IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 2024 Term

No. 22-918

CHRISTOPHER P.,
Petitioner,

v.

AMANDA C.,
Respondent.

Appeal from the Intermediate Court of Appeals of West Virginia
No. 22-ICA-2

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED TO THE FAMILY COURT OF UPSHUR COUNTY WITH DIRECTIONS

Submitted: April 30, 2024
Filed: June 12, 2024

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JUSTICE WALKER delivered the Opinion of the Court.

CHIEF JUSTICE ARMSTEAD concurs in part and dissents in part and reserves the right to file a separate Opinion.

JUSTICE BUNN concurs and reserves the right to file a concurring Opinion.

SYLLABUS BY THE COURT

1. "It is a settled principle of statutory construction that courts presume the Legislature drafts and passes statutes with full knowledge of existing law." Syllabus Point 1, *David Duff, II v. Kanawha County Commission*, No. 23-42 (W. Va. Apr. 22, 2024).

2. When a final order of a family court is appealed to the Intermediate Court of Appeals of West Virginia, the Intermediate Court of Appeals shall review the findings of fact made by the family court for clear error, and the family court's application of law to the facts for an abuse of discretion. The Intermediate Court of Appeals shall review questions of law de novo.

3. On appeal of a final order of a family court from the Intermediate Court of Appeals of West Virginia, the Supreme Court of Appeals of West Virginia shall review the findings of fact made by the family court for clear error, and the family court's application of law to the facts for an abuse of discretion. The Supreme Court of Appeals shall review questions of law de novo.

4. When a final order of a family court is appealed directly to the Supreme Court of Appeals of West Virginia, the Supreme Court of Appeals shall review the findings of fact made by the family court for clear error, and the family court's application of law to the facts for an abuse of discretion. The Supreme Court of Appeals shall review questions of law de novo.

5. “To 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.” Syllabus Point 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

WALKER, Justice:

In February 2021, Christopher P. (Father) petitioned the Family Court of Upshur County for custody of his two children with Amanda C. (Mother). For various reasons, the final hearing on the petition was continued until May 11, 2022. Days before the final hearing date, Mother's counsel notified the parties, the family court, and the Circuit Court of Webster County that he was scheduled to appear before both those courts at conflicting times on May 11. The courts did not resolve the conflict, Mother's counsel elected to appear in the circuit court, and the family court held the final hearing in this matter without Mother or her counsel.

On appeal to the Intermediate Court of Appeals (ICA), Mother argued that the family court had impermissibly failed to yield its hearing time to the circuit court. The ICA granted Mother a new custody hearing but based that decision on the conclusion that the family court had applied the wrong version of West Virginia Code § 48-9-206. Father now appeals that decision.

We reverse the ICA insofar as it concluded that the family court plainly erred when it failed to apply West Virginia Code § 48-9-206 (2022) to Father's petition for custodial allocation but concur with the ICA that Mother is due a new hearing in family court. Mother is entitled to relief because the family court and circuit court did not comply with West Virginia Trial Court Rule 5.05 to resolve her counsel's scheduling conflict. That

failure mandates here that the family court conduct a new, final hearing on Father's petition for custodial allocation.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 1, 2021, Father filed a Petition for Support and/or Allocation of Custodial Responsibility in the Family Court of Upshur County related to his two children with Mother, A.P. and B.P.[1] At an initial hearing on March 29, 2021, the family court set this matter for a status/final hearing on June 22, 2021 and appointed a guardian ad litem to represent the children. When the family court convened the parties on June 22, the guardian ad litem "requested additional time for investigation before reaching a final resolution" in this matter, and the family court rescheduled the final hearing for October 19, 2021. The family court again convened the parties on October 19, then scheduled another hearing for November 9, 2021, and the final hearing for January 12, 2022. Later, the November 9 hearing was continued, apparently because Father's counsel had been exposed to COVID-19.

On December 28, 2021, Father moved to continue the January 12, 2022, hearing, as his counsel was scheduled to appear before this Court on that day.[2] On January

[1] A.P. attained the age of majority during these proceeding. The issue of custody of B.P. remains.

