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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 BRIEF

JESSICA E. MYERS, Esq.
West Virginia State Bar Number 9700
Counsel for Petitioner
Post Office Box 287
Parkersburg, West Virginia 26102
(304) 485-3600 Phone No.
www.myerslawwv.com

TABLE OF CONTENTS

	Page Number(s)
1. Table of Authorities	ii
2. Assignments of Error	1
3. Statement of the Case	1
4. Summary of Argument	8
5. Statement Regarding Oral Argument and Decision	9
6. Argument	9
7. Conclusion	19

TABLE OF AUTHORITIES

Page Number(s)

A. Case Law:

1. In Re: A.B.-1 and A.B.-2, No. 19-0718 (W.Va. 2020) (Memorandum Decision) 15, 16

2. Rowsey v. Rowsey, 174 W.Va. 692, 329 S.E.2d 57 (1985) 15

B. Statutes:

1. W.Va. Code 48-9-102 9

2. W.Va. Code 48-9-206 9, 16, 17, 18

3. W.Va. Code 48-9-209 10-12, 14

ASSIGNMENTS OF ERROR

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.**

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

The Petitioner herein, Kane M., was married to the Respondent herein, Miranda 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 the Family Court of Wood County, West Virginia by Order entered October 2, 2023 (App. pgs. 121-142). Prior to said 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. 121-142). At the final hearing, Petitioner requested a 50/50 allocation of custodial responsibility while Respondent requested that he receive two (2) fewer days per week. The Family Court compromised and granted Petitioner one day short of a 50/50 allocation of custodial responsibility every week. It is from this decision that this appeal follows.

Specifically, as pertinent to issues to be decided herein, the court allocated custodial responsibility as follows:

"PERMANENT PARENTING PLAN

CHILDREN

The children subject to this Parenting Plan are:

Name	Date of Birth
[C.M.-1]	[Date of Birth]
[C.M.-2]	[Date of Birth]

RESTRICTIONS

The Father shall not consume, ingest or be under the influence of any alcohol or non-prescribed drugs prior to or during parenting time with the children subject to this plan.

DECISION MAKING

Each parent shall make decisions regarding the day-to-day care and control of the children while the children are residing with that parent. Regardless of the allocation of decision making in this parenting plan, either parent may make emergency decisions affecting the health or safety of the children...

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.

VACATION

The parties will each have one week during the summer months of each year for vacation with the children subject to this parenting plan. The vacation schedule shall supersede the Regular schedule above." (App. pgs. 6-8).

Thereafter, the court split the holidays of Christmas, Thanksgiving, Easter, Mother's Day and Father's Day equally.

In its Final Order, the court made the following findings of fact regarding the allocation of custodial responsibility:

"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.

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. 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 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 "Sustatined 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).

C.M.-1 has sensory integration issues which led the court to find that he needed a set schedule for the school year to optimize his educational opportunities. The court appeared to use this as a ground for giving Petitioner just one day per week less than a 50/50 allocation of custodial responsibilities. However, a review of Petitioner's history with his sons as seen through neutral eyes suggests that Petitioner was more than capable and willing to address C.M.-1's needs in that regard.

For approximately three years (2017-2020) the parties had an experienced nanny named Samantha Clements. Ms. Clements testified that Mr. Kane worked from home on a very regular basis during that time. Although she did quite a bit of caring for the boys, she testified that he was around and cared for the boys when he was not working during the day. (Tape 3). Ms. Clements stated that he was a good father who was very involved and the children were attached to him. She never saw any alcohol in the home and never saw Kane M. under the influence. She

never believed alcohol was an issue. She felt that Petitioner wanted structure and routine in the kids' lives.

On one occasion, Miss Clements received a call from Miranda M. instructing her to pick up the boys at school and bring them home. Miranda M. claimed that Petitioner was in bed and too drunk to get up. However, Miranda M. called the police. When they arrived, Miss Clements saw Petitioner walk outside with police. He was obviously able to get up and she noted that he was walking just fine. Miss Clements thought the whole thing was ridiculous. There was no yelling or screaming from Petitioner, only Miranda M.

Ultimately, Miss Clements testified that, in her opinion, custodial responsibility should be split evenly.

C.M.-1 and C.M.-2 attended Parkersburg Catholic Elementary School for some time. Jerry Shaw is the business manager and something of a jack of all trades at the school (Tape 3). Over the years preceding his testimony he had become very familiar with Petitioner and believed him to be "a very involved, caring parent." Petitioner participated in volunteer activities, seasonal parties, fundraisers, teacher appreciation efforts and field trips. He observed that the boys interact great with Kane M. and are always excited to see him to the point that C.M.-1 is sometimes "clingy." Since Mr. Shaw did not see Miranda M. at school as much, he felt like Kane M. was primary parent involved in school events but also felt that the parties should split custody equally.

Christina Bixman, a school counselor at Vandevender Middle School and neighbor to the parties, stated that C.M.-2 can get a bit violent with Miranda M. but not with Petitioner. She has

actually seen C.M.-2 punch Miranda M. in the face. She felt it would actually be a detriment to the boys if Petitioner had less than a 50/50 allocation of parenting time.

