INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

at

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 Darren Tallman, Presiding

PETITIONER'S REPLY BRIEF

CONFIDENTIAL CASE

CONFIDENTIAL MATERIALS

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

STATEMENT OF CASE

In her Response Brief, the Respondent states that:

> "The testimony the Court considered during the hearing regarding the events and circumstances leading up to the Final Hearing, are set forth below..." (Resp. Brief pgs. 7-14).

The Respondent Mother then lists a number of entries recounting testimony, which is almost entirely from the Respondent Mother, as though the information contained therein were facts considered to be true by the Family Court and upon which this Court may rely in its decision. Many of these entries are allegations by the Respondent Mother that Petitioner is somehow a danger to the children and is continuing to use alcohol. However, the Family Court made thirteen (13) specific Findings of Fact in the Final Divorce Order and not one of them found that the Petitioner was in any way a danger to his children or that he continues to use alcohol. In fact, the Family Court stated in its Conclusions of Law in the Final Divorce Order that:

> "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." (App. p. 124).

The Respondent Mother has not filed an appeal from the Court's Order nor did she allege any cross-assignments of error alleging that the Family Court erred in any way in arriving at its Findings of Fact and Conclusions of Law. Accordingly, Petitioner contends that it is inappropriate for Respondent Mother to include them in her Brief or for this Court to consider those allegations in its review as they do not constitute a part of the Family Court's ruling or established facts of this case.

Instead, in its Final Order, the court made the following findings of fact regarding the allocation of custodial responsibility which includes a specific ruling that both the Petitioner and the Respondent Mother are "fit and proper persons to have and be allocated permanent shared custodial responsibility, stating:

> "5. That neither the Wife nor the Husband is an infant, an incompetent person, or an incarcerated convict...
>
> 10. That two (2) children were born as issue of the marriage, namely, [C.M.-1] and [C.M.-2]; that since the birth of said infant children, the parties have exercised shared custodial responsibility and shared decision-making authority for said infant children; that both parties are fit and proper persons to have and be allocated permanent shared custodial responsibility permanent shared decision making authority for said infant children." (App. pgs. 122-123).

In its Final Order, the court made the following Conclusions of Law:

> "1. That it is in the best interests of the children to allow each parent to have a meaningful relationship with the children.
>
> 2. Based on current law, [Wife] 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 [C.M.-1]has a condition that is being addressed in counseling that a set schedule is better for the minor child during the school year." (App. p. 125)."

These findings appear to be the sole bases for the court's denial of Petitioner's request for a denial of a 50/50 allocation of custodial responsibility and none of them suggest the Petitioner is somehow a danger to his children.

Kane M. is a medical doctor licensed to practice in the State of West Virginia. Unfortunately, Kane M. had a second DUI arrest and conviction in 2017 with the first one occurring in 2014. His license to practice medicine has never been suspended or revoked. However, there is an organization in West Virginia called the West Virginia Medical Professionals Health Program. Shortly after his 2nd DUI in 2017, Kane M. enrolled in their program to assist him in stopping drinking. After approximately five years of participating in the program, Kane M. received and filed with the court a letter from said program dated June 1, 2022, which stated:

"Dear Dr. [Kane M.],

"This letter is to verify you are a voluntary/confidential participant of the West Virginia Medical Professionals Health Program (WVMPHP), Case ID#111113N7(Q9), and in good standing since November 18, 2018).

You are in compliance with the WVMPHP and all frequent, random toxicology screens have been negative to date for all mind, mood altering substances including alcohol.

Should you have any questions or concerns, please feel free to contact me at your convenience.

Respectfully,

P. Bradley Hall, M.D.

Executive Medical Director, WVMPHP." (App. p. 26).

In her Response Brief, the Respondent Mother complains that the only proof of Petitioner's participation in this program was the above letter. This is an inaccurate representation of the testimony. The Respondent Mother herself testified under oath that she had spoken at length on at least two occasions with the Medical Professionals Health Program (Tape 1, 0:00 to 4:52). She admitted that the Program assured her that if Petitioner failed a drug test or was otherwise not in compliance with his requirements that she would be notified. She further admitted that she had never received such a call in the approximately three (3) years immediately preceding the final hearing held herein. She acknowledged that as of the time of the final hearing, Petitioner was still participating in the program and that it takes five years to complete it (Tape 1, 46:00).