[2] A review of this Court's docket shows that Father's counsel was notified of the January 12, 2022, oral argument date roughly six weeks earlier, on November 15, 2021.

3, the family court entered an order granting Father's counsel's motion for a continuance, and again rescheduled the final hearing—this time for Wednesday, May 11, 2022.

On Monday, May 2, 2022, Mother's counsel notified the family court, the Family Court of Webster County, and the Circuit Court of Webster County, of an imminent scheduling conflict.[3] Mother's counsel represented that on May 11, he was scheduled to appear for the final hearing in this matter at 9:00 a.m.; a hearing before the Webster County Family Court at 11:30 a.m.; and felony, sentencing hearings before the Circuit Court of Webster County at 10:40 a.m., 11:40 a.m., 1:45 p.m., 2:00 p.m., and 2:15 p.m., that had been set in early April. Mother's counsel moved the family court, the Family Court of Webster County, and the Circuit Court of Webster County to "confer and advise which matter will necessitate the services of the undersigned on May 11, 2022." The family court and the Family Court of Webster County resolved the conflict in their schedules, with regard to Mother's counsel.

[3] *See* R. Prac. & Proc. for Fam. Ct. 19(e) ("Scheduling conflicts shall be resolved pursuant to Rule 5 of the Trial Court Rules.").

The notice does not indicate whether Mother's counsel had attempted to resolve the conflict with opposing counsel in either this proceeding or that in the Circuit Court of Webster County. As discussed below, while Rule 5 of the West Virginia Trial Court Rules provides both a process and a standard for resolving scheduling conflicts, Rule 5.05 makes clear that it should not be read to "to discourage counsel from resolving conflicts or to prevent courts from voluntarily yielding a favorable scheduling position." We encourage counsel to work together to resolve scheduling conflicts before resorting to the process provided under Rule 5.

On Friday, May 6, 2022, the family court entered an "Order Acknowledging Filing of Notice of Scheduling Conflict," in which it deemed Mother's counsel's notice of the scheduling conflicts "unreasonabl[y] tard[y]" and affirmed the May 11 trial date. The family court then stated that it "and its staff also had email correspondence with" the Circuit Court of Webster County, despite the tardy notice, but "no consensus could be reached." The family court concluded that, in view of the factors set forth in Trial Court Rules 5.02 and 5.03, the final hearing in this matter took precedence over the sentencing hearings scheduled in the circuit court.

The family court held the final hearing in this matter on May 11, 2022. Neither Mother nor her counsel attended. The family court attempted to contact Mother by telephone, but she could not be reached. It does not appear that the family court telephoned Mother's counsel, as the family court "believe[ed] that [Mother's] counsel chose to appear in the Circuit Court of Webster County rather than in the Family Court of Upshur County . . . ." The family court went on to take testimony and evidence.

The family court entered a post-hearing, temporary order on May 19, 2022, and then the final order was filed on ("Order Establishing Custodial Allocation and Child Support") on July 8, 2022. There, the family court reiterated its assessment of Mother's counsel's notice of imminent scheduling conflict as unreasonably tardy, analysis of the factors set forth in Trial Court Rules 5.02 and 5.03, and conclusion that this case took precedence over the sentencing hearings in circuit court. The family court then applied

West Virginia Code § 48-9-206 (2020) to conclude that B. P. should reside primarily with Father, with Mother to have time with the child on alternating weekends and various holidays, subject to certain restrictions.

Mother appealed the July 8 order to the ICA. She assigned a single error to the proceedings in family court: that court's refusal to cede the date of the final hearing in this matter—May 11, 2022—to the Circuit Court of Webster County based upon Trial Court Rule 5. Mother requested that the July 8 order of the family court be reversed, and the case remanded back to that court for a new evidentiary hearing. On November 18, 2022, the ICA issued its opinion remanding the case to the family court for a new evidentiary hearing, although not to correct the sole error assigned by Mother.[4] Instead, the ICA noticed and acted to correct a legal error it deemed plain, that is, the family court's use of § 48-9-206 (2020), rather than § 48-9-206 (eff. June 10, 2022).[5] Father now appeals to this Court.

II. STANDARD OF REVIEW

This is the first opportunity for this Court to consider the standard of review for final orders from family court since the effective date of the West Virginia Appellate

[4] *Amanda C. v. Christopher P.*, 248 W. Va. 130, 887 S.E.2d 255 (Ct. App. 2022).

[5] *Id*. at 135, 887 S.E.2d at 260. The ICA directed that the July 8, 2022, order was no longer a final order, but a temporary custodial allocation order to remain in place until the family court conducted the new evidentiary hearing, pursuant to West Virginia Code § 48-9-206 (eff. June 10, 2022).

Reorganization Act of 2021. That legislation rerouted appeals from family court through the ICA,[6] rather than the circuit courts, as was the case until June 30, 2022. Parties may yet appeal the final order to this Court following a decision by the ICA, so that two layers of appellate review remain.[7]

Previously, under West Virginia Code § 51-2A-14(c) (2005), "[t]he circuit court [was to] review the findings of fact made by the family court judge under the clearly erroneous standard and . . . review the application of law to the facts under an abuse of discretion standard." And under § 51-2A-15(a) and (b) (2001), this Court was to apply that same standard[8] when an aggrieved party appealed from the circuit court, or when the

[6] *See* W. Va. Code §§ 51-2A-24 (2022), 51-11-4(b)(2) (2024). A final order of the family court may still be appealed directly to this Court, assuming certain requirements are met. *See* W. Va. R. App. Proc. 13(b) (eff. July 1, 2022) ("An appeal from a final order of a family court may not be filed in the Supreme Court unless, within fourteen days after entry of a family court final order, both of the parties file a notice of intent to appeal directly to the Supreme Court and waive their right to appeal to the Intermediate Court."); *see also* R. Prac. & Proc. for Fam. Ct. 26(a) (2022) ("If, within fourteen days after entry of a family court final order, both of the parties file, either jointly or separately, a notice of intent to appeal directly to the supreme court of appeals and waiver of the right to appeal to the intermediate court of appeals, either party aggrieved by a final order of a family court judge may file a petition for appeal to the supreme court of appeals.").

[7] *See* W. Va. Code § 51-11-10(a) (2021) ("A party in interest may petition the Supreme Court of Appeals for appeal of a final order or judgment of the Intermediate Court of Appeals in accordance with rules promulgated by the Supreme Court of Appeals."); W. Va. R. App. Proc. 13(d) ("Appeals from the Intermediate Court to the Supreme Court in family court cases are governed by Rule 5 of the Rules of Appellate Procedure.").

[8] W. Va. Code § 51-2A-15(a) and (b) (2001). Both subsection (a) and (b) refer to "the standard of review . . . set forth in subsection (b), section 14 of this article," that is § 51-2A-14. In its original form, subsection (b) of § 51-2A-14 stated the standard of review to be used by the circuit court and, per § 51-2A-15, this Court, too. *See* 2001 W. Va. Acts

aggrieved party appealed the family court's order directly to this Court. To that end, we held in the syllabus of *Carr v. Hancock*[9] that this Court reviews

> 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*.

Likewise, in those instances when the family court's final order was appealed directly to this Court, "we review[ed] findings of fact by a family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard[, and] questions of law *de novo*."[10]

> As recently summarized in *Duff v. Kanawha County Commission*,
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> > "[T]his Court has held that it is a settled principle of statutory construction that courts presume the Legislature drafts and passes statutes with full knowledge of existing law." *Charleston Gazette v. Smithers*, 232 W. Va. 449, 467, 752 S.E.2d 603, 621 (2013). This includes familiarity with the rules of statutory construction. *See* Syl. Pt. 4, *Twentieth St. Bank v. Jacobs*, 74 W. Va. 525, 82 S.E. 320 (1914) ("The Legislature is presumed to know the rules and principles of construction adopted by the courts."). We may, therefore, presume that when it legislates, the Legislature "is aware of judicial interpretations of existing statutes when it passes new laws[,]" *United States v. Place*, 693 F.3d 219, 229 (1st Cir. 2012),

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5th Extra. Sess. 2944−45. But in 2005, the Legislature amended § 51-2A-14 and moved the standard of review from subsection (b) into its own subsection, (c). It appears that § 51-2A-15 was not amended to reflect that change to § 51-2A-14.

