IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2020 Term

FILED
March 23, 2020
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 18-0569

BENTON B.,
Petitioner Below, Petitioner

v.

CASSIDY T.,
Respondent Below, Respondent

Appeal from the Circuit Court of Jackson County
The Honorable Lora A. Dyer, Judge
Civil Action No. 17-D-110

REVERSED AND REMANDED

Submitted: February 12, 2020
Filed: March 23, 2020

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Respondent

JUSTICE JENKINS delivered the Opinion of the Court.

JUSTICE HUTCHISON, deeming himself disqualified, did not participate in the decision of this case.

JUDGE ROBERT A. WATERS, sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "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).

2. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner,* 159 W. Va. 108, 219 S.E.2d 361 (1975).

Jenkins, Justice:

This is an appeal by Petitioner Benton B. ("Father")[1] from a final order entered May 30, 2018, in the Circuit Court of Jackson County. The circuit court affirmed a family court order denying the petition for modification of custodial responsibility filed by Father which was based on the allocation of decision-making responsibilities under West Virginia Code § 48-9-207 (LexisNexis 2015). Father filed the petition seeking an order awarding him sole decision-making responsibility pertaining to medical and educational matters for his child, J.B. Respondent Cassidy T. ("Mother") opposed the petition. After the family court denied Father's petition, he appealed the matter to the circuit court where the order—requiring joint decision-making responsibility—was upheld. Having considered the briefs submitted on appeal, the appendix record, the parties' oral arguments, and the applicable legal authority, this Court reverses the final order of the Circuit Court of Jackson County, and remands this matter for further proceedings consistent with this opinion.

[1] It is this Court's customary practice in cases involving sensitive facts to refer to parties by their initials rather than by their given names. *See In re Jeffrey R.L.*, 190 W. Va. 24, 26 n. 1, 435 S.E.2d 162, 164 n. 1 (1993).

I.

FACTUAL AND PROCEDURAL HISTORY

In May of 2013, the parties gave birth to their only child, a son, J.B. The parties were never married, but cohabitated at the time of the child's birth. When the child was two years old, the parties separated. On June 19, 2017, Father filed a petition with the Family Court of Jackson County seeking an allocation of custodial responsibility, decision-making responsibility, and caretaking time, in addition to setting child support and medical support. By order entered in September of 2017, the family court approved a temporary parenting plan, which directed the parties to share decision-making responsibility concerning the child's medical care, religious training, education, and extra-curricular activities. The order also temporarily granted equal shared parenting time on a rotating two-week schedule, subject to specific requirements related to when and where the child would be picked up.[2]

Thereafter, the family court held its final hearing on the matter on December 19, 2017. Father asserted that there were "several parenting issues on which the parties have encountered unresolvable differences which must be decided by the [Family] Court." The unresolvable issues included whether the child should be home schooled, whether the child should be immunized, and whether the child suffered from certain food allergies. Specifically, Father wished for the child to receive immunizations, wanted the child to

[2] The issue on appeal pertains only to the parties' shared decision-making responsibility. Father does not appeal the parenting plan or child support.

receive a public school education, and sought an order permitting "each parent to provide the child food that the parent exercising parenting time considers appropriate" while precluding Mother "from telling the child that he is allergic to any food or substance which is not medically verified." Conversely, Mother requested to be designated the primary residential custodian.

During the December 19, 2017 hearing, Father presented the testimony of three witnesses. The first witness presented was expert witness Patricia Swann, the Director of Performance Improvement and Infection Control at Jackson General Hospital in Ripley, West Virginia. Ms. Swann was designated as an expert in the field of immunizations and disease control and prevention. She testified to her opinion that "immunizations [are] the front line in the prevention of infectious diseases." She further addressed the concerns expressed by some individuals about the safety of immunizations, and testified that notwithstanding these concerns, medical practitioners agree that immunization is much safer for children than failing to immunize at all. Specifically, Ms. Swann opined that "[i]t's better to get them than to not get them. . . . To take the risk of getting the disease is much worse than any risk associated [with] a vaccine." The family court concluded that it "agree[d] with the analysis and recommendations of Patricia Swann."

