

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED
April 22, 2024

CAITLYN H.,
Petitioner Below, Petitioner

ASHLEY N. DEEM, DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

v.) No. 23-ICA-399 (Fam. Ct. McDowell Cnty. No. FC-27-2019-D-183)

CHRISTOPHER H.,
Respondent Below, Respondent

and

REBECCA B. and WILLIAM B.,
Respondents Below, Respondents

MEMORANDUM DECISION

Petitioner Caitlyn H.¹ (“Mother”) appeals the McDowell County Family Court’s August 9, 2023, order reducing her parenting time from four days a week to three weekends per month. Respondent Christopher H. (“Father”) and the Guardian ad Litem (“GAL”) filed responses in support of the family court’s decision.² Mother filed a reply.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2022). After considering the parties’ arguments, the record on appeal, and the applicable law, this Court finds that there is error in the lower tribunal’s decision but no substantial question of law. This case satisfies the “limited circumstances” requirement of Rule 21(d) of the Rules of Appellate Procedure for resolution in a memorandum decision. For the reasons set forth below, the family court’s decision is vacated, and this case is remanded for further proceedings consistent with this decision.

Mother and Father were divorced by an agreed final order entered on April 7, 2020. They are the parents of three children, namely, B.H. born in 2015, E.H., born in 2016, and J.H., born in 2018. At the time of the parties’ divorce, all three children were ordered to

¹ To protect the confidentiality of the juveniles involved in this case, we refer to the parties’ last name by the first initial. *See, e.g.*, W. Va. R. App. P. 40(e); *State v. Edward Charles L.*, 183 W. Va. 641, 645 n.1, 398 S.E.2d 123, 127 n. 1 (1990).

² Caitlyn H. is represented by Diana Carter Wiedel, Esq., and Marsha Webb Rumora, Esq. Christopher H. is represented by Anthony Veneri, Esq. The GAL was William O. Huffman, Esq. Rebecca B. and William B. did not participate in the appeal.

stay with their maternal grandparents, Rebecca B. and William B. (collectively “Grandparents”) and ended up staying with them for more than two and one-half years after the divorce, in a *de facto* guardianship situation. Mother and Father were agreeable to this arrangement.

On November 30, 2022, Father filed a petition for modification, wherein he asserted that there had been substantial a change in circumstances, that he had the ability to care for the children, and he requested 50-50 custody. On December 5, 2022, Mother filed a response, wherein she also requested 50-50 custody. On December 9, 2022, Grandparents filed a petition for guardianship of the children, arguing that the children had lived with them their entire lives.

On December 14, 2022, Mother and Father entered into an agreed order for 50-50 custody, under which Grandparents received no visitation. On December 15, 2022, Grandparents filed a motion for an emergency hearing and a motion to consolidate the guardianship petition with the custody matter. The family court held the emergency hearing on December 15, 2022, during which it consolidated the two cases and ruled that Father would have “possession” of the children three days per week with one overnight, and that Mother would have the same, but that the children would remain in Grandparents’ custody.

Relevant to this appeal, on January 12, 2023, after the children had an overnight stay with Father, J.H. and E.H. allegedly told to Grandmother that they had been sexually abused by Father. The following morning, Grandmother took the children to her attorney, who advised her to take the children to the doctor to be examined. Grandmother took the children to their doctor, who, as a mandatory reporter, made a referral to Child Protective Services (“CPS”). Forensic interviews of the children were conducted through Stop the Hurt, at a child advocacy center. Deputy Dalton Martin attended the forensic interview, prepared a report, and informed the prosecuting attorney that he believed the children had been coached. Charity Workman, a CPS worker, and Spring Bailey, a counselor, also testified that they believed the children had been coached. The GAL stated in his brief that he agreed that the children had been coached. Moreover, Mother provided the family court a letter questioning Grandmother’s truthfulness. CPS closed its investigation within approximately twenty-four hours from the time it received the report.