[9] Syl. Pt. *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

[10] Syl. Pt. 1, *May v. May*, 214 W. Va. 394, 589 S.E.2d 536 (2003).

> including past judicial practices under those statutes. *See In re Egebjerg*, 574 F.3d 1045, 1050 (9th Cir. 2009) ("[W]e presume that when Congress legislates, it is aware of past judicial interpretations and practices.").[11]

When the Legislature enacted the West Virginia Appellate Reorganization Act of 2021, it maintained two levels of appellate review of final orders from family court, substituting the ICA for the circuit court as the first level.[12] We have held that, "[i]t is a settled principle of statutory construction that courts presume the Legislature drafts and passes statutes with full knowledge of existing law."[13] So, we presume that in substituting the ICA for the circuit court as the initial level of appellate review of a final order from family court, the Legislature was aware of the statute directing the circuit court (formerly, the initial level of appeal) to review the family court's factual findings for clear error and its application of law to those factual findings for an abuse of discretion. And we also presume that the Legislature was aware of the statute and precedent directing that, when asked to review the order entered by the circuit court reviewing a final order from a family court, or to review a final order from family court appealed directly to this Court, we review the findings of fact made by the family court judge for clear error, the application of law to the facts for an abuse of discretion, and questions of law de novo. Because the

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[11] *Duff v. Kanawha Cnty. Comm'n*, No. 23-43, 2024 WL 1715166, at *6 (W. Va. Apr. 22, 2024).

[12] *But see supra*, note 6 (party aggrieved by final order of family court may appeal directly to the Supreme Court of Appeals, assuming the party has satisfied prerequisites).

[13] Syl. Pt. 1, *Duff*, 2024 WL 1715166, at *1.

Legislature has, effectively, substituted the ICA for the circuit court in the two-level review process for final orders from family court, and in the absence of direction by the Legislature, otherwise, we conclude that those standards hold true for the review of the final orders of the family court, post-enactment of the West Virginia Appellate Reorganization Act of 2021.

For those reasons, we now hold that, when a final order of a family court is appealed to the Intermediate Court of Appeals, the Intermediate Court of Appeals shall review the findings of fact made by the family court for clear error, and the family court's application of law to the facts for an abuse of discretion. The Intermediate Court of Appeals shall review questions of law de novo.[14] We further hold that, on appeal of a final order of a family court from the Intermediate Court of Appeals, the Supreme Court of Appeals shall review the findings of fact made by the family court for clear error, and the family court's application of law to the facts for an abuse of discretion. The Supreme Court of Appeals shall review questions of law de novo. Finally, we hold that when a final order of the family court is appealed directly to the Supreme Court of Appeals, the Supreme

[14] In West Virginia Code § 51-2A-14(c), the Legislature did not expressly state that, in reviewing the final order of the family court, the circuit court was to review questions of law de novo. Considering the precedential value of written opinions, orders, and decisions of the ICA, we find it appropriate to include in the standard of review that the ICA will review questions of law de novo. *See* W. Va. Code § 51-11-9(b) (2021) ("A written opinion, order, or decision of the Intermediate Court of Appeals is binding precedent for the decisions of all circuit courts, family courts, magistrate courts, and agencies unless the opinion, order, or decision is overruled or modified by the Supreme Court of Appeals.").

Court of Appeals shall review the findings of fact made by the family court for clear error, and the family court's application of law to the facts for an abuse of discretion. The Supreme Court of Appeals shall review questions of law de novo. We now apply the second of those standards to the matter before us.

III. ANALYSIS

In his appeal to this Court, Father first argues that the ICA erroneously read West Virginia Code §§ 48-9-206 (eff. June 10, 2022) and 48-9-603 (eff. June 10, 2022); second, that the final order of the family court should not be disturbed; and third, that Mother is not due a new, final hearing before the family court. The guardian echoes Father's arguments. Mother responds that the ICA correctly concluded that the family court applied the wrong version of § 48-9-206. But Mother also argues—as she did before the ICA—that the family court erroneously refused to yield the date of the final hearing in this matter to the Circuit Court of Webster County upon notice of Mother's counsel's scheduling conflict. We first address the issue appealed by Mother to the ICA, and that she raises again to this Court.

