

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

At

**ICA EFiled: Dec 27 2023
03:02PM EST
Transaction ID 71696902**

CHARLESTON, WEST VIRGINIA

NO. 23-ICA-479

KANE M. vs. MIRANDA M.

**Wood County Divorce Action
Case No. FC-54-2021-D-23
The Honorable C. Darren Tallman**

AMENDED RESPONDENT'S BRIEF

Ginny Conley, WVSB#6563
CONLEY LAW OFFICE, PLLC
1130 Market Street
P. O. Box 143
Parkersburg, WV 26102
Phone (304) 485-3333
Fax (304) 485-3444
Email: gconley@conleylawoffice.com

TABLE OF CONTENTS

	<u>Page</u>
1. Table of Authorities	2
2. Objection to Assignment of Error	4
3. Statement of Case	4
4. Summary of Argument	15
5. Statement Regarding Oral Argument and Decision	17
6. Argument	17
7. Conclusion	23

TABLE OF AUTHORITIES

	<u>Page</u>
A. Case Law:	
1. <i>In Re A.B.-1 and A.B.-2</i> , No. 19-0178 (W.Va. 202) (Memorandum Decision)	20
2. <i>Province v. Province</i> , 196 W.Va. 473, 483, 473 S.E.2d 894, 904 (1996)	21
3. <i>Nestor v. Bruce Hardwood Florrying, L.P.</i> , 206 W. Va. 453, 456, 525 S.E.2d 334, 337 (1999)	21
4. <i>Collisi v. Collisi</i> , 231 W.Va. 359, 364, 745 S.E.2d 250, 255 (2013)	21
5. <i>Carr v. Hancock</i> , 216 W.Va. 474, 607 S.E.2d 803 (2004)	21
6. <i>Amanda C. v. Christopher P.</i> , No. 22-ICA-2, __W.Va. __, 887 S.E. 2d 255, 258 (Ct. App. 2022)	21
7. <i>Daniel Y. v. Anne Y.</i> , 23-ICA-34 (W.Va. ICA Nov 01, 2023)	21

B. Statutes:

- | | |
|---|---------------|
| 1. W.Va. Code §48-9-102a | 17 |
| 2. W.Va. Code §48-9-209(f)(4)(D) | 18 |
| 3. W. Va. Code §27-1-11 | 19 |
| 4. W.Va. Code §48-9-206 | 21, 22 |

OBJECTIONS TO ASSIGNMENTS OF ERROR

1. **THE FAMILY COURT DID NOT ERR BY AWARDING PETITIONER AN ALLOCATION OF CUSTODIAL RESPONSIBILITY LESS THAN 50/50 PURSUANT TO WEST VIRGINIA CODE §48-9-102a and §48-9-209(f)(4)(D) AND THE EVIDENCE SUPPORTING THE REBUTTAL OF THE PRESUMPTION PRESENTED BY THE RESPONDENT MOTHER HEREIN.**

2. **THE LOWER COURT MADE SUFFICIENT FINDINGS OF FACT AND/OR CONCLUSIONS OF LAW TO JUSTIFY DENYING THE PETITIONER A 50/50 ALLOCATION OF CUSTODIAL RESPONSIBILITY.**

STATEMENT OF CASE

The Respondent Mother herein, Miranda M. married Respondent herein, Kane M. on June 12, 2010, in Wood County, West Virginia (App.p.122) Two children were born as issue of the marriage to wit: C.M.-1 born 2013 and C.M.-2 born May 2017 (App. P. 123). The parties were granted a divorce from the bonds of matrimony by Family Court of Wood County, West Virginia by Order entered October 2, 2023 (App. Pgs. 121 to 142). Prior to said final hearing the parties agreed on all matters regarding equitable distribution, spousal support, child support and all other matters except for the allocation of custodial responsibility. (App Pgs. 121 to 142). At the final hearing, Petitioner requested a parenting plan of a 50/50 allocation of custodial responsibility while Respondent Mother requested that the Father received one less day per week, namely, Wednesday. The family court granted petitioner a parenting plan one day less of a 50/50 allocation of custodial responsibility every week.