Father next presented the testimony of the child's paternal grandmother. According to the grandmother, Mother informed her that the child had allergies to specific

foods, including bananas, apples, grapes, ketchup, peanut butter, eggs, bread, and cow's milk, and that eating the foods "would cause him to 'act out.'" However, the grandmother testified that she gave the child many of these foods and "never witnessed an allergic reaction to these things." Further, the grandmother believed that Mother's beliefs about these allergies were unreasonable because the child had "never been tested up to that point" and she "never saw any evidence of it. . . . it just didn't make sense."

Finally, Father presented his own testimony. He testified that he observed the child's food interactions on a daily basis and he did not feel his son had food allergies. Father noted that Mother's list of foods—that she felt the child was allergic to—"kept growing and growing and growing and bec[ame] . . . more absurd." He indicated that any communication between him and Mother about the child's food allergies turned into a confrontation. According to Father, Mother informed him on one occasion, that "[j]ust because [he's] his father, does not mean [he gets] to make decisions like these." Father described past arguments that Mother initiated after he attempted to discuss the possibility that the child did not suffer from allergies, including an incident in which Mother yelled at Father and called him derogatory names in front of the child. In another incident, Mother threw her cellphone across the room.

Father next testified that the parties agreed to have the child undergo allergy testing at the Holzer Hospital in Gallipolis, Ohio, in June of 2017. The parties agreed that the child would undergo the "traditional prick test." The results of the test showed that the

child was negative for allergies to approximately twenty-five food items.[3] After this test, Mother insisted that a blood test be performed, despite the fact that Father described the process of drawing blood as "traumatic" for the child. With the exception of banana, which resulted in the lowest detected positive result, the blood test results were identical to the prick test results already obtained. Again, Father considered the matter closed, but only later did he learn that Mother unilaterally took the child to the Parkersburg Asthma and Allergy Center for additional testing both before and after the August 8, 2017 hearing during which the parties were granted temporary joint decision-making responsibility. This additional testing took place on July 13, 2017, and again showed negative results for approximately twenty-seven food items. Thereafter, on August 7, 2017, Mother had the child undergo additional blood tests, this time resulting in "equivocal" results for banana and crab, and positive results for shrimp. Then, on August 24, 2017, Mother took the child to the Charleston Asthma and Allergy Center for a "follow up" regarding food allergies, during which medical personnel informed Mother that the modest result to banana and the other results were all "within normal limits." The records from this visit indicate that Mother reported she would continue to have the child avoid certain foods, including cow's milk, eggs, corn, wheat, peanuts, and chicken, among others, even though she had been advised that his results in regard to these foods were negative.

[3] During the child's first "traditional prick test," in June of 2017, the following foods were tested and showed negative results: milk, peanut, wheat, black walnut, pecan food, hazelnut/filbert, carrot, potato, orange, apple, sweet potato, chocolate, ghost pepper, egg, soy, fish mix, cashew, brazil nut, almond, tomato, corn, strawberry, chicken, pineapple, and avocado.

Additionally, Father recalled the child's Hepatitis B immunization. When the child was nine days old, both parties took the child to the pediatrician for his first immunization—Hepatitis B. Soon after, the maternal grandmother found out about the immunization and expressed her displeasure, even going as far as accusing the parties of "taint[ing] a perfect child." Mother became very upset about the confrontation with her own mother, and it was at this point that Mother decided she did not want the child to receive any other immunizations. In order to avoid further confrontation, Father agreed not to take the child back for additional immunizations at that time. According to Father, he continuously brought up immunizations, but Mother would immediately turn the discussion into a confrontation. Further, Father also explained that he initially waited to initiate court proceedings regarding this issue, but ultimately had to file his petition because the child was getting close to school age and immunizations are required to attend public school.

Lastly, the family court heard testimony from Mother. She testified that she first became concerned with the safety of immunizations when the child's "demeanor drastically changed after the [Hepatitis B] vaccination." As such, she did some independent research on immunizations and the potential interactions they may have with certain foods. Based upon her research, and her fear of possible vaccine-related reactions, she did not wish for her child to receive any more immunizations at that point. However, Mother did testify that she is "neither anti-immunization [nor] pro immunization" she just wants to pursue the safest avenue for the [parties'] child."