It should be no surprise that courts' schedules conflict at times, particularly the schedules of trial courts in those areas of our State served by few lawyers. Rule 5 of the West Virginia Trial Court Rules addresses this inevitability; the rule was "adopted in order to provide a uniform standard for the resolution of scheduling conflicts between and among State and federal magistrate, trial and appellate courts and federal bankruptcy courts

of West Virginia."[15] Rule 5 provides both a process and a standard to resolve scheduling conflicts. The process begins under Rule 5.04, Notice of Conflict, which directs lawyers first to communicate about the conflict,

> upon learning of an imminent scheduling conflict . . . give written notice to opposing counsel, the clerks of all courts, and the presiding judges, if known, in all cases, stating therein the circumstances above relevant to a resolution of the conflict under these rules. Ex parte communication is inappropriate, unless there is insufficient time to resolve the conflict by written notice.

Once a lawyer provides the notice of the imminent scheduling conflict, then, under Rule 5.05, the judges are directed to handle the matter:

> [t]he judges of the courts involved in a scheduling conflict shall promptly confer, resolve the conflict, and notify counsel of the resolution. Nothing in these rules is intended to discourage counsel from resolving conflicts or to prevent courts from voluntarily yielding a favorable scheduling position. Judges are urged to communicate with each other in an effort to lessen the impact of conflicts and continuances on all courts.

And as for the standard, Rule 5.02 provides an order of general priorities that "should ordinarily prevail" "[i]n resolving scheduling conflicts . . . ." In order,

> (a) appellate cases should prevail over trial cases;
>
> (b) criminal felony trials should prevail over civil trials;

[15] W. Va. Tr. Ct. R. 5.01.

> (c) cases in which the trial date has been first set (by published calendar, order or notice) should take precedence over cases which were set later;
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> (d) trials should prevail over hearings, and hearings should prevail over conferences; and,
>
> (e) trials and hearings of a judge in travel status should prevail over trials and hearings of a judge sitting in residence.

Rule 5.03 lists additional factors to which "consideration should be given . . . in the resolution of scheduling conflicts." These are:

> (a) age of the cases and number of previous continuances;
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> (b) whether sanctions for delay have been previously imposed;
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> (c) the complexity of the cases;
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> (d) the estimated trial time;
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> (e) the number of attorneys and parties involved;
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> (f) whether the majority of parties and witnesses are local or will be summoned from outside the venue;
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> (g) whether the trial involves a jury;
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> (h) the difficulty or ease of rescheduling; and,
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> (i) the existence of any constitutional or statutory provision granting priority to a particular type of litigation.

In sum, Rule 5 provides both a process and a standard for the resolution of scheduling conflicts "between and among State and federal magistrate, trial and appellate courts and federal bankruptcy courts of West Virginia."[16] Process-wise, "upon learning of

[16] *Id*.

an imminent scheduling conflict," counsel must provide the notice specified in Rule 5.04 "to opposing counsel, the clerks of all courts, and the presiding judges . . . ." Once an attorney has fulfilled the requirements of Rule 5.04, under Rule 5.05, "[t]he judges of the courts involved in a scheduling conflict shall promptly confer, resolve the conflict, and notify counsel of the resolution." Standard-wise, Rule 5.02 provides an order of priorities that, ordinarily, will make the appropriate resolution of the conflict clear to the courts involved; but in resolving the scheduling conflicts, courts should also consider the factors outlined in Rule 5.03. Finally, Rule 5 should not be read to "to discourage counsel from resolving conflicts or to prevent courts from voluntarily yielding a favorable scheduling position."[17]

Aspects of the family court's final order lead us to conclude that the court abused its discretion in applying Rule 5 to these circumstances. First, the family court refused to act upon Mother's counsel's notice of scheduling conflict based on an incomplete reading of Rule 5.04. The family court founded its refusal to act based upon its conclusion that Mother's counsel's notice was untimely filed, since (1) he had learned of conflicting sentencing hearings in the Circuit Court of Webster County roughly one month before filing the notice of scheduling conflict and, (2) under Rule 5.04, counsel is

[17] W. Va. Tr. Ct. R. 5.05.