Specifically, at the final hearing held on August 1, 2022, the Petitioner Mother proposed a parenting plan consistent with the parenting plan awarded by the Court at the Preliminary

hearing held on March 22, 2021. (App. P. 12). The only area of the Respondent Mother's proposed parenting plan contested by the Petitioner Father was the Residential Schedule.

Following is the Petitioner's Proposed Residential Schedule:

RESIDENTIAL SCHEDULE

The principal residence of the children shall be at the home of the Mother. The time to be spent by the Father with his children will be as follows:

Every other week from Thursday after school, or at 3:00 p.m. if school is not in session, until Monday at school or at 8:00 a.m. if school is not in session.

On the weeks the Father does not exercise parenting time with the children Thursday through Monday, the Father shall have the children, Thursday after school, or at 3:00 p.m. if school is not in session, to Friday after school, or 3:00 p.m. if school is not in session.

The Petitioner Father proposed a residential schedule exactly like the Respondent Mother, with one exception, he proposed an additional overnight of parenting time with the children on Wednesday of each week. (tape 8-1-22, 11h:34m to 11h:40min).

In the Final Divorce Order, the Family Court ordered a compromise of the parties' requests by granting Father parenting time every Wednesday during the Summer but awarded the Mother every Wednesday overnight during the school year.

Following is the Residential Schedule entered by the Court at the Final Divorce Hearing to which the Petitioner now appeals:

RESIDENTIAL SCHEDULE

The principal residence of the children shall be at the home of the mother. The time to be spent by the Father with his children will be as follows:

SCHOOL YEAR

Every other week from Thursday after school, or at 8:00 a.m. if school is not in session, until Monday at school or at 3:00 p.m. if school is not in session.

On the weeks the Father does not exercise parenting time with the children Thursday through Monday, the father shall have the children, Thursday after school, or at 8:00 a.m. if school is not in session, to Friday after school, or 3:00 p.m. if school is not in session.

SUMMER

Beginning the first Wednesday after school ends, and ending the last Wednesday before school begins, the father shall have parenting time on Wednesday from 5:00 p.m. until Friday at 3:00 p.m. during the weeks in the summer when the father does not have weekend parenting time. The Father shall have visitation on Wednesday from 5:00 p.m. until Monday at 3:00 p.m. during the weeks in the summer when the father has weekend parenting time.

(App.p.127)

In the Court's Final Order, the Court made the following findings in the Court's Judgement of the Court, regarding the allocation of custodial responsibility:

"Based on the evidence presented, arguments of counsel and the pleadings in this case, the court finds:

1. That is in the best interests of the children and to allow each parent to have a meaningful relationship with the child.
2. Based on current law, Mrs. Maier's was put in the uncomfortable position of presenting evidence to deviate from an equal shared parenting plan based on the Husband's substance abuse issue. The Court finds that the mother has met that burden.
3. The Court finds that the Respondent has a significant substance abuse problem, namely alcohol.

4. The Court finds that the father has taken significant steps to rectify the substance abuse problem and based on the evidence it appears it is not a current problem.

5. The Court further finds that the child Cruz has a condition that is being addressed in counselling that a set schedule is better for the minor child during the school year.

These findings above were set forth in the Final Order and further findings and rulings were set forth on the record at the final hearing. (Tape 4, at 20:22).

The Respondent Mother is a practicing Dentist and majority owner of her own Dental Practice. Petitioner Father is a practicing Medical Doctor employed by Med Express. As it pertains to the issue on appeal, the Respondent Mother testified in detail about how the Father's alcohol addiction affected the children and the family. She described the reason she was requesting the current plan was based on a "compilation of dangerous circumstances that Kane created that hollowed out their lives;" the parties work schedules and the medical condition the oldest child was dealing with in therapy and at home.