On February 8, 2023, Father filed an emergency petition for modification alleging that Grandparents made false claims of sexual abuse against him and requested that the children have no contact with Grandparents. A hearing was held on Father’s petition on February 23, 2023. At that hearing, Deputy Dalton Martin was the first witness called. He testified that he was a deputy with three years of experience and that this case was the second forensic interview he had ever observed. Over Mother’s counsel’s objection, the family court allowed Deputy Martin to testify that he believed the children were coached. Mother’s counsel also requested copies of the forensic interviews and asked that she be permitted to review them before conducting cross examination of Deputy Martin. The

family court stated, “we will see that any evidence in this regard is made available . . . if [. . .] you find any inconsistencies with his testimony at a later date, we can take that up.” The family court did not view the interviews. Deputy Martin repeatedly advised the family court that he had copies of the interviews with him and could provide them to the family court. He also stated that he felt it would be best if the parties viewed the interviews. Also, during the hearing, Mother and Grandparents moved the family court to overlap the matter in circuit court due to the allegations of abuse but their motions were refused. Despite not viewing the forensic interviews, the family court stopped all contact between the children and Grandparents.

Another hearing was held on March 23, 2023. At that hearing, the family court ordered that the guardianship case be dismissed, that no party should speak of the sexual abuse of the children, and that the grandparents would continue to have no contact with the children.

On May 11, 2023, the GAL filed a motion to modify visitation, requesting that Mother’s contact with the children be suspended because Mother was allegedly continuing to re-hash the sexual abuse issue and had exposed the children to the maternal Grandmother against the family court’s March 23, 2023, order. Hearings were held on the GAL’s motion on May 17, 2023, May 22, 2023, and June 29, 2023. At the June 29, 2023, hearing, the family court found Mother in contempt for violation of its March 23, 2023, order, based on video footage of Mother discussing the case in front of the children at the post office. Thereafter, without a notice to Mother that the June 29, 2023, hearing was a final hearing regarding modification of the parenting plan, the family court entered a “final order” on August 9, 2023, reducing Mother’s parenting time from four days a week to three weekends per month plus one evening per week. It is from that order that Mother now brings this appeal.

For these matters, we apply the following standard of review:

In reviewing . . . 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. Pt., [in part,] *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

Amanda C. v. Christopher P., 248 W. Va. 130, 133, 887 S.E.2d 255, 258 (Ct. App. 2022); *accord* W. Va. Code § 51-2A-14(c) (2005) (specifying standards for appellate court review of family court orders).

As her first assignment of error, Mother asserts that the family court erred in denying her motion to remove the matter to circuit court immediately after allegations of abuse were raised. We agree. Rule 48(a) of the Rules of Practice and Procedure for Family Court states:

If a family court has reasonable cause to suspect any minor child involved in family court proceedings has been abused or neglected, that family court shall immediately report the suspected abuse or neglect to the state child protective services agency, pursuant to W. Va. Code §§ 49-6A-2, and the circuit court.

However, because CPS closed its investigation, the jurisdictional issue of the family court's failure to remove this case to the circuit court is now moot and without remedy. Therefore, we decline to address it further.

As her fourth assignment of error, Mother asserts that the family court violated her right to due process and notice by issuing a final order modifying the parenting plan after limiting the evidence to two narrow issues and when there was no agreement by the litigants to treat the hearing as a final hearing. We agree. Rule 21(b) of the Rules of Practice and Procedure for Family Court provides that a temporary hearing may be converted to a final hearing "by agreement of all parties placed on the record." Upon review of the record, the scheduling order issued on or about May 15, 2023, provided notice that another hearing was scheduled on the GAL's motion to modify visitation. Because the parties did not receive notice that the June 29, 2023, hearing would be a final hearing and the record reflects that the parties did not agree to convert the temporary hearing to a final hearing, we remand this case for further proceedings consistent with this decision.³

For the foregoing reasons, the August 9, 2023, order of the Family Court of McDowell County is hereby converted to a temporary order, which shall remain in place until an order is issued containing sufficient findings of fact and conclusions of law consistent with this decision. The August 9, 2023, order is vacated and remanded with instructions for the family court to view the forensic interviews, conduct a hearing on any remaining issues, reconsider its custody ruling, and issue a new order. The Clerk is directed to issue the mandate contemporaneously with this memorandum decision.

Accordingly, we vacate and remand the order dated August 9, 2023, to the Family Court of McDowell County for further proceedings consistent with this decision.

Vacated and Remanded, with Directions.

ISSUED: April 22, 2024

CONCURRED IN BY:

³ Mother asserts two other assignments of error. However, due to our decision to remand on procedural grounds, we do not address those here.

Chief Judge Thomas E. Scarr
Judge Charles O. Lorensen
Judge Daniel W. Greear