supposed to provide notice of scheduling conflicts "[u]pon learning" of them.[18] But the family court's application of Rule 5.04 is incomplete. The rule specifies that, "[u]pon learning of an *imminent* scheduling conflict," counsel must act.[19] We do not define "imminent" for purposes of Rule 5.04 but we do observe that the common meaning of the word is, "ready to take place: happening soon."[20] In this instance, it is enough that the family court did not consider whether, when Mother's counsel learned of the conflicting schedules, that conflict was imminent; "'[i]n general, an abuse of discretion occurs when a material factor deserving significant weight is ignored.'"[21]

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[18] In the briefing before the ICA, Father faulted Mother's Notice of Scheduling Conflict for failing to include sufficient information regarding the scheduling conflict to allow the family court and circuit court to resolve the matter. We decline to address this argument, as the family court's decision rests on the timeliness of Mother's counsel's notice and an application of Trial Court Rules 5.02 and 5.03 to these circumstances.

[19] Emphasis added. This qualification does not give license to counsel to provide notice pursuant to Rule 5.04 in a manner intended to disadvantage opposing parties or to paint any court into a corner. Instead, the qualification of "imminent" accounts for the variability of counsels' schedules and court calendars, particularly those of trial courts.

[20] *See* Imminent, MERRIAM-WEBSTER'S DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/imminent (last visited June 5, 2024); *cf. Matter of Guidelines for Resolving Scheduling Conflicts in Okla. Cts.*, 952 P.2d 993, 993 (Okla. Crim. App. 1997) ("Attorneys confronted by such conflicts are expected to give written notice such that it will be received at least seven (7) days prior to the date of conflict."). We frequently look to dictionary definitions for the common, ordinary, and accepted meaning of undefined terms. *See, e.g.*, *State v. McClain*, 247 W. Va. 423, 430, 880 S.E.2d 889, 896 (2022) (the terms "crash" and "involved" as used in our "hit-and-run statute," West Virginia Code § 17C-4-1).

[21] *Amanda A. v. Kevin T.*, 232 W. Va. 237, 245, 751 S.E.2d 757, 765 (2013) (quoting *Shafer v. Kings Tire Serv., Inc.,* 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004) (citation omitted)).

Second, Rule 5.05 requires "[t]he judges of the courts involved in a scheduling conflict [to] promptly confer, resolve the conflict, and notify counsel of the resolution." From the final order of the family court, it appears that a meaningful attempt to fulfill this requirement was not made. That order states that the family court "and its staff . . . had email correspondence with [the Circuit Court of Webster County and its staff] on May 5, 2022, and no consensus could be reached," as to the resolution of the scheduling conflict between the final hearing in this matter and the five sentencing hearings scheduled in circuit court. The family court described that correspondence in a footnote in the final order; it consists of three terse emails that appear to have been designed to do anything other than resolve the scheduling conflict.[22]

Before the ICA and at oral argument before this Court, Father and the guardian argued that the family court accurately assessed these circumstances under Rules 5.02 and 5.03 to conclude that the final hearing in this matter took priority over the sentencing hearings scheduled in the Circuit Court of Webster County.[23] Yet, Rule 5.05

[22] While the family court detailed those emails and even attached them to the order, we decline to do the same. These emails are communications between members of the judiciary and court staff. Counsel was not copied on these emails, and there is nothing to indicate that the senders intended, or recipients expected, the emails to be shared with the parties.

[23] Father also highlights Rule 59(b) of the Rules of Practice and Procedure for Family Court. That rule directs that "a final order shall be entered in every case within 240 days of filing of the initial pleading," a timeframe far shorter than developed in this case. We do not see that, in refusing to act upon Mother's counsel's notice of scheduling conflict, the family court relied on Rule 59(b), although it did consider the relative age of this matter

makes clear that the priorities listed in Rule 5.02 and the factors identified in Rule 5.03 are to be used by "[t]he judges of the courts involved in a scheduling conflict . . . to resolve the conflict . . . ." The priorities and factors are not up for debate between the parties. For purposes of the resolution process provided for in Rule 5, counsel's role is confined to Rule 5.04, setting forth counsel's "duty . . . to give written notice" of an imminent scheduling conflict "to opposing counsel, the clerks of all courts, and the presiding judges . . . ."