The testimony the Court considered during the hearing regarding the events and circumstances leading up to the Final Hearing, are set forth below and more fully upon the record:

1. The Paternal grandparents began discussing concerns with the Mother about the Father's alcohol abuse in 2009. She defended him to his parents until 2014 when it became evident that his parents were right. She admitted being naïve and maybe even woefully ignorant regarding Father's alcohol problems until then. (Tape1, 11:54)
2. The Father's substance abuse worsened and eventually put the lives of their children and their marriage in jeopardy. (Tape1, 11:54)

3. Early Spring of 2014, a few months after their first child was born, the Respondent Mother and the child began transitioning to Parkersburg, West Virginia, from Huntington while the Father remained in Huntington, West Virginia working until the Spring of 2015. This is when she began noticing the husband in what she described as “funks.” During these times, the Father would avoid family interaction, sleep a lot, leave the home, go somewhere, and come back in the middle of the night noticeably drunk. (Tape1, 11:54)
4. Winter of 2014, the Father was arrested for his first DUI after he wrecked his car into a ditch. The Father told her that he would not have wrecked if she had not texted him. He was not physically hurt during the wreck, but as a result of the DUI an “in vehicle breathalyzer” was installed in his car for a year with scheduled monitoring through the beginning of 2016. (Tape1, 11:54)
5. Summer 2016, there was an episode at the home of the paternal grandparents where they were afraid something was wrong medically with the Father. At the time the Father was slurring, incoherent and glazed. The Father later admitted during that visit to the Mother and his parents that he had a problem with alcohol, and he was trying to hide it from people. (Tape1, 11:54)
6. September 29, 2017, The Petitioner Father drove drunk with our three-year-old child in the car to their farm while taking him camping. The Father attempted to jump a fallen tree with his brand-new truck which he significantly damaged in the attempt. The Father called the Mother after the event and said, “I 100 percent jacked up my truck” because he wanted to see what it could do. The Mother rushed to the farm and when she arrived the Father was stumbling around trying to set up a tent. His speech was slow and slurred. After an intense fight between the parties about taking the child home

with her, she left with the child. The Father eventually arrived home after 1:00 AM. Earlier that day, the Father attempted to take an air 15 assault rifle with him and the child to the farm. The Father told her that the three-year-old “wanted to shoot it.” The Mother removed the gun from the truck before the Father left for the farm. (Tape1, 11:54)

7. In October 2017, the Petitioner Father had an incident at the home of the Mother’s uncle and aunt. The Father had been working during the day, out of a room at this home for several months. One day, the uncle came home to find the Father talking to the Aunt, slurring his speech, and appearing intoxicated. The Uncle would not let the Father drive home in that condition, so the Father stayed at the house for several hours until the Uncle determined it was safe for him to drive. At some point while the Petitioner Father was at the Aunt and Uncle’s home that day, he stole pills from a medicine cabinet in the bathroom understood by the Mother to be controlled substances belonging to the Aunt. The Uncle confronted the Father about the medicine and the Father denied taking the pills. The uncle gave the Father the opportunity to return the pills the next day or he was going to contact law enforcement to investigate the matter. The Father returned the pills the next day. (Tape1, 11:54)
8. November 16, 2017, The Father was not allowed to board a Southwest flight home from a work trip because he was too intoxicated or drugged. He was rebooked on a flight the next day. The Father admitted that he told the Mother about this incident. At the Final Hearing he testified that he just made that up because he was embarrassed that he was afraid to board the plane due to his fear of flying. (Tape1, 11:54)
9. The next day, November 17, 2017, when the Father was returning from the trip described above, the Wife called to see where he was. They spoke at noon that day, he

