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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 22-918, *Christopher P. v. Amanda C.*

Armstead, Chief Justice, concurring, in part, and dissenting, in part:

In this appeal from the Intermediate Court of Appeals ("ICA"), I agree with the majority opinion's ruling remanding the case to the Family Court of Upshur County ("family court") for it to conduct a new hearing on Petitioner Father's ("Father") petition for custodial allocation. The majority opinion arrived at this conclusion after thoroughly outlining the scheduling conflict between the family court and the circuit court and concluding that the family court abused its discretion when it proceeded to conduct its final hearing in the absence of Respondent Mother ("Mother") or her counsel. This analysis was sufficient to resolve this appeal. However, the majority opinion proceeded to reverse the portion of the ICA's opinion that was predicated on plain error. As the majority opinion acknowledges, Rule 10(c)(3) of our Rules of Appellate Procedure permits the ICA to exercise its discretion to consider plain error under appropriate circumstances. Exercising this discretion, the ICA determined that the family court plainly erred by applying the wrong version of West Virginia Code § 48-9-206 to Father's petition for custodial allocation. As discussed below, I agree with the ICA's plain error analysis and believe that the majority opinion incorrectly and unnecessarily reversed the ICA's plain error ruling.

In *Amanda C. v. Christopher P.*, 248 W. Va. 130, 887 S.E.2d 255 (Ct. App. 2022), the ICA reversed the family court and remanded for additional proceedings after concluding, sua sponte, that the family court applied the wrong version of West Virginia Code § 48-9-206 in its July 8, 2022, "Order Establishing Custodial Allocation and Child

Support." In Mother's appeal to the ICA, her lone assignment of error was that the family court erred by holding its hearing without her or her counsel being present. The ICA did not address this issue. Instead, it found "plain error in the [family court's] failure to apply the applicable version of West Virginia Code § 48-9-206." *Id.* at 133-34, 887 S.E.2d at 258-59.

As previously noted, Rule 10(c)(3) of our Rules of Appellate Procedure permits the ICA to exercise "its discretion" to "consider a plain error not among the assignments of error but evident from the record and otherwise within its jurisdiction to decide."[1] It is well-established that "[this Court] may, sua sponte, in the interest of justice, notice plain error." Syl. Pt. 1, in part, *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998). This Court has applied plain error in both criminal and non-criminal cases. *See In re K.L.*, 233 W. Va. 547, 552 n.6, 759 S.E.2d 778, 783 n.6 (2014) (applying plain error

[1] Rule 10(c)(3) provides:

> (c) Petitioner's brief. The petitioner's brief shall contain the following sections in the order indicated, immediately following the cover page required by Rule 38(b). . . .
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> (3) Assignments of Error: The brief opens with a list of the assignments of error that are presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The assignments of error need not be identical to those contained in the notice of appeal. The statement of the assignments of error will be deemed to include every subsidiary question fairly comprised therein. If the issue was not presented to the lower tribunal, the assignment of error must be phrased in such a fashion as to alert the Intermediate Court or the Supreme Court to the fact that plain error is asserted. In its discretion, the Intermediate Court or the Supreme Court may consider a plain error not among the assignments of error but evident from the record and otherwise within its jurisdiction to decide.

standard when reviewing the termination of parental rights in an abuse and neglect proceeding and recognizing that "[a]lthough the practice of noticing plain error sua sponte is usually applied in criminal cases, it is not exclusive to such cases"). We have held that "[t]o trigger application of the 'plain error' doctrine there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

The ICA explained its decision to rely on plain error in this case as follows:

> On April 10, 2021, the Legislature amended West Virginia Code § 48-9-206, specifically providing that said statute became effective on July 9, 2021. The 2021 amendment substantially changed the allocation of custodial responsibility. On March 12, 2022, the Legislature enacted additional substantive changes to West Virginia Code § 48-9-206, which require the presumptive application of 50/50 custodial allocation. The 2022 amendment was effective on June 10, 2022, prior to the entry of the final order in this matter. Each of the amendments to West Virginia Code § 48-9-206 became applicable prior to the entry of a final order allocating the parties' custodial rights. Here, the Family Court of Upshur County considered and applied the facts of the case pursuant to West Virginia Code § 48-9-206 (2020), without reference to the 2021 or 2022 amendments.
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> *The changes enacted by the Legislature substantively changed the rights afforded to the parties in this matter*. By way of these amendments, the evaluation of child custody allocation was changed by adding additional factors for consideration and providing a rebuttal presumption favoring a 50/50 right of allocation. *Each of these changes substantially affected the rights of the parties with regard to their child and, thus, are substantive in nature.*

Amanda C., 248 W. Va. at 134, 887 S.E.2d at 259 (emphasis added).

The ICA clearly and, in my view, correctly, found that the family court erred by applying the prior version of West Virginia Code § 48-9-206 in its July 8, 2022, order.[2] Further, the ICA found that the Legislature's substantive changes to this statute added additional factors and a rebuttal presumption favoring a 50/50 custodial allocation that the family court should have considered. Finally, the ICA concluded that the family court's "[f]ailure to utilize the applicable statute completely hinders the fairness and integrity of

[2] West Virginia Code § 48-9-603 went into effect on June 10, 2022. The statute addresses its applicable timeframe as follows:

> West Virginia Code § 48-9-603. Effect of enactment; operative dates. (Effective June 10, 2022):
>
> (a) The amendments to this chapter enacted during the 2022 regular session of the Legislature shall become applicable upon the effective date of those amendments. Any order entered prior to the effective date of those amendments remains in full force and effect until modified by a court of competent jurisdiction.
>
> (b) The amendments to this chapter enacted during the 2022 regular legislative session do not constitute a change in circumstances or other basis for modification under § 48-9-401 or § 48-9-402 of this code.
>
> (c) The amendments to this chapter enacted during the 2022 regular legislative session shall become applicable upon the effective date of those amendments. Any order entered prior to the effective date of those amendments remains in full force and effect until modified by a court of competent jurisdiction.

The ICA found that because the family court's final order had not been entered as of June 10, 2022, the new statute applied and that the family court erred by applying the prior version of the statute. I agree with the ICA's ruling and find that it is consistent with the plain language of West Virginia Code § 48-9-603. *See* Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.").

these judicial proceedings. The Legislature specifically intended these amendments to be applied to cases pending consideration—those not yet reduced to a final order." *Id.* at 135, 887 S.E.2d at 260.

Because the ICA conducted a proper plain error analysis under the steps this Court has outlined, I disagree with the majority opinion's conclusion that the ICA erred by applying plain error. The majority opinion finds that the ICA did not afford "adequate consideration of the actual effect of any error upon these particular parties." I disagree with this characterization of the ICA's opinion. The ICA identified substantive differences between the prior and 2022 versions of West Virginia Code § 48-9-206 and determined that the family court's failure to afford the parties their substantive rights under the 2022 version of the statute hindered the fairness and integrity of the proceedings. Thus, I disagree with the majority opinion's determination that the ICA did not adequately consider the effect of the error upon the parties in this case.

Based on all of the foregoing, I concur with the majority opinion's conclusion that this matter needs to be remanded to the family court for a new hearing. I respectfully dissent to the majority opinion's determination that the ICA's ruling that was predicated on plain error should be reversed.