Father and the guardian also argued that Mother's counsel should have moved to continue proceedings in either the family court or the Circuit Court of Webster County, arranged to appear at the family court hearing telephonically, obtained substitute counsel, or allowed Mother to appear at the hearing, unrepresented. These arguments do not address the fundamental point of our review in these circumstances—that "[w]hile counsel has responsibility to seek to avoid scheduling conflicts, . . . judges have a concomitant obligation to assist counsel and their fellow jurists in their attempts to meet the scheduling demands of an ever burgeoning caseload in our judicial system."[24]

Here, the family court communicated to Mother's counsel in no uncertain terms that a resolution of the scheduling conflict was not forthcoming—from either that

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and the felony cases pending in the Circuit Court of Webster County. In addition, as Father filed the petition for custodial allocation on February 1, 2021, the 240-day span ended in September. We observe that even after September 2021, Father sought to continue this matter to accommodate his own scheduling conflict.

[24] *Matter of Denney*, 377 A.2d 1360, 1363 (D.C. 1977) (internal citation omitted).

court or the Circuit Court of Webster County, and so placed Mother's counsel and Mother in a no-win situation. We concur with Father and the guardian that Mother's counsel's and Mother's choice not to attend the hearing without notice was not ideal and should not be repeated. Other options were available. But, again, the fundamental problem in this instance is not that Mother's counsel and Mother failed to choose the correct response to the courts' failure to resolve the scheduling conflict; it is that the courts involved in this scheduling conflict put Mother's counsel and Mother in the position of having to choose at all.

We do not have precedent on all fours with the circumstances presented here. That, alone, is telling. Still, Father and the guardian point to a 2016 memorandum decision, *In re E.L.*,[25] to support their contention that the family court properly conducted the final hearing in this matter in the absence of Mother and Mother's counsel. In that case, an abuse and neglect petition was filed against the mother, but by the time of the preliminary hearing, she was incarcerated and awaiting extradition to Texas.[26] Regardless, the mother appeared at the hearing in person and by counsel.[27] The mother's counsel expressly agreed to schedule the adjudicatory hearing thirty days hence, and assured the court that if, by that

[25] *In re E.L.*, No. 16-0027, 2016 WL 3165822 (W. Va. June 6, 2016) (memorandum decision).

[26] *Id*. at *1−*2.

[27] *Id*. at *2

time, the mother had not "sort[ed] out the Texas thing," he "may make a motion."[28] But neither the mother nor her counsel appeared at the adjudicatory hearing, nor did the mother's counsel move to continue the hearing.[29] The court waited about fifteen minutes for the mother's counsel to appear; he did not.[30] Later, the court received a message that the mother's counsel would arrive at the hearing "shortly."[31] Again, the court waited.[32] Once the mother's counsel arrived, he explained that an earlier hearing in another matter had run long and declined the court's invitation to cross-examine the child protective services worker who had testified in counsel's absence.[33] The court went on to adjudicate mother and, ultimately, terminate her parental rights.[34]

The mother appealed, arguing that "the circuit court's decision to proceed with [the adjudicatory] hearing violated her statutory and constitutional rights to counsel and to a meaningful opportunity to be heard."[35] This Court disagreed for various reasons.

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[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] *Id*. at *3.

[35] *Id*. at *4.

Relevant here, we rejected the mother's counsel's argument "that the circuit court erred in proceeding without him because he was in another court in a different jurisdiction,"[36] directed him to Rule 5.04, and explained that that rule places "the impetus . . . upon that attorney to provide proper written notice . . . ."[37] We then concluded that the circuit court did not err in commencing the hearing in the absence of the mother or her counsel,

> where petitioner's counsel appears to have known of the potential scheduling conflict on the morning of April 2, 2015, (as he informed DHHR's counsel), but he failed to provide the circuit court with any notice of the issue—written or otherwise—and further failed to request a continuance or other delay from the circuit court as a result of that conflict.[38]

In re E.L. is easily distinguished. First, in this case, Mother's counsel filed the notice required by Rule 5.04. And while the family court deemed it untimely, any undue delay did not impede the family court from communicating with the Circuit Court of Webster County regarding the scheduling conflict and from assessing the competing proceedings there. Second, we found it significant in *In re E.L.* that the mother's counsel failed to move to continue the adjudicatory hearing; but we do not see that that significance carries over to these circumstances. As discussed above, the family court made it quite clear that it would not alter its schedule; practically, as Mother's counsel pointed out during oral argument, what good would have come of moving the family court to continue the

[36] *Id*. at *5.