- was clearly intoxicated. She told him to sleep it off in his car where he was. By 9:00 p.m. she had not heard from him, and he was not answering her calls. She contacted the Ohio State Police and learned that the Father had been arrested for DUI, he refused the breathalyzer, his car was impounded. As a result of his conviction, he was sentenced to 10 days in jail, 90 days monitoring by ankle bracelet and an in-vehicle breathalyzer for two years. The Father had the breathalyzer installed in a second vehicle that he rarely drove, to avoid responsibility for his actions. (Tape1, 11:54)
10. December 17, 2023, The Wife contacted the West Virginia State Police to alert them that he was driving home intoxicated from a work trip 2 hours away. (Tape1, 11:54)
 11. January 2018, there were multiple episodes of intoxication during this month. At least three of which the Mother tested him on a breathalyzer that registered above .4. The Mother tried a family intervention to get him involuntarily committed for treatment during this time. (Tape1, 11:54)
 12. February 2018, the Father served his 10-day jail sentence for his second DUI. (Tape1, 11:54)
 13. May of 2018, the Father had his ankle monitor removed. (Tape1, 11:54)
 14. June 2018, the Father became intoxicated again and denied it. The next day he told the Mother during the night he shot a 22 rifle at a streetlamp or at a cat in their neighborhood, the story changed because he wanted to. The neighborhood had multiple houses around. The Mother did not believe him until she saw the 22 Rifle in the home unsecured with shell casings on the front porch. (Tape1, 11:54)
 15. June 22, 2018, the Father was acting erratic and he wanted to take their 4- year- old in the car with him. The Mother refused to let the child go. The Father left angry and returned several hours later drunk. (Tape1, 11:54)

16. June 24, 2018, The Mother filed for separation and the Father moved into a hotel the separation lasted for over a year. The minor children at issue here stayed in the marital home with the Mother. (Tape1, 11:54)
17. September 11, 2018, very intoxicated at his apartment when he had multiple work several conference calls scheduled. This was the first time his drinking affected his work.
18. After the Father's first DUI offense, he enrolled in a program known as the West Virginia Medical Professionals Health Program (hereinafter "WVMPHP"). This agency works with the West Virginia Medical Licensing Board to assist physicians with substance abuse and other conditions, to make treatment recommendations and to keep doctors from losing their medical license. (Tape 1, 11:54)
19. The first offense or stage of this program required the Father to attend meetings and be monitored for one year. The Father testified that he successfully completed this program in 2016. (Tape 1, 11:54)
20. After the Father's second DUI, he re-enrolled into the second offense level of this program. The requirements of the second level of this program required inpatient rehabilitation if warranted, mandatory drug and alcohol testing, Alcoholics Anonymous meetings, and treatment with a counselor and a psychiatrist. (Tape 1, 11:54)
21. The Mother testified that part of the WVMPHP intake process was to interview family members about their concerns. The Father told the Mother, if he had to go to rehab it would be all her fault because that decision would be determined by what she said in the interview. (Tape 1, 11:54)

22. From January until April 2019, the Father completed an eighty-day (80) day inpatient rehabilitation program in Alabama. The Mother stayed home and took care of the children. (Tape 1, 11:54)
23. At the time of the final hearing, the Father was in the third year of the five-year program with “WVMPHP.” The only documentation of this program presented to the Court was a letter from P. Bradley Hall, M.D. the Executive Medical Director of the agency stating that as of June 1, 2022, the Father was a voluntary participant of the program and in good standing with the program since November 28, 2018. It stated that his testing for mind/mood altering substances, including alcohol, had been negative as of the date of the letter. (Tape 1, 11:54)
24. The Father testified about the program requirements and his compliance with the program. The Family Court was able to evaluate the Father’s credibility and commitment to the program in light of the events that caused him to have to enter it to keep his medical license.
25. The Father refused to share information with the Mother concerning his aftercare treatment plan, telling her it was “none of her business.” He also told her he had stopped seeing the psychiatrist and going to meetings or getting tests done. He told her he did not have to see the psychiatrist anymore or be tested.
26. The Mother testified that through all of the above events and other events related to the Father that were not brought before the Court, she remained the predictable, reliable, and stable parent for the minor children.
27. In August of 2019, after approximately four months of the Father being home from inpatient rehab, the Mother made another effort to keep the family together. The Father moved back into the marital home with the family. Not long after, the Mother

determined that the Father's core issues had not been changed by recent events. The Father told her that she had handled the situation in an extreme manner. He told her everyone he talked to would not have reacted the same way she did in the same situation. He told her everyone he talked to believe his habits and behaviors were acceptable. The Father continued to blame the Mother for everything that had happened to him. (Tape 12:05)

28. The Mother testified that past behavior is the best predictor of future behavior. The Father has continually behaved as if the rules do not apply to him. She rarely ever saw true remorse from him for his actions. Over and over again she has watched the Father have perfect behavior when held legally accountable or when the spotlight was on him only to quickly relapse when the spotlight was gone. She asked the Court to look at the past to predict what will happen in the future. She believes he will threaten the safety of his children again once he is not being monitored. (Tape 12:05-12:07)

29. The Mother testified about their oldest child CM-1's was diagnosed with sensory integration and anxiety issues while the Father was in rehab. The Mother described that the child became anxious about change, anxious about certain types of clothing. Both parties discussed that the child had these issues and extra time had to be spent explaining to the child when change was going to happen. Details about what was going to be happening in the time ahead and specifics on where the child would be and who the child would be with were necessary with the oldest child. The Father acknowledged that the oldest child's anxiety was a lot like him as a child and he did not want the child to have the same problems as the Father. (Tape 1, 12:13)

30. The Father testified that he has a problem with alcohol, but he is not an alcoholic. He testified that at the Alabama rehab facility in 201, he was tested and diagnosed with

“mild alcohol use, in sustained remission”. He further testified that the reason for sustained remission is because it has been a period of time since the last adverse event. He attributed his drinking to stress and anxiety of his job and family life. He admitted to pleading guilty to two DUIs. He admitted that he drank alone in his car while driving on multiple occasions. He admitted that his alcohol was to the point that he was harming people. Most importantly, the Father confirmed some and did not dispute any of the adverse events related to alcohol the Mother described in her testimony. (Tape 4, 18:44 to 19:20)

31. The Court had the ability to observe and determine the testimony of the witnesses and parties. In particular the court had the opportunity to observe and determine the credibility of the parties. The Court also engaged in asking its own questions of the parties and witnesses.
32. The Father’s testimony about his treatment and testing was not supported by much proof at all. The Father testified the evaluation was not available, the drug testing results were not available, the AA sign in records were not available and the record of meetings with his doctor’s group were not available.
33. Both parties testified that the current parenting plan was working well for the children. (Tape 4, 19:57)
34. After the Court ruled on the parenting plan, the parties and the Court discussed which extra overnight to give the Father during the week in the Summer. The parties settled on Wednesday at 5:00 p.m. each week as additional time for the Father. The Court set the time at 5:00 p.m. because the Mother is off work every Wednesday. (Tape 4, 19:57 to end)

SUMMARY OF ARGUMENT

1. **THE FAMILY COURT DID NOT COMMIT AN ERROR BY FAILING TO GRANT PETITIONER AN EXACT 50/50 ALLOCATION OF CUSTODIAL RESPONSIBILITY PURSUANT TO WEST VIRGINIA CODE §48-9-209 AS THE RESPONDENT ESTABLISHED A REBUTTABLE PRESUMPTION FOR THE SAME.**

The evidence revealed that the Husband's rollercoaster problems with alcohol date back to 2009. There was no real dispute by the Father of all of the adverse events caused by his alcohol problem, including the events where a child was placed in danger. The Wife's compelling undisputed testimony was that each time the Husband was not monitored for his alcohol issues he quickly relapsed. Both parties acknowledge that the Husband appears to be compliant with his program, but this is based on the Father's testimony and one letter from the program stating that he is in compliance and has passed his drug and alcohol testing. At the time of the final hearing, the Husband had approximately two years left in the WVMPHP program. The Father himself testified that he would have a problem with alcohol forever. (Tape 19:35). The question here is did the Mother present sufficient evidence to rebut the 50-50 presumption? Did the Mother sufficiently prove to the Family Court that the Father was addicted to alcohol? The Court determined that she did meet her burden.

