IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED
June 6, 2025
ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

JON H.,
Respondent Below, Petitioner

v.) No. 24-ICA-396 (Fam. Ct. Kanawha Cnty. Case No. FC-20-2023-D-605)

LYDIA M.,
Petitioner Below, Respondent

MEMORANDUM DECISION

Petitioner Jon H.[1] ("Father") appeals the Family Court of Kanawha County's September 6, 2024, order denying his motion to reconsider and overruling his objections to the family court's August 29, 2024, custodial allocation order. Respondent Lydia M. ("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 no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the family court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Father and Mother were never married but share one child, born in 2016. Mother, who was represented by different counsel below, filed a petition for custodial allocation on July 20, 2023.[3] The case was originally assigned to a certain family court judge ("first judge") but was re-assigned to a different judge ