IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED
February 28, 2025
ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

PAUL L.,
Respondent Below, Petitioner

v.) No. 24-ICA-350 (Fam. Ct. Taylor Cnty. Case No. FC-46-2023-D-20)

STEPHANIE L.,
Petitioner Below, Respondent

MEMORANDUM DECISION

Petitioner Paul L. ("Father")[1] appeals the Family Court of Taylor County's August 8, 2024, order dismissing his petition for modification of custody. The family court held that Father's participation in substance abuse counseling did not constitute a substantial change in circumstances warranting a modification. Respondent Stephanie L. ("Mother") filed a response in support of the family court's decision.[2] Father did not file a reply.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2024). After considering the parties' arguments, the record on appeal, and the applicable law, this Court finds that there is error in the family court's decision, but no substantial question of law. This case satisfies the "limited circumstances" requirement of Rule 21 of the Rules of Appellate Procedure for resolution in a memorandum decision. For the reasons set forth below, the family court's decision is vacated and remanded to the family court with directions as set forth herein.

Father and Mother were married in October 2005. They were parties to a divorce action in 2017 but reconciled before the divorce was finalized. During that divorce action the family court appointed a guardian ad litem ("GAL") due to Father's admitted drug use. The parties separated again in August of 2022, when Mother filed for divorce a second time, again due to Father's alleged drug use. The parties share two children, one born in 2012 and the other in 2016 (the "Children").

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[1] To protect the confidentiality of the juveniles involved in this case, we refer to the parties' last name by the first initial. *See, e.g.*, W. Va. R. App. P. 40(e); *State v. Edward Charles L.*, 183 W. Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

[2] Father is represented by Mark Gaydos, Esq., Buddy Turner, Esq., and Jacob Trombley, Esq. Mother is represented by Alyson A. Dotson, Esq., and Michelle L. Bechtel, Esq.

Events leading to this appeal began with a September 20, 2023, hearing, during which both parties were ordered to submit to drug testing afterward. The parties were advised that if they failed to submit to testing, it would result in a failed screen. Mother participated and her results showed negative for all substances. Father failed to appear for his drug test. On September 21, 2023, the family court entered an order suspending all of Father's parenting time due to his failure to appear for drug testing.

A subsequent hearing was held six days later. At that hearing, the court inquired of Father about why he failed to participate in the court-ordered drug screen. He advised the court that he had become ill and had an accident on his clothing. He testified that, by the time he changed clothes, he assumed it was too late to return to the drug testing facility. He further testified that he was not using drugs. The family court then gave Father a second opportunity to participate in drug testing by completing a hair follicle test within five days of the hearing. Father participated in hair follicle testing on September 29, 2023. His results were negative but they had to be sent to the lab for confirmation. On October 11, 2023, the family court received lab confirmation showing that Father tested positive for Methamphetamine and Hydrocodone. The family court entered its final divorce order on November 20, 2023, wherein it included the following findings of fact and conclusions of law:

- Father was not credible.
- Father lied about why he failed to submit to drug testing on September 20, 2023, and lied about his drug use.
- Father was ordered to have no contact with the Children nor to coach their sports.
- Father was permitted to have supervised parenting time at a professional third-party location, contingent upon him producing a negative hair follicle test ninety (90) days after his previous hair follicle test.
- Mother was named the primary custodial parent with sole decision-making authority.
- If supervised visits begin, Father must complete hair follicle testing every ninety (90) days. If Father complies with this provision for one year with negative test results, it may be grounds for custody modification by Father.

Mother filed a petition for contempt on or about November 28, 2023, due to Father attending the children's basketball practice, in violation of the court's no-contact provision contained in the November 20, 2023, final divorce order. On December 6, 2023, Father filed both a motion for reconsideration and a motion for ex parte relief, wherein he requested supervised visitation preceded by urine drug testing. Father's motion for ex parte relief was denied by order entered on December 11, 2023, due to Father not following the court's instructions on how to obtain parenting time as stated in its November 20, 2023, order. Father submitted to a hair follicle test on December 11, 2023, and tested negative for all substances. Father's motion for reconsideration was denied by order on December

15, 2023. Father then filed a motion for visitation on December 18, 2023. A hearing on Mother's petition for contempt was held on December 20, 2023. Father was not found in contempt because he had neither received nor reviewed the final order which included the no-contact provision.

On December 28, 2023, the family court entered an order denying Father's motion for visitation, noting that, even though Father produced a negative hair follicle test result, he had dyed his hair prior to testing, which was a known method of "beating the test." Further, the hair follicle test did not test for Hydrocodone, which was one of the drugs for which Father tested positive in his first hair follicle test. The court vacated its prior order that entertained supervised parenting time, holding that Father would now be required to show a substantial change in circumstances in order to gain any parenting time in the future. In doing so, the court held that it would review a petition accompanied by evidence showing that Father "has acknowledged the problem and has participated in treatment to resolve the problem."

On February 2, 2024, Father filed a petition to modify custody wherein he argued that there had been a substantial change in circumstances in that he was willing to admit that he needed treatment for drug use and was on a waitlist for treatment through a facility called the Bellington Clinic. Father further argued that he had always played an important role in the children's upbringing, served as an essential caregiver, and participated extensively in their extra-curricular activities. On that same day, Father also filed a motion for temporary relief seeking two four-hour visits at a third-party facility for a two-week period preceded by a negative drug test, accompanied by a proposed plan to gradually increase parenting time until the parties reach 50-50 parenting. Father also requested the ability to coach the Children's basketball teams and attend their games.

On February 7, 2024, Mother filed another petition for contempt alleging that Father showed up at the oldest child's basketball game on February 6, 2024, hid in the restroom, and had a friend inform one of the children that he was in the restroom and wished to talk to the child. The child informed his coach and the coach informed Mother and asked another coach to tell Father to leave the premises.

On February 12, 2024, the family court entered an order dismissing Father's petition for modification for the failure to state a substantial change in circumstances, as Father failed to comply with the requirements of its December 28, 2023, order. The family court's order found that Father filed his petition prematurely insofar as he was on a waitlist to receive drug treatment, finding that Father should have waited to file the petition post-treatment.

At a contempt hearing on March 13, 2024, the family court appointed a guardian ad litem and conducted an in camera hearing with the older child, who was found to be credible. Father was found in contempt, sanctioned in the deferred amount of $500, and

ordered to have no contact with the children. A contempt review hearing was scheduled for May 8, 2024.

On March 23, 2024, Father filed a motion for temporary relief seeking the same relief as requested in his first motion for temporary relief—additional visitation in two-week intervals and permission to coach the Children's teams. On March 27, 2024, Father filed another petition to modify custody alleging his actual participation in drug treatment therapy. A hearing was held on Father's petitions on May 8, 2024. At the hearing, Father admitted that he had a drug problem, testified that he had been attending drug treatment counseling weekly and would be starting a new job the week following the hearing, and that he had not used drugs in seven or eight months. Father also admitted that he previously lied to the court about his drug use, but that he did not dye his hair to skew the results of the previously ordered hair follicle test. By order entered on August 8, 2024, the family court dismissed Father's petition and held the following: (1) Father's recent participation in substance abuse counseling did not amount to a substantial change in circumstances; (2) Father still lacked credibility; (3) Father's lack of credibility made his participation in substance abuse counseling an exercise in futility; (4) there was no approved drug testing available to the Court that could assure Father is drug free after being found to have tampered with the hair follicle results; and (5) the court's prior orders remain in full force and effect. It is from the August 8, 2024, order that Father now appeals.

For these matters, we are guided by the following standard of review:

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

Syl. Pt. 2, *Christopher P. v. Amanda C.*, 250 W. Va. 53, 902 S.E.2d 185 (2024); *accord* W. Va. Code § 51-2A-14(c) (2005) (specifying standards for appellate court review of family court orders).

On appeal, Father raised two related assignments of error, which we will consolidate. *See generally Tudor's Biscuit World of Am. v. Critchley*, 229 W. Va. 396, 402, 729 S.E.2d 231, 237 (2012) (allowing consolidation of related assignments of error). First, Father asserted that that family court erred by not granting him any parenting time. Second, Father contended the family court erred when it found that no method of drug testing could assure the court that he was sober. Upon review, we agree, in part.

The August 8, 2024, order, as written, strongly suggests that Father has no ability to ever regain any parenting time, as it states that "there is no approved drug testing available to the [c]ourt that could give [the] [c]ourt assurance that [Father] is drug free as

he has been found to have tampered with those results." This is contrary to established precedent. *See Dancy v. Dancy*, 191 W. Va. 682, 685, 447 S.E.2d 883, 886 (1994) (stating that when a parent is determined to be addicted to a substance or is dealing with tendencies of substance abuse, the sobriety and abstinence from such substance provides a basis for modification).

When considering parenting plans, family courts must consider West Virginia Code § 48-9-102a (2022), which 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*.

Once the 50-50 presumption is rebutted, the family court shall maximize the parenting time with each parent consistent with ensuring the child's welfare.[3] In its discretion, the family court may use a variety of options, including those contained in West Virginia Code § 48-9-209(b) to both maximize parenting time and ensure the children's welfare.[4] Here, the family court did not abuse its discretion in its February 12, 2024, order dismissing Father's petition for modification, as mere enrollment in a drug treatment class was not found by the family court to be enough to warrant a parenting plan modification. However, the August 8, 2024, order goes too far in granting Father *no* parenting time, coupled with providing *no* avenue by which Father may seek a future modification in the event specified conditions are satisfied.

Accordingly, we vacate and remand to the Taylor County Family Court with directions to enter an order pursuant to which Father is not foreclosed from reestablishing parenting time with the Children consistent with this decision.

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[3] The statutory best-interest-of-the-child factors emphasize, among other consideration, "meaningful contact between a child and each parent" and "collaborative parental planning" as important considerations for the family court. W. Va. Code § 48-9-102(a)(2) and (4).

[4] The family court, at its discretion, may consider options such as supervised visitation through a third-party facility, negative drug testing to demonstrate progress with Father's drug counseling treatment, and other measures that facilitate the opportunity for Father to have meaningful contact with the Children while also setting appropriate safeguards for the Children's welfare.

Vacated and Remanded with Directions.

ISSUED: February 28, 2025

CONCURRED IN BY:

Chief Judge Charles O. Lorensen
Judge Daniel W. Greear
Judge S. Ryan White