In addition, Kane M. stated during his testimony at the final hearing on August 1, 2022, that the Board program mentioned above was very thorough and included a professional evaluation (Tape Segment 4, 2:35). In addition, they speak to people in your life, including Miranda M., in order to obtain a comprehensive picture of what is going on in your life. The initial program is eight months of in-patient treatment with follow up testing (Tape 4, 2:32). Kane M. testified that his prior pattern with the DUIs was a problem but also that he had not taken a drink in over 4 years (Tape 4, 2:18 – 2:32). The Board found only that Kane M. had Mild

Alcohol Abuse but that it was in "Sustained Remission." During his testimony, the lower court remarked that the court "admires" his parenting.

Also during his testimony, the court remarked that he was dealing with "two good parents" (Tape 4, 2:48-2:49) and later that he was dealing with "two wonderful parents." (Tape 4, 3:17).

SUMMARY OF ARGUMENT

1. **THE FAMILY COURT ERRED BY FAILING TO GRANT PETITIONER A 50/50 ALLOCATION OF CUSTODIAL RESPONSIBILITY PURSUANT TO WEST VIRGINIA CODE § 48-9-206 AS THE RESPONDENT HEREIN FAILED TO REBUT THE PRESUMPTION CONTAINED THEREIN.**

The Petitioner Below, Miranda M. failed to rebut the presumption of a 50-50 allocation of custodial responsibility. The evidence below established that the Petitioner has long been a regular and dedicated father who tends to his children's needs on a regular basis. The evidence proffered to rebut the presumption focused on problems of the Petitioner from 4-7 years ago and was rebutted by several witnesses who are familiar with the family and the Petitioner's dedicated parenting over the last several years. Even the court below acknowledged that the Petitioner's past problems are not a problem anymore.

The findings of the lower court regarding the factors contained in West Virginia Code §48-9-209 are not couched in statutory terms nor do they explain why the court's findings justify a deviation from the presumption of a 50-50 split in the allocation of custodial time and responsibility.

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

The findings of the lower court are insufficient to justify a deviation from a 50-50 grant of custodial responsibilities as required by W.Va. Code §48-9-206(d). The findings further fail to explain how the findings support the determination to deviate from the 50-50 allocation of custodial responsibilities and are against the weight of the evidence. The findings further fail to establish how it is in the children's best interests to deviate from the 50-50 division

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for Rule 19 argument ass 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 that evidence.

ARGUMENT

1. **THE FAMILY COURT ERRED BY FAILING TO GRANT PETITIONER A 50/50 ALLOCATION OF CUSTODIAL RESPONSIBILITY PURSUANT TO WEST VIRGINIA CODE §§ 48-9-102a and 48-9-206 AS THE RESPONDENT HEREIN FAILED TO REBUT THE PRESUMPTION CONTAINED THEREIN.**

W.Va. 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."

W.Va. Code §48-9-206(a) and (d) provide:

> "(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).

(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."

Therefore, as an initial matter, Kane M. was entitled to a 50/50 allocation of custodial responsibility unless and until Miranda M. rebutted that presumption under W.Va. Code §48-9-209. She failed to do so.

Neither of the parties hereto were accused of engaging in or found to have engaged in any activity specified by W.Va. Code § 48-9-209(a). Therefore, the court was required to make findings pursuant to W.Va. Code §48-9-209(f) to consider denying Petitioner a 50/50 allocation of custodial responsibility. It is important to note here that W.Va. Code § 48-9-209(f) does not mandate that the court deviate from the 50/50 allocation merely because one of the factors exist. It requires only that a court consider the existence of the factor in deciding whether or not the presumption has been rebutted. W.Va. Code §48-9-209(f) provides as follows:

"(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:

(1) The factors set forth in subsection (a) of this section;

(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;

(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;

In its ruling, the court did not use the specific language found in W.Va. Code § 48-9-209 and made no finding of "addiction" in attempting to rely on that statute which renders its findings ambiguous and even self-contradictory.

The Respondent Mother attempts to apply to this case the definition of Addiction found in W.Va. Code §27-1-11 regarding Mentally Ill Persons. However, this is a Domestic Relations case and the definition of addiction found in the Mentally Ill Persons Statute does not apply. In fact, W.Va. Code § 27-1-11(a) specifically states that:

"(a) As used in this chapter, "addiction" or substance use disorder means..."

