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OF WEST VIRGINIA

BUNN, JUSTICE, concurring:

I concur with the majority's judgment reversing, in part, and affirming, in part, the decision of the Intermediate Court of Appeals. Here, the ICA determined that the family court plainly erred when applying the 2020 version of West Virginia Code § 48-9-206, the statute regarding the allocation of custodial responsibility, which had been amended at the time of the family court's order, rather than addressing the sole assignment of error before it. While the majority recognizes that the ICA's conclusion requires reversal because the ICA found plain error "absent adequate consideration of the actual effect of any error upon these particular parties," Maj. Op. at 21, I again express my concern with the overuse of the plain error standard of review in civil cases—this time by the ICA.

Certainly, Rule 10(c)(3) of the West Virginia Rules of Appellate Procedure allows the ICA to, "[i]n its discretion, . . . consider a plain error not among the assignments of error but evident from the record and otherwise within its jurisdiction to decide." Still, this Rule does not abrogate the well-reasoned guardrails constraining the ICA's use of plain error review. "We have repeatedly acknowledged that our use of the plain error standard of review should be rare and 'exercised sparingly.'" *Kent v. Sullivan*, No. 22-0428, ___ W. Va. ___, ___, ___ S.E.2d. ___, ___, 2024 WL 2097528, at *9 (May 9, 2024) (Bunn, J., concurring) (quoting Syl. pt. 7, in part, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996)). As the majority identifies, the plain error standard requires that the error "affects

substantial rights" and "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Yet here, again a reviewing court—the ICA—sua sponte employed plain error review in a civil case without careful consideration and thorough analysis of these factors.

As I maintained earlier this term, if this Court "*must* apply the plain error standard in reviewing a civil appeal, we should provide an analysis, rather than a conclusion, to explain our approach." *Sullivan*, No. 22-0428, ___ W. Va. at ___, ___ S.E.2d. at ___, 2024 WL 2097528, at *10 (Bunn, J., concurring). The same requirement applies to the ICA's finding of plain error. In its decision, the ICA, sua sponte, first recognized that West Virginia Code § 48-9-206's 2021 amendment "substantially changed the allocation of custodial responsibility" and the 2022 amendment included "additional substantive changes . . . requir[ing] the presumptive application of 50/50 custodial allocation." *Amanda C. v. Christopher P.*, 248 W. Va. 130, 134, 887 S.E.2d 255, 259 (Ct. App. 2022). The ICA concluded that "[e]ach of these changes substantially affected the rights of the parties with regard to their child, and thus, are substantive in nature." *Id.* When finding that the family court plainly erred by applying the 2020 version of the statute, the ICA, relying on its earlier recitation of the amendments, cursorily determined that "the substantial impact of the amendments on a parents' [sic] right to a custodial allocation is clear," without further analysis, and stated that "[f]ailure to utilize the applicable statute completely hinders the fairness and integrity of these judicial proceedings." *Id.* at 135, 887

S.E.2d at 260. Still, the ICA ultimately concluded that it "offer[ed] no opinion as to the outcome of the final hearing had the correct version of the statute been applied." *Id.* The ICA—illustrated by its own conclusion that it had no opinion regarding the purported error's effect on the parties—failed to determine whether any error *actually* affected either party's substantial rights and instead remanded the case to the family court for further proceedings. *See* Syl. pt. 9, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114 (explaining that in a criminal case, "to affect substantial rights" of a defendant means that "the error was prejudicial" and "must have affected the outcome of the proceedings in the circuit court").

In its opinion, the ICA inadequately and erroneously applied the plain error doctrine. Plain error review in civil cases—especially sua sponte plain error review—should be "a 'rare species in civil litigation,' encompassing only those errors that reach the 'pinnacle of fault[.]'" *See Smith v. Kmart Corp.*, 177 F.3d 19, 26 (1st Cir. 1999) (quoting *Cambridge Plating Co. v. Napco, Inc.*, 85 F.3d 752, 767-68 (1st Cir. 1996)). Furthermore, like this Court, when the ICA determines a lower court plainly erred, the ICA must fully consider and justify its findings. For these reasons, I respectfully concur.