The Court also considered the sensory impairment and anxiety of the oldest child in adopting a plan that had already been set and seen success during the pendency of the case.

2. THE LOWER COURT MADE SUFFICIENT FINDINGS OF FACT AND/OR CONCLUSIONS OF LAW TO JUSTIFY DENYING THE PETITIONER A 50/50 ALLOCATION OF CUSTODIAL RESPONSIBILITY.

The Petitioner argues that the findings made by the Court were not sufficient because the Court finds that the Father has significant substances abuse issues, namely, alcohol, but indicates he no longer has a problem. This is a misstatement of the Court's findings and the evidence in the case. The Court specifically found, "that the father has taken significant steps to rectify the substance abuse problem and based on the evidence it appears it is not a current problem." That is not the same thing as finding that the "Father no longer has a problem." With alcoholism, relapse has been an issue for people for years. The court heard testimony of the Father's pattern of relapsing when he is not being monitored for his alcohol issues. Hopefully this time, the Father will not relapse once the program ends. The Court's finding is sufficient and leads the parties to believe that the Court is pleased with the Father's current progress, but that the future is not yet determined.

3. THAT THE FAMILY COURT AWARDED THE FATHER AS CLOSE TO A 50/50 ALLOCATION OF CUSTODIAL RESPONSIBILITY AS IT COULD BASED ON THE REQUESTED PARENTING PLANS OF THE PARTIES AND THEIR WORK SCHEDULES.

The Family court proceeded on the proposed parenting plans of both parties. The Father's requested extra day was directed at the Wednesday of each week. On all of the Father's parenting plan days he was off work, able to enjoy the children completely. The Mother's

day off was Wednesday. This was the day the Father wanted the Court to take from the Mother and add to the Father.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for a Rule 19 argument as it involves an unsustainable exercise of discretion where the law governing that discretion is settled and Petitioner is claiming insufficient evidence or a result against the weight of the evidence. The Respondent makes this statement only because of the Petitioner's statement.

ARGUMENT

- 1. THE FAMILY COURT DID NOT ERR BY AWARDING PETITIONER AN ALLOCATION OF CUSTODIAL RESPONSIBILITY LESS THAN 50/50 PURSUANT TO WEST VIRGINIA CODE §48-9-102a and §48-9-209(f)(4)(D) AND THE EVIDENCE SUPPORTING THE REBUTTAL OF THE PRESUMPTION PRESENTED BY THE RESPONDENT MOTHER HEREIN.**

West Virginia Code § 48-9-102a provides:

There shall be a presumption, rebuttable by a preponderance of the evidence, that equal (50-50) custodial allocation is in the best interest of the child. If the presumption is rebutted, the court shall, absent an agreement between the parents as to all matters related to custodial allocation, construct a parenting time schedule which maximizes the time each parent has with the child and is consistent with ensuring the child's welfare.

West Virginia Code § 48-9-209(f)(4)(D) in relevant part provides:

(f) In determining whether the presumption for an equal (50-50) allocation of physical custody has been rebutted, a court shall consider all relevant factors including any of the following:

(2) Whether the child:

(B) Has special needs, a chronic illness, or other serious medical condition and would receive more appropriate care under another custodial allocation and;

(4) Whether a parent, partner, or other person living, or regularly in that parent's household:

(D) Is addicted to a controlled substance or alcohol;

West Virginia Code § 48-9-209(f)(4)(D)

The Respondent Mother met her burden of rebutting the presumption of a 50-50 allocation of custodial responsibility based on the overwhelming evidence presented of the years of adverse events related to the Father's abuse of alcohol. From this undisputed evidence, the Court determined that the Father had a significant substance abuse problem with alcohol. The Court's findings state:

2. Based on current law, Mrs. Maier's was put in the uncomfortable position of presenting evidence to deviate from an equal shared parenting plan based on the Husband's substance abuse issue. The Court finds that the mother has met that burden.