Therefore, the Legislature expressed their clear intention that the definition of addiction used in Chapter 27 is specifically restricted to cases involving Mentally Ill Persons and that it does not apply to Domestic Relations cases. Moreover, W.Va. Code §27-1-11 specifically requires that a number of findings must be made before a person can be deemed "addicted." None of those findings were made here.

The court stated in the Final Order that:

"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." (App. p. 125).

The fact remains that the statute requires a finding of "addiction" and the court made no such finding. On the contrary, the only specific evidence introduced on the subject was that the Medical Professionals Program found that Kane M. had "Mild Alcohol Abuse" in "Sustained Remission" In addition, the court acknowledged that whatever problem there had been some

4-5 years ago doesn't exist anymore. Therefore, the court failed to relate the father's previous problems with alcohol to any claim that the Petitioner could not adequately care for the child on a 50-50 basis.

During the hearing, the court remarked that he was dealing with "two good parents" and even "two wonderful parents." Moreover, the evidence adduced at the hearing established that the Petitioner was and had been a very capable and attentive parent who always cared for his children on a regular and substantial basis. In short, the court simply failed to establish or make a finding that whatever the nature of Petitioner's condition was that it was significant to deprive him of one day of visitation every weeks or to explain how 50-50 custody would harm the children. The burden of proof was on Miranda M. to establish why that one day every week would have harmed the children in any way. She failed to meet that burden.

At the final hearing, Miranda M. proposed a parenting plan that was just one day short per week of a 50/50 allocation. It is glaringly inconsistent to propose such a plan but now argue that Kane. M. is somehow a danger to the children. It goes without saying that a fit parent, which Miranda M. obviously is, would never propose such a plan if she seriously considered Petitioner to be a danger to his children. Most importantly, Miranda M. testified and admitted that the Parenting Plan in place immediately preceding the final hearing was working, the kids were doing well, and had adjusted to it (Tape 1, 29:20). She further agreed that it was good for the kids (Tape 1, 29:20 to 30:00).

West Virginia Code §48-9-209(f)(2)(B) provides:

"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."

It appears that the court may have been relying on this section when it referred to C.M.-1's "condition" in its Final Order. However, the court did not make a finding of "special needs," "a chronic illness" or "serious medical condition." This makes the court's Final Order ambiguous as this Court cannot now ascertain with certainty the basis of the court's ruling. Moreover, the court made no findings as to how the addition of one day of parenting time every week would be in any way detrimental to the child.

The court readily acknowledged in its final Order that C.M.-1 was receiving counseling for his sensory issues and that a set schedule was better for the child during the school year. However, the 50-50 allocation of custodial responsibility is a set schedule and the court gave no explanation why it is worse than one day less of parenting time for Petitioner.

For the above reasons, it appears the court's ruling was based on speculation that something might happen under the Father's supervision and not that anything has ever actually happened to the children under his watch. However, "a change of custody based on a speculative notion of potential harm is an impermissible exercise of discretion." Rowsey v. Rowsey, 174 W.Va. 692, 329 S.E.2d 57 (1985).

Finally, the court stated in its Final Order that:

"Based on the current law, [Miranda M.] 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..."

Petitioner disagrees. Miranda M.s' choice was hers and hers alone. She voluntarily chose to contest the 50/50 allocation by complaining about a one-day per week addition to Petitioner's parenting time. If she really believed that the addition was a detriment to the children, it is difficult to conceive why she proposed the parenting plan which was adopted by the court in the first place. Under all of the circumstances, her opposition to that extra day seems frivolous.

In his Petitioner's Brief, Petitioner relies on the case of In Re: A.B.-1 and A.B.-2, No. 19-0718 (W.Va. 2020)(Memorandum Decision). However, the Respondent Mother misinterprets the import of that case. The Respondent Mother states that "we are not arguing about taking primary custody away from the Father." That is a true statement. We are, however, talking about depriving him of 50/50 custody based on old issues which he has corrected. The import of the A.B. case, however, is that courts should not adversely affect a parent's rights based on matters which they have addressed and which indicate to the court that the parents have corrected the problem. The Family Court herein, however, did just that. The Family Court specifically found that Kane M. "has taken significant steps to rectify the substance abuse problem and based on the evidence it appears that it is not a current problem." He then used this past issue against Petitioner anyway to justify the denial of 50/50 custody. That is precisely what A.B. says you cannot do.