[37] *Id*.

[38] *Id*.

final hearing? Finally, this Court found no reversible error in *In re E.L.* because, in part, the circuit court "in no way prevented petitioner or her counsel from appearing at the properly noticed [adjudicatory] hearing or from challenging the evidence presented."[39] In fact, the circuit court took steps to avoid prejudicing the mother due to her counsel's unexplained absence. It delayed the start of the adjudicatory hearing, recessed once it received the message that the mother's counsel was en route, and invited the mother's counsel to cross-examine the CPS officer after he arrived.[40] The actions of the family court in this matter are not comparable.

So, we conclude that the family court abused its discretion when it proceeded to conduct the final hearing in this matter in the absence of Mother or her counsel. In reaching that conclusion in the present case, we do not mean to imply that a failure to resolve a duly noticed scheduling conflict under Rule 5.05 amounts to an abuse of courts' discretion, or even an appealable error in every case. Here, though, the courts' failure to resolve the conflict is addressed in detail in the final order on appeal, resulted in a situation patently disadvantageous to Mother, and affected the penultimate hearing in a case about the custody of a vulnerable child.

[39] *Id*.

[40] *Id*.

Before concluding, we must acknowledge the path taken by the ICA to resolve Mother's appeal. While we agree with the ICA that remanding this case to the family court to afford Mother a new, final hearing is the correct outcome,[41] we do not condone the ICA's resort to plain error. As this Court explained in *State v. Miller*, "[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."[42] The ICA summarily stated that the amendments to § 48-9-206 in 2021 and 2022 "substantially affected the rights of the parties with regard to their child,"[43] but did not elaborate—an elaboration that would have been particularly helpful in this case where the parties had a fifty-fifty residential custody arrangement as to B.P. going into the final hearing. We do not dispute that under Rule 10(c)(3) of the West Virginia Rules of Appellate Procedure, the ICA may 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." But in the present circumstances, we find it necessary to reverse that portion of the ICA's decision in which it elected to exercise that discretion

[41] *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.").

[42] Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

[43] *Amanda C.*, 248 W. Va. at 34, 887 S.E.2d at 259.

absent adequate consideration of the actual effect of any error upon these particular parties.[44]

IV. CONCLUSION

For those reasons, we reverse that portion of the ICA's judgment predicated on plain error and affirm that portion of the judgment remanding the case to the family court.[45] This case is remanded to the Family Court of Upshur County for proceedings consistent with this Opinion. The Clerk is directed to issue the mandate contemporaneously with this Opinion.

REVERSED IN PART, AFFIRMED IN PART,
AND REMANDED WITH DIRECTIONS.

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[44] *See Amanda A.*, 232 W. Va. at 245, 751 S.E.2d at 765 ("'[i]n general, an abuse of discretion occurs when a material factor deserving significant weight is ignored'") (quoting *Shafer*, 215 W. Va. at 177, 597 S.E.2d at 310 (citation omitted)). These circumstances contrast with those presented in our recent decision, *Kent v. Sullivan*. No. 22-0428, 2024 WL 2097528 (W. Va. May 9, 2024). That case dealt with the lower court's utter failure to apply the correct body of immunities law, an error that, unequivocally, affected those defendants' substantial rights (*i.e.*, not to be subjected to suit). *See Robinson v. Pack*, 223 W. Va. 828, 833, 679 S.E.2d 660, 665 (2009) ("the underlying objective in any immunity determination (absolute or qualified) is immunity from suit").

[45] In affirming the judgment of the ICA, in part, this Court also maintains the July 8, 2022, order of the Family Court of Upshur County as the temporary custodial allocation order that shall remain in place until a final hearing is conducted in accordance with this Opinion.