3. The Court finds that the Respondent has a significant substance abuse problem, namely alcohol.

4. The Court finds that the father has taken significant steps to rectify the substance abuse problem and based on the evidence it appears it is not a current problem.

The Petitioner Father argues that the Court erred by not making a finding that the Father was “addicted” to alcohol. The Court instead used the language, “the Respondent has a significant substance abuse problem, namely alcohol.” There is no specific definition of “addicted” in the Domestic Relations Chapter of the West Virginia Code. Looking to other definitions in the West Virginia Code, Chapter §27-1-11, Mentally Ill Persons defines addiction as:

§27-1-11. Addiction.

(a) As used in this chapter, “addiction” or substance use disorder means a maladaptive pattern of substance use leading to clinically significant impairment or distress as manifested by one or more of the following occurring within 30 days prior to the filing of the petition:

(1) Recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home, including, but not limited to, repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; or neglect of children or household;

(2) Recurrent use in situations in which it is physically hazardous, including, but not limited to, driving while intoxicated or operating a machine when impaired by substance use;

(3) Recurrent substance-related legal problems; or

(4) Continued use despite knowledge or having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance.

(b) As used in this section, “substance” means alcohol, controlled substances as defined in sections §60A-2-204, §60A-2-206, §60A-2-208, and §60A-2-210 of this code, or anything consumed for its psychoactive effect whether or not designed for human consumption.

In the above code provision, “addiction” is used interchangeably with “substance use disorder.” Based on the foregoing definition, the Court’s failure to specifically state “addicted” should not be considered an error.

The Petitioner Father’s testimony at the Final Hearing and position on appeal is that he refutes that he is an “alcoholic” or “addicted to alcohol.” He refuses to give himself that label, although his admitted and undisputed history with the adverse events while he was under the influence of alcohol, the required treatment and drug and alcohol testing he has endured all indicate that he is addicted to alcohol.

The Petitioner argues an abuse and neglect case *In Re A.B-1 and A.B-2*, No. 19-0178 (W.Va. 2020) (Memorandum Decision), where a Mother wrecked a vehicle with her children in the car while under the influence is applicable to the case at hand. The Mother in that case had one very adverse incident related to drinking and driving her children. The Mother was granted and successfully completed a pre-adjudicatory improvement period. Prior to the wreck, the Mother had been the primary custodian of the children. The Court ruled that after the successful completion of the improvement period, the parties should revert to the prior custodial arrangement, due to the Mother “abating” the problems set forth in the Petition. The case here differs substantially. First and foremost, we are not arguing about taking primary custody away from the Father. The parties here have shared custody. Here, we are debating whether the Court by not awarding the Father the one extra day a week in the parenting plan he requested during the school year is error. Second, in the instant case there is evidence of a longstanding alcohol problem with the Father. In the abuse and neglect case cited, the Mother’s conduct, although a terrible incident, appears to be isolated. For these reasons, the abuse and neglect case cited are not dispositive of the issues in the current case.

The Supreme Court of Appeals of West Virginia has said that to properly review an order of a family court:

"[t]he order must be sufficient to indicate the factual and legal basis for the [family court]'s ultimate conclusion so as to facilitate a meaningful review of the issues presented." *Province v. Province*, 196 W.Va. 473, 483, 473 S.E.2d 894, 904 (1996); see also *Nestor v. Bruce Hardwood Flooring, L.P.*, 206 W.Va. 453, 456, 525 S.E.2d 334, 337 (1999) ("[O]ur task as an appellate court is to determine whether the circuit court's reasons for its order are supported by the record."). "Where the lower tribunals fail to meet this standard-i.e. making only general, conclusory or inexact findings-we must vacate the judgment and remand the case for further findings and development." *Province*, 196 W.Va. at 483, 473 S.E.2d at 904.

Collisi v. Collisi, 231 W.Va. 359, 364, 745 S.E.2d 250, 255 (2013).