Finally Kane M. testified regarding his activities with the boys. From March 20, 2020 forward, Kane M. was only working approximately 10 days out of the month (Tape 4, 1:22). Miranda M. was working 4 days per week and Kane M. was responsible for nearly all the boys needs (Tape 4, 1:28). He took the boys on day trips to Columbus, attended medical appointments, helped with homework, took C.M.-1 to occupational therapy appointments, helped with soccer practice before becoming an actual assistant coach, took the kids to church regularly although Miranda M. did attend occasionally, became an Ambassador for Parkersburg Catholic Schools, volunteered at book fairs, was involved in pre-school and kindergarten and otherwise attended events when he wasn't working (Tape 4, 1:45 to 2:15).

The court asked Kane M. to respond to C.M.-1's sensory issues. Kane M. responded that he was somewhat similar as a child and the parties needed to do what they could to prevent C.M.-1 from taking his particular problems into adulthood. He acknowledged that C.M.-1 required advance prep time for a change in his schedule but also recognized, as did Miranda M., that if he was properly prepared for change, then he would be ok with it. Finally, Kane M. testified that his proposed parenting plan did not require any babysitters or nannies as it was built entirely around the parents' schedules.

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 4-5 years ago and was rebutted by several witnesses who are familiar with the family and the Petitioner's dedicated parenting. Even the court below acknowledged that the Petitioners 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.

In relevant parts, W.Va. Code §48-9-209 provides:

> "(a)When entering an order approving or implementing a temporary or permanent parenting plan order, including custodial allocation, the court shall consider whether a parent:
>
> (1) Has abused, neglected, or abandoned a child, as defined by state law;
>
> `(2) Has sexually assaulted or sexually abused a child as those terms are defined in §61- 8B-1 et seq. and §61-8D-1 et seq. of this code;
>
> (3) Has committed domestic violence, as defined in §48-27-202 of this code;
>
> (4) Has overtly or covertly, persistently violated, interfered with, impaired, or impeded the rights of a parent or a child with respect to the exercise of shared authority, residence, visitation, or other contact with the child, except in the case of actions taken for the purpose of protecting the safety of the child or the interfering parent or another family member, pending adjudication of the facts underlying that belief; or
>
> (5) Has made one or more fraudulent reports of domestic violence or child abuse: Provided, That a person's withdrawal of or failure to pursue a report of domestic violence or child support shall not alone be sufficient to consider that report fraudulent."
>
> (b) If a parent or another person regularly in the household of the parent is found to have engaged in any activity specified by subsection (a) of this section, the court shall impose limits that are reasonably calculated to protect the child or child's parent from harm..."

Neither of the parties hereto were accused of engaging in or found to have engaged "in any activity specified by subsection (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:

(A) Was conceived as a result of sexual assault or sexual abuse by a parent as set forth in §48-9-209a of this code;

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

(C) Is a nursing child less than six months of age, or less than one year of age if the child receives substantial nutrition through nursing: Provided, That the child reaching one year of age shall qualify as a substantial change in circumstances per §48-9-401 of this code; or

(D) Will be separated from his or her siblings or the arrangement would otherwise disrupt the child's opportunities to bond with his or her siblings;

(3) Whether a parent:

(A) Is willfully noncompliant with a previous order of the court regarding payment of child support payments for a child or children of the parties;

(B) Is unwilling to seek necessary medical intervention for the child who has a serious medical condition;

(C) Has a chronic illness or other condition that renders him or her unable to provide proper care for the child;

(D) Has intentionally avoided or refused involvement or not been significantly involved in the child's life prior to the hearing, except when the lack of involvement is the result of actions on the part of the other parent which were, without good cause, designed to deprive the parent of contact and involvement with his or her child or children without good cause;

(E) Repeatedly causes the child or children to be in the care of a third party rather than the other parent when he or she is available;

(F) Does not have a stable housing situation: Provided, That a parent's temporary residence with a child in a domestic violence shelter shall not constitute an unsafe housing situation; or

(G) Is unwilling or unable to perform caretaking functions for the child as required by §481-210 of this code;

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

(A) Has been adjudicated in an abuse and neglect proceeding to have abused or neglected a child, or has a pending abuse and neglect case;

(B) Has been judicially determined to have committed domestic violence or has a pending domestic violence case;

(C) Has a felony criminal record;

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

(E) Has threatened or has actually detained the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody: Provided, That a parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the parent's intent to retain or conceal the child from the other parent; or

(F) Has been involuntarily committed to a mental health facility, or suffers from a serious mental illness;

(5) Whether an equal (50-50) physical allocation is:

(A) Impractical because of the physical distance between the parents' residences;

(B) Impractical due to the cost and difficulty of transporting the child;

(C) Impractical due to each parent's and the child's daily schedules;

(D) Would disrupt the education of the child; or

(E) Contrary to the firm and reasonable preferences of a child who is 14 years of age or older; and to accommodate, if the court determines it is in the best interests of the child, the firm and reasonable preferences of a child under 14 years of age, but sufficiently matured that he or she can intelligently express a voluntary preference for one parent;

(6) Whether the parents cannot work cooperatively and collaboratively in the best interest of the child; or

(7) Whether a parent will encourage and accept a positive relationship between the child and the other parent, including which parent is more likely to keep the other parent involved in the child's life and activities."

