~28115.13~~ 23,115.13 JM 3/22/2013
Total	131,649.65 136649.65 JM 03/22/2013	~~136649.66~~ 131,649.66 JM 3/22/2013

Adjustments to equitable distribution needed

Attorney fees 9/8/09	-1273.48
Car insurance	-3590
Wife's Separate Credit Card Debt	-3,000 JM 3/22/2013
Total amount payable	~~-23251.65~~ -15,251.65 JM 3/22/2013

Exhibit A

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STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th Family Court Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 22 day of March, 2013.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of the Court this 22 day of March, 2013.

Donald L

Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia