STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

S.U.,
Petitioner Below, Petitioner

vs) No. 18-0566 (Mason County 16-D-233)

C.J.,
Respondent Below, Respondent

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner S.U.[1] ("Father") appeals the May 16, 2018, order of the Circuit Court of Mason County, West Virginia, wherein it refused his petition for appeal from an order by the Family Court of Mason County. The family court designated Respondent C.J. ("Mother") as the primary residential and custodial parent of the parties' four minor children. Petitioner raises several assignments of error all of which turn on his argument that the family court erred by rejecting his claim that Mother has no rights whatsoever to the parties' three youngest children because she was acting as his gestational surrogate.

This Court has considered the parties' briefs, their oral arguments, and the record on appeal.[2] Upon review, the Court discerns no substantial question of law and no prejudicial error. Consequently, a memorandum decision affirming the order of the circuit court is the appropriate disposition pursuant to Rule 21 of the West Virginia Rules of Appellate Procedure.

I. Factual and Procedural History

The parties, who never married, were in a relationship for approximately twelve years and have four children together. We note from the outset that Mother gave birth to all four children; their birth certificates provide that Father is their legal father and Mother is their legal mother. As explained below, the children were conceived in nonconventional ways.

The parties attempted to have children through sexual intercourse but were unsuccessful. Relevant to these attempts is the fact that Father was listed as a female on his birth certificate.

[1] Consistent with our long-standing practice in cases involving sensitive facts, we identify the parties by initials only. *See In re Jeffrey R.L.*, 190 W. Va. 24, 26 n.1, 435 S.E.2d 162, 164 n.1 (1993).

[2] Father is represented by counsel, Connor D. Robertson. Mother is represented by counsel, Jeffrey M. Strange. The children's guardian ad litem, D. Randall Clarke, filed a response on behalf of the children in support of the circuit court's order.

Father testified that he was not a binary male or female at birth, although he has always considered himself to be male.[3] Before the parties met, Father underwent surgeries to correct unspecified "anomalies" and had his ova (eggs)[4] harvested and stored. Mother testified that, until these proceedings, she was not aware that Father underwent such procedures.

The parties' first child, G.U., was born in 2011. G.U. was conceived when Father, a registered nurse, performed an intrauterine insemination of Mother at home. At the time, Mother believed that Father was the sperm donor for this procedure. But Father did not (and apparently could not) provide the sperm. Father later refused to answer questions concerning the identity of the sperm donor. Thus, the record does not reflect who is G.U.'s biological father; however, Mother is his biological mother. Father criticized Mother for not losing enough of the weight she gained during her pregnancy with G.U. He became verbally abusive and insisted the couple have their next child by in vitro fertilization ("IVF").

The parties' second child, Lo.U., was born in 2014. Lo.U. was conceived when Mother underwent IVF at the CNY Fertility Center ("Clinic") in New York. According to Father, the embryos used in the IVF procedure were from Father's previously harvested eggs and the sperm of an anonymous donor. However, at the time of the procedure, Mother believed that the embryos were from Father's sperm and an anonymous egg donor. Similarly, the parties' two youngest children, twins Z.U. and Lu.U., who were born in 2016, were conceived in the same manner at the Clinic. Thus, Father is the biological mother of the parties' three youngest children, having provided the eggs with which the embryos were created. It is undisputed that Mother has no genetic connection to the three youngest children.

When Mother was pregnant with the twins, the parties' relationship deteriorated further and the verbal abuse from Father grew worse. Father served Mother with an eviction notice when she was hospitalized due to complications from this pregnancy. After the twins were born in October 2016, Mother never returned to Father's home.

Shortly before the twins were born, Father filed a Petition for Declaration of Parentage and Motion to Seal Record in the Circuit Court of Kanawha County[5] in an attempt to prevent Mother's name from being listed on the twins' birth certificate. Father asserted the parties entered into a formal Custodial Agreement in 2005 that set forth the following: Father agreed to provide Mother with a biological child of her own and over whom the parties would share custody; after that child was born, Mother would act as a gestational surrogate for Father's child through IVF; and Father would have full rights and custody of any resulting child. Before the circuit court issued a ruling, Mother gave birth to the twins and this matter was ultimately transferred to the Family Court of Mason County where the parties resided.

[3] In September 2002, a court granted Father's petition to change the name on his birth certificate to his current name.

[4] Ova is the plural of ovum (the female reproductive cell).

[5] Mother was in a hospital in Kanawha County.

Father filed various motions relating to custody and parentage of the children, including motions to remove Mother from the three youngest children's birth certificates. In December 2016, the family court issued a temporary order granting Father custody of G.U. and Lo.U., and Mother custody of Z.U. and Lu.U.[6] The family court further ordered each parent time with all four children on alternating weekends. In March 2017, the family court ordered psychological evaluations for G.U. and Lo.U., and psychological/parental fitness evaluations for the parties. In August 2017, the family court denied Father's motion to amend the children's birth certificates.

Over two days in October 2017, the family court held final hearings. The parties described the nature of their relationship in polar opposite terms. Father claimed Mother lived with him as a roommate and friend and the two never engaged in sexual relations. Mother claimed she and Father had intimate relations and lived together as a couple. Mother's family members, including her sister, corroborated her testimony and stated they believed the parties were a cohabitating couple.

Father reiterated that the purported Custodial Agreement described above demonstrated the parties agreed that he would provide Mother with a biological child of her own and they would share equal custody of this child; and in exchange, Mother agreed to be a gestational surrogate for Father's children and he would have full rights and custody of those children. Father introduced a photocopy of the purported Custodial Agreement and claimed he could not locate the original. Father testified that the parties signed this document in 2005 and that it was notarized; but he offered no witness to its execution.[7] Mother emphatically denied that she agreed to be Father's gestational surrogate. Mother also denied that she signed the Custodial Agreement.

Dr. Timothy Saar produced written reports concerning his evaluations of the parties and the two oldest children. According to Dr. Saar, the children viewed Mother as their mother and exhibited a close emotional bond with her. Dr. Saar recommended that Mother be designated the children's primary residential caretaker. With regard to Father, Dr. Saar indicated that he "exhibited psychological and behavioral factors which appear to be harmful to the children." This included Father's failure "to consider that the children would be emotionally harmed if [Mother] were eliminated from their lives"; Father's stated goal of "getting [Mother] out of the picture"; and the fact that "preventing emotional harm to the children was not a priority" for Father. These facts caused Dr. Saar to have significant concerns about Father having unsupervised contact with the children.

In its order, the family court concluded that Mother had been the primary caregiver for the children. It noted that the children have a close emotional bond to Mother and she is "a fit and proper parent[.]" The family court concluded the purported Custodial Agreement was unenforceable because it could not conclude Mother signed the document. After finding that

[6] For reasons that we need not discuss, Father's temporary custody was short-lived.

[7] Father called his father, J.P., who testified that he believed the parties signed the document while at his office in 2005. However, J.P. did not state that he witnessed Mother sign the document. Mother denied even being at J.P.'s office that year.

Mother had no biological relationship to the three youngest children, the family court applied the doctrine of psychological parent to find Mother's name should remain on the children's birth certificates. The family court found there had been physical and mental abuse and inappropriate behavior between the parties since their separation—primarily initiated by Father—and in at least one instance, his mother. The family court found some of these incidents occurred in the presence of the children and caused them emotional stress. The family court ordered Father to "enroll and actively participate in counseling services" in order to address the psychological and behavioral factors that Dr. Saar indicated were harmful to the children.[8] It also ordered Father to pay $471 a month in child support.

Father appealed the family court's decision to the circuit court and it refused his petition for appeal.

II. Standard of Review

Father asserts that the circuit court erred in affirming the findings and rulings made by the family court. In this regard, we have explained that,

> [i]n 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).

When the family court's factual findings are based on determinations regarding the credibility of witnesses, this Court gives them great deference. *In re Tiffany Marie S.*, 196 W. Va. 223, 231, 470 S.E.2d 177, 185 (1996). Deference is appropriate because the family court observed the demeanor of the parties and their witnesses. *Id*.

III. Discussion

According to West Virginia Code § 16-5-10(e), "[f]or the purposes of birth registration, the woman who gives birth to the child is presumed to be the mother, unless otherwise specifically provided by state law or determined by a court of competent jurisdiction prior to the filing of the certificate of birth." Father filed this action shortly before the birth of the twins in an attempt to prevent Mother's name from being listed on their birth certificates. Because he obtained no court ruling prior to the filing of their birth certificates, Father now seeks to force an adoption, remove Mother from the twins' birth certificates, and take sole custody not only of the twins, but also Lo.U. Father admits that he "did not label it as an adoption, but in substance, that was exactly what he was trying to accomplish."

[8] The guardian ad litem filed a status report with this Court indicating that Father's in-person visits with the children were suspended because of his abusive conduct; he was permitted monitored telephone visits.

On appeal before this Court, Father sets forth several assignments of error,[9] all of which are grounded on his contention that Mother was nothing more than a gestational surrogate for the parties' three youngest children—a point Mother flatly denied. Mother claims that, although the parties were not married, they were a couple raising their family. The family court resolved this conflict in Mother's favor.

> The Court finds [Mother's] testimony and evidence as well as the testimony of [her] witnesses regarding the nature of the parties' relationship to be credible. [Father] asserted that the parties' were never in a romantic relationship and that the parties never engaged in sexual relations. [Father] described [Mother] as a housemate at first, then a gestational surrogate whose purpose was to give birth to [Father's] children, and then an in-home babysitter for [Father's] children. The Court finds that [Father's] testimony and evidence regarding the nature of the parties' relationship is not credible.

This Court will not disturb these credibility findings. *See Mulugeta v. Misailidis*, 239 W. Va. 404, 408-09, 801 S.E.2d 282, 286-87 (2017) ("It is within the sole province of the family court, as fact-finder, to decide issues of credibility, and this Court will not disturb those determinations."). We therefore reject Father's argument that the family court erred in finding that the parties were in a sexual relationship.

Father's primary contention is that the family court erred in finding the purported Custody Agreement was unenforceable. We disagree. After hearing conflicting evidence on this issue, the family court articulated sound reasons for declining to enforce a photocopy of a document Mother denied even seeing, let alone signing, that would strip her of legal rights to her three youngest children. Father produced this document over a year after this litigation began and did not call the notary who allegedly witnessed its execution. While this document was self-authenticating pursuant to Rule 902 of the West Virginia Rules of Evidence for purposes of its admissibility, Mother was entitled to dispute its legitimacy and purported signatures.[10] Significantly, the medical providers who treated the couple's children prior to the twins' birth testified that they never heard anything about Mother being a gestational surrogate until after this litigation commenced. Our review of the record uncovers no error by the circuit court. Succinctly stated, Father failed to submit competent evidence to overcome the presumption set forth in West Virginia Code § 16-5-10(e) that "the woman who gives birth to the child is presumed to be the

[9] Father raises nine assignments of error. In the interest of brevity, we consolidate related assignments of error and discuss them accordingly. *See Tudor's Biscuit World of Am. v. Critchley*, 229 W. Va. 396, 401-02, 729 S.E.2d 231, 236-37 (2012) (consolidating related and/or redundant assignments of error).

[10] *See e.g.*, *State v. King*, 146 P.3d 1274, 1278 (Ariz. App. 2006) (once self-authenticating document admitted, opponent is still free to contest its genuineness; and weight to be given document becomes question for fact finder).

mother[.]"[11] For this reason, it was wholly unnecessary for the family court to conduct a psychological-parent analysis when Mother is the legal mother of all four children.[12]

After the family court found no credible evidence to support Father's contention that Mother was nothing more than a gestational surrogate to the three youngest children, the proceeding was a straight-forward case of custodial allocation of the children and their legal parents.[13] Therefore, Father's argument that the family court lacked jurisdiction is without merit. The family court properly exercised jurisdiction under West Virginia Code § 51-2A-2 which provides it has jurisdiction over actions to establish child support, a parenting plan, and allocation of custodial responsibility and decision-making responsibility for the children.

Father also argues that the family court failed to consider the children's best interests. This argument lacks merit. The family court ruling was based on the expert testimony of Dr. Saar who recommended that Mother be the children's primary caretaker. Moreover, the family court appointed an experienced guardian ad litem, and heard testimony from several medical providers, educators, and other professionals familiar with the family.

Several witnesses corroborated the family court's finding that Father and his mother physically abused Mother during two exchanges of the children, in the presence of the children. This included an incident wherein Father's mother yelled that Mother "kidnapped" the children and "grabbed [Mother] by the shoulder and pushed her back." Father also kicked Mother in the stomach during one exchange of the children and she notified the police. The family court further found that Father was mentally abusive toward Mother, based on his controlling behavior and his use of derogatory names for Mother such as "fat, stupid, and ugly." Based on Dr. Saar's

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[11] We reject Father's related argument that the family court erred by finding certain Clinic forms, purporting to establish Mother was nothing more than his gestational surrogate, unenforceable. Again, the family court heard conflicting evidence regarding these forms and articulated valid reasons for giving them little weight. Mother denied signing anything other than two forms, one of which she testified Father obscured and forced her to sign. Moreover, Father admitted that the alleged signatory witness on the forms signed them *after* he faxed the documents to the Clinic. Father also admitted that he obstructed the guardian ad litem's attempts to obtain the entire record from the Clinic. The family court ultimately found that there are no provisions in the Clinic forms (which Mother admitted to signing) that operate to legally transfer custody of the resulting children to Father.

[12] *See* Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965) ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.").

[13] Father states the family court erred in finding that West Virginia does not recognize gestational surrogacy contracts because the West Virginia Department of Health and Human Resources issued an Instructional Memorandum on this subject. This memorandum is beside the point considering the family court found no valid gestational surrogacy contract between the parties.

testimony, some of the incidents the children witnessed caused them emotional distress. Father "admitted that he knew his behavior caused the children to suffer emotional harm but [claimed] he could not help himself."

Father also contends that the family court's rulings were cumulatively prejudicial to the point that he was denied due process. We disagree. Father had notice of and attended all hearings, including the two-day hearing that ultimately resolved custodial allocation. The family court provided Father the opportunity to be heard, present witnesses, cross-examine witnesses of Mother, and present exhibits on his behalf. *See* Syl., *Crone v. Crone*, 180 W. Va. 184, 375 S.E.2d 816 (1988) ("'The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard.' Syllabus point 2, *Simpson v. Stanton*, 119 W. Va. 235, 193 S.E. 64 (1937).").[14]

IV. Conclusion

For the reasons set forth above, we affirm the May 16, 2018 order of the Circuit Court of Mason County.

Affirmed.

ISSUED: November 4, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Margaret L. Workman
Justice Tim Armstead
Justice Evan H. Jenkins
Justice John A. Hutchison

[14] Because of our resolution of this case, we likewise find no merit to Father's argument that the family court erred in failing to remove Mother's name from the three youngest children's birth certificates.