When reviewing the order of a family court, 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., No. 22-ICA-2, ___ W.Va. ___, ___, 887 S.E.2d 255, 258 (Ct. App. 2022); accord W.Va. Code § 51-2A-14(c) (2005) (specifying standards for appellate review of a family court order). *Daniel Y. v. Anne Y.*, 23-ICA-34 (W. Va. ICA Nov 01, 2023)

Pursuant to West Virginia Code §48-9-206, allocation of custodial responsibility at the final hearing (a) Unless otherwise resolved by agreement of the parents under

§48-9-201 of this code or unless harmful to the child, the court shall allocate custodial responsibility so that, except to the extent required under §48-9-209 of this code, the custodial time the child spends with each parent shall be equal (50-50).

Petitioner Father's argument concerning the above statute requires a finding of harmfulness to the child in order for the Court to allocate less than 50/50 custody. The above cited provision §48-9-206 applies if a party has not rebutted the presumption pursuant to §48-9-209. In this case the Court found that the Mother did rebut the presumption with the finding of alcohol abuse. With this finding, there is no requirement for the Court to find that the allocation would be harmful to the child.

2. THE LOWER COURT MADE SUFFICIENT FINDINGS OF FACT AND/OR CONCLUSIONS OF LAW TO JUSTIFY DENYING THE PETITIONER A 50/50 ALLOCATION OF CUSTODIAL RESPONSIBILITY.

West Virginia Code 48-9-206(d) provides in part, that:

(d) In the absence of an agreement of the parents, the court's determination of allocation of custodial responsibility under this section shall be made pursuant to a final hearing, which shall be conducted by the presentation of evidence. The court's order determining allocation of custodial responsibility shall be in writing and include specific findings of fact and conclusions of law supporting the determination.

The Petitioner argues that the findings made by the Court were not sufficient because the Court finds that the Father has significant substances abuse issues, namely, alcohol, but indicates he no longer has a problem. This is a misstatement of the Court's findings and the

evidence in the case. The Court specifically found, “that the father has taken significant steps to rectify the substance abuse problem and based on the evidence it appears it is not a current problem.” That is not the same thing as finding that the “Father no longer has a problem.” With alcoholism, relapse has been an issue for people for years. The court heard testimony of the Father’s pattern of relapsing when he is not being monitored for his alcohol issues. Hopefully this time, the Father will not relapse once the program ends. The Court’s finding is sufficient and leads the parties to believe that the Court is pleased with the Father’s current progress, but that the future is not yet determined.

3. **THAT THE FAMILY COURT AWARDED THE FATHER AS CLOSE TO A 50/50 ALLOCATION OF CUSTODIAL RESPONSIBILITY AS IT COULD BASED ON THE REQUESTED PARENTING PLANS OF THE PARTIES AND THEIR WORK SCHEDULES**

The testimony was undisputed that the Mother has historically taken each Wednesday off from work. Yet, this is the additional day of the week the Father requested at the final hearing and the basis of this appeal. The Court granted the Father this additional Wednesday each week in the summer, but refused to take the children away from the Mother on a day she was not working in her dental practice during the school year. Yet his schedule, as set forth by the Court, gives him every day of the month that he is off from work.

CONCLUSION

For the above reasons, Respondent moves this Honorable Court to uphold the Family Court’s decision and dismiss this appeal.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, **MIRANDA M.**, hereby certifies that, on this 27TH day of December 2023, she served the foregoing **AMENDED RESPONDENT'S BRIEF** upon **JESSICA E. MYERS**, counsel for Respondent, by electronic transmission as follows:

Jessica E. Myers, Esquire
Email: jessicaskogstad@gmail.com

/s/ Ginny Conley, Esquire
Ginny Conley, WWSB#6563
CONLEY LAW OFFICE, PLLC
1130 Market Street
P. O. Box 143
Parkersburg, WV 26102
Phone (304) 485-3333
Fax (304) 485-3444
Email : gconley@conleylawoffice.com
Counsel for Respondent