Mother next expressed her desire for the child to be homeschooled. She acknowledged in her testimony that she, herself, had been immunized as a child, and had received a public school education. However, despite her own background, she still wished to remain steadfast in her opposition to both immunizations and public school. In September of 2018—after the temporary order granting joint decision-making responsibility was entered—Mother made a unilateral decision to notify the board of education of her intent to homeschool the parties' child. At the hearing, Mother admitted that that was not a shared decision with Father, and that "that was the intention."

When questioned about food allergies, Mother indicated that she provided the allergist at Holzer with approximately ten to twenty items to test and chose to have an additional blood test performed, even though the medical provider indicated that the prick test the child had already undergone was equally accurate. Despite the fact that drawing blood during the first testing was traumatic for the child, Mother admitted that she subjected the child to additional blood testing despite the fact that all the results of the allergy testing were within normal limits. She also admitted that she did not inform Father of her decision to subject the child to additional allergy testing because she did not believe he would agree with her. Mother testified that she asked for duplicative testing because she believed that the person who administered the Holzer test did it "so lightly [that she did not] know if there was enough of a penetration of the food substance into his skin for a reaction to - - a true reaction to show."

Based upon these facts, the family court issued a final order on January 23, 2018, regarding the allocation of significant decision-making responsibility. The family court concluded that while it agreed with Ms. Swann's analysis and recommendations, it found that Mother's objections to immunizations did "not represent a *de facto* finding that [Mother] is unfit to exercise shared decision-making authority" over the child, especially in light of her testimony that she is open to the recommendations of a pediatrician. According to the family court, even assuming Father's allegations are true, they do not "overcome the presumption" set forth in West Virginia Code § 48-9-207(b) (LexisNexis 2015) that the allocation should be shared equally by both parents. Each parent exercised a reasonable share of parenting functions for the child; there had been no domestic violence; each parent participated substantially in past decision making on the child's behalf; the parent's wishes were stated in the pleadings; the parents have the ability to cooperate as to decision-making responsibilities; there was no evidence of prior agreements as to the decision-making responsibilities; no limiting factors under West Virginia Code § 48-9-209 (LexisNexis 2015) exist; and joint allocation of decision-making responsibility is in the child's best interest. Despite stating these conclusions, the family court did not give specific findings for each individual factor supporting its decision.

Moving forward, the family court ordered that the parties "shall discuss and share all major decisions for the child, including, but not limited to, education, religion, medical, extracurricular activities, and discipline." In February of 2018, Father appealed the decision to the Circuit Court of Jackson County, which held a hearing on the appeal in

April of 2018. By final order dated May 30, 2018, the circuit court affirmed the family court's order, finding that the family court's ruling was "plausible in light of the record viewed in its entirety" and that it did not abuse its discretion in its final ruling. This appeal followed.

II.

STANDARD OF REVIEW

Father asks this Court to review the decision of the Circuit Court of Jackson County affirming the family court's order denying his petition for modification of decision-making responsibility. Our standard of review of the circuit court's order is well settled:

> 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). With this standard in mind, we now address the arguments presented.

III.

DISCUSSION

In the case *sub judice*, Father asserts three separate assignments of error all arising from the circuit court's application of West Virginia Code § 48-9-207. As such,

we address all assignments of error under the umbrella of a West Virginia Code § 48-9-207 analysis. Because this case will be resolved by a thorough interpretation of statutory provisions,

> we are mindful that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). In determining the intent of the Legislature, we "look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995).

Nicole L. v. Steven W., 241 W. Va. 466, 471, 825 S.E.2d 794, 799 (2019).

According to West Virginia Code § 48-1-220 (LexisNexis 2015), "'[d]ecision-making responsibility' refers to authority for making significant life decisions on behalf of a child, including, but not limited to, the child's education, spiritual guidance and health care." Under West Virginia Code § 48-9-207(a) (LexisNexis 2015), when evaluating how to apportion decision-making responsibility between parents,

> the court shall allocate responsibility for making significant life decisions on behalf of the child, including the child's education and health care, to one parent or to two parents jointly, in accordance with the child's best interest, in light of:
>
> (1) The allocation of custodial responsibility under section 9-206 of this article;
> (2) The level of each parent's participation in past decision-making on behalf of the child;
> (3) The wishes of the parents;
> (4) The level of ability and cooperation the parents have demonstrated in decision-making on behalf of the child;
> (5) Prior agreements of the parties; and

> (6) The existence of any limiting factors, as set forth in section 9-209 of this article.

W. Va. Code §§ 48-9-207(a)(1)-(6). Considering this framework, we now turn to the facts presented to determine whether the respective lower courts properly applied the statutory provisions when denying Father's petition seeking an order awarding him sole decision-making responsibility pertaining to medical and education matters for his child.

In this appeal, Father argues that the circuit court erred when it affirmed the family court's application of the incorrect legal standard to the award of decision-making responsibility. He contends that while the lower courts cited correctly to West Virginia Code § 48-9-207, the courts incorrectly based their rulings on parental fitness. In deciding to award shared decision-making responsibility, the family court concluded: "[Mother's] object[ions] to vaccinations for the child do not represent a *de facto* finding that [Mother] is unfit to exercise shared decision-making authority over the parties' minor child." Here, the lower courts found that, pursuant to West Virginia Code § 48-9-207(b), each party had been exercising a reasonable share of parenting functions for the child. Father contends that to analyze his petition—on whether to award him sole decision-making responsibility—the courts should have examined whether he overcame the presumption that continuing the parents' shared decision-making responsibility is in the child's best interest.

Mother, who is self-represented, maintains that the lower courts properly relied on the standards set forth in West Virginia Code § 48-9-207(b). According to Mother, the testimonial evidence illustrates her careful observations and concerns regarding health matters and all aspects of the child's life. Therefore, she contends that the lower courts used the correct legal standard, and properly decided to grant shared decision-making responsibility to both parties.

We agree with Father's argument that the lower courts used the wrong standard when denying his petition for allocation of decision-making responsibility. After a close review of this State's law, we find nothing in the governing statute that requires courts to determine a parent's fitness when awarding decision-making responsibility to one parent. Rather, West Virginia Code § 48-9-207(b) is clear that "[i]f each of the child's legal parents has been exercising a reasonable share of parenting functions for the child, the court *shall presume* that an allocation of decision-making responsibility to both parents jointly is *in the child's best interests*." W. Va. Code § 48-9-207(b) (emphasis added). However, "the presumption is overcome if there is a history of domestic abuse, or *by a showing that joint allocation of decision-making responsibility is not in the child's best interest*." *Id.* (emphasis added).

As stated above, the lower courts found that Mother's opposition to immunizations did not represent a *de facto* finding of unfitness, and they failed to find how Father's allegations overcame the presumption outlined in West Virginia Code § 48-9-

207(b). The family court stated in its final order that (1) there was no history of abuse, and (2) Father failed to show that joint allocation of decision-making responsibility was not in the child's best interest. Yet, despite stating this conclusion, there is no evidence that either court fully examined the child's best interest as required by West Virginia Code § 48-9-207. Rather, the courts generally stated, "[j]oint allocation of decision-making authority [was] in the child's best interest."[4]

It is well-established law in West Virginia that "[t]he pol[ar] star in child custody cases is the welfare of the child. We have repeatedly acknowledged that the child's

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[4] The Legislature enacted Chapter 48, Article 9 of the West Virginia Code to govern the allocation of custodial responsibility and decision-making responsibility of children. In doing so, the Legislature found and declared, that "it is the public policy of this state to assure that the best interest of children is the court's primary concern in allocating custodial and decision-making responsibilities between parents who do not live together." W. Va. Code § 48-9-101 (LexisNexis 2015). To guide courts, the Legislature has set forth principles that facilitate the best interests of a minor child:

> (1) Stability of the child;
> (2) Parental planning and agreement about the child's custodial arrangements and upbringing;
> (3) Continuity of existing parent-child attachments;
> (4) Meaningful contact between a child and each parent;
> (5) Caretaking relationships by adults who love the child, know how to provide for the child's needs, and who place a high priority on doing so;
> (6) Security from exposure to physical or emotional harm; and
> (7) Expeditious, predictable decision-making and avoidance of prolonged uncertainty respecting arrangements for the child's care and control.