The Respondent Mother further argues that the Respondent Mother's conduct in A.B. "appears" to be isolated while Petitioners is of greater duration. However, the Respondent Mother therein also only had to pass a pre-adjudicatory improvement period which is of short

duration but her DUI had also occurred recently. Conversely, Kane M.'s conduct is several years old and he is participating in a much longer treatment program.

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

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

> 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 court herein did make certain findings of fact set forth above. However, the court was ambiguous as it seemed to rely on the Petitioner's past alcohol issues while simultaneously acknowledging that they were no longer a problem. The court utilized these issues to help deny Petitioner a 50-50 allocation of custodial responsibility without explaining how the evidence of his past use justifies a deviation from the statutorily required 50-50 custody split and appears to rely on some species of speculation regarding future conduct. However, "a change of custody based on a speculative notion of potential harm is an impermissible exercise of discretion." Rowsey v. Rowsey, 174 W.Va. 692, 329 S.E.2d 57 (1985).

In addition, the court made a finding that C.M.-1 has a medical condition that requires a set schedule during the school year. However, the court failed to identify any reasons why a set schedule of a 50-50 allocation would interfere with that need or be better than the schedule adopted by the court. Both parties acknowledged that C.M.-1 could adapt to a minor change in his schedule with advance notice.

Underlying all of this is the odd nature of the court's ruling approving just one day less of custody every two weeks than a 50-50 allocation would afford to the Petitioner and the

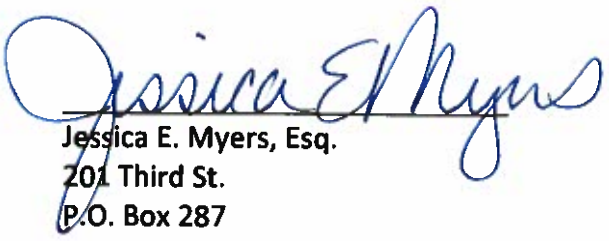
children's time with the father. The court made no findings that the 50-50 allocation would be detrimental to the children or that the deviation was necessary to fulfill some needs of the children. The mere need for a set schedule could have been satisfied either way and, therefore, does not justify such deviation.

In summary, the lower court failed to make sufficient findings of fact or conclusions of law to establish that a deviation from the 50-50 presumption was rebutted. The order does not explain why the findings of the court support a deviation or why the Petitioner is not equally capable of caring for the children on a 50-50 basis. The court's decision to grant parenting time to Petitioner just one day short of 50-50 every two weeks evinces a clear belief on the part of the court that Petitioner is perfectly capable of caring for his children, as does the court's belief that Petitioner is a "good" and "wonderful" parent.

Accordingly, the court's order does not "include specific findings of fact and conclusions of law supporting the determination" as required by W.Va. Code §48-9-206(d). The court's findings and the evidence adduced at the final hearing more closely establish that a 50-50 allocation is eminently appropriate.

CONCLUSION

For the above reasons, Petitioner moves the Court to reverse the lower court's decision and remand this matter to the Family Court for the entry of a parenting plan allocating custodial time and duties on a 50-50 basis pursuant to statute.



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CERTIFICATE OF SERVICE

I, Jessica E. Myers, hereby certify that on the 2nd day of January, 2024, I deposited a true and correct copy of the Petitioner's Reply Brief into an authorized receptacle of the United States Postal System, with sufficient first class postage affixed thereon, and properly addressed to the following persons at their last known addresses, being:

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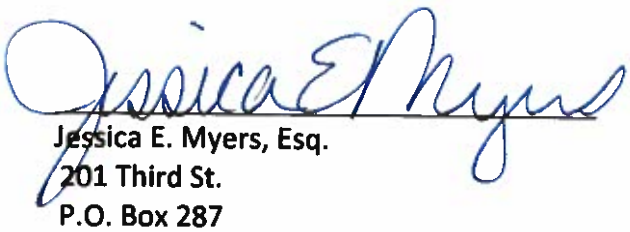

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