In its ruling, the court did not use the specific language found in W.Va. Code § 48-9-209 in attempting to rely on that statute which renders its findings ambiguous and even self-

contradictory. Nevertheless, it appears that the court relied on Code §§48-9-209(f)(4)(D)and 48-9-209(f)(2)(B).

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).

However, the statute requires a finding of "addiction" and the court made no such finding. 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. In fact, 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 a week 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 would have harmed the children in any way. She failed to meet that burden.

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.

During their testimony, each parent acknowledged that change was ok for C.M.-1 as long as he was given advance notice of it. The court could have easily addressed this by simply delaying the implementation of the 50-50 schedule for a short time to allow the parents to discuss it with C.M.-1. In short, the court simply did not explain or make appropriate findings to establish that such a minor change was in any way a detriment to the child. Who better to look after C.M.-1's needs than two doctors who are committed to the counseling process and follow up on that process at home. The evidence established that both parents were cognizant of the child's condition and eager to address it through appropriate channels. Again, the entry of a 50-50 allocation would only have resulted in one day every week of added parenting time for Petitioner

and the court did not explain why denying that extra day would somehow have harmed the children or not be in their best interests.

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 two weeks 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.

Our Supreme Court has spoken about a similar, but more egregious, situation in an abuse and neglect case. In In Re: A.B.-1 and A.B.-2, No. 19-0718 (W.Va. 2020)(Memorandum Decision), the Respondent Mother had driven a vehicle with the children in the car and had an accident. The WVDHHR filed a Petition to Institute Child Abuse and Neglect Proceedings. The Respondent Mother was given a pre-adjudicatory improvement period which are only permitted to last three

(3) months. She passed the improvement period by obtaining alcohol counseling and the court returned her children to her and dismissed the case. Shortly thereafter, the father of the children filed a Motion to Modify the Parenting Plan on the grounds that the Respondent Mother's act of driving under the influence constituted a change in circumstances. The Circuit Court of Logan County denied his Motion and he appealed.

In a Memorandum Decision, the Court denied him relief, stating:

> "When a parent rectifies the conditions that cause an abuse and neglect petition to be filed, he or she is reunited with his/her children. In other words, the parent's custodial rights are restored...In that instance, there is simply no basis for a court to find a substantial change in circumstances under W.Va. Code §48-9-401 to modify a parenting plan. Accordingly, the circuit court did not err by denying Father's motion to modify custody..."

This case was not a Motion to Modify in the traditional sense. However, the Legislature has made it clear that the parenting plan must be a 50-50 allocation of custody. Any effort to modify that must be "pursuant to a final hearing, which shall be conducted by the presentation of evidence." (W.Va. Code §48-9-206(d). While this case did not require proof of a change in circumstances, it did require evidence that establishes that the 50-50 presumption was not in the children's best interests.

However, as in A.B., Petitioner herein took substantial steps to rectify any issues with alcohol. Petitioner's steps herein were far greater and longer lasting than the Mother in A.B., Id.

In fact, Petitioner's efforts in that regard were so successful that the court herein recognized them and acknowledged that based on the evidence regarding his treatment that his alcohol issues do not appear to be a current problem.

In A.B., supra, the Court restored custody of her children and specifically stated that her parental rights were fully restored upon her successful completion of a treatment program, that she was entitled to custody and that her past actions could not be used to diminish her parental rights. Petitioner herein asks for nothing less. He has also addressed his problem to a far greater degree than the Respondent Mother in A.B., supra. He has proven that he is an involved, attentive and "wonderful parent." To grant him anything less than 50-50 is a diminution of his parental rights granted to him by the 50-50 allocation statute and sanctions a modification of that rule based on a problem that no longer exists. That is precisely what the Court in A.B. supra, said that a court cannot do.

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. As set forth above, it is an impermissible exercise of discretion to rely on speculation about future events.

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 week 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 week 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.

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.

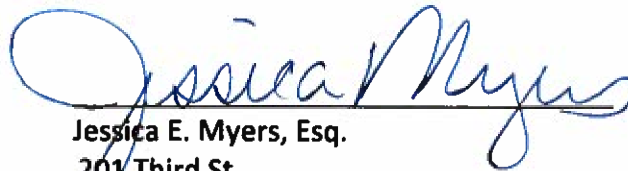
Petitioner,
By Counsel,

Jessica Myers, Esq., State Bar No: 9700
Counsel for Petitioner
201 Third Street
PO Box 287
Parkersburg, WV 26102

CERTIFICATE OF SERVICE

I, Jessica E. Myers, hereby certify that on the 6th day of December, 2023, I deposited a true and correct copy of the Petitioner's Brief and Appendix 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:

Virginia A. Conley, Esq.
1130 Market St.
Parkersburg, WV 26101
gconley@conleylawoffice.com



Jessica E. Myers, Esq.
201 Third St.
P.O. Box 287
Parkersburg, WV 26102