W. Va. Code § 48-9-102(a)(1)-(7).

welfare is the paramount and controlling factor in all custody matters." *David M. v. Margaret M.*, 182 W. Va. 57, 60, 385 S.E.2d 912, 916 (1989). *Accord Storrie v. Simmons*, 225 W. Va. 317, 324, 693 S.E.2d 70, 77 (2010) ("[T]he children's best interests are the 'polar star' by which all custody decisions should be made."); *In re Ryan B.*, 224 W. Va. 461, 467, 686 S.E.2d 601, 607 (2009) ("As this Court has frequently emphasized, the best interest of the child is the polar star by which all matters affecting children must be guided.").

Despite the fundamental importance of the child's best interest, the family court in the present case abused its discretion in its application of the provisions set forth in West Virginia Code § 48-9-207. When engaging in matters of statutory construction, the goal is to give effect to the Legislature's intent.

> As this Court has previously stated, "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 7, *Dan's Carworld, LLC v. Serian*, 223 W. Va. 478, 677 S.E.2d 914 (2009). Indeed, where "the legislative intent is clearly expressed in the statute, this Court is not at liberty to construe the statutory provision, but is obligated to apply its plain language." *Id.* at 484, 677 S.E.2d at 920.

Storrie v. Simmons, 225 W. Va. at 324, 693 S.E.2d at 77. The Legislature has clearly expressed its intent in the statute at issue. Here, West Virginia Code § 48-9-207(b) specifically provides that to overcome the presumption for shared decision-making responsibility there must be (1) "a history of domestic abuse," or (2) "a showing that joint allocation . . . is not in the child's best interest." *Id.* Therefore, according to the plain

language of the statute, since the lower courts found no history of domestic abuse, the courts should have performed a best interest analysis.

As mentioned previously, although the lower courts generally stated in their orders that joint allocation was in the child's best interests, the final orders lacked specific findings regarding the child's best interest. However, the record provided reveals that the family court was provided with sufficient evidence from both parties—including expert witness testimony, lay witness testimony, testimony from both parties, and medical records—to illustrate the resolute and unwavering opinions of the parties regarding the child's best interest. From this evidence, one could easily conclude that the parties are in disagreement on significant life decisions affecting the child that do not have room for compromise. However, it does not appear that the lower courts thoroughly evaluated this evidence to determine the child's best interests, and the record fails to show how the evidence put forth justifies awarding shared decision-making responsibility to Mother and Father.

Thus, because the plain language of West Virginia Code § 48-9-207(b) sets forth clear instructions of what is required to overcome the presumption of shared decision-making responsibility, we find that the lower courts erred in failing to perform the requisite best interest analysis, and in failing to provide specific findings with respect to the child's best interest. As such, this Court reverses the circuit court's order affirming the family court's decision to award shared decision-making responsibility to both parents. We

further remand this case to the family court with instructions to appoint a guardian ad litem and to hold a hearing within thirty days to allocate decision-making responsibility in accordance with the child's best interests.[5] Because of the expediency with which we have ordered the family court to act, we further order the Clerk of this Court to issue the mandate contemporaneously with this opinion.

IV.

CONCLUSION

For the reasons set forth above, the May 30, 2018 order of the Circuit Court of Jackson County is reversed, and this case is remanded with instructions to appoint a guardian ad litem and to hold a hearing within thirty days to allocate decision-making responsibility in light of the child's best interests. Furthermore, the mandate of this Court shall issue forthwith.

Reversed and Remanded.

[5] This Court does not take a position as to how decision-making responsibility should be allocated between the parties. Rather, we emphasize that the allocation should reflect the best interests of the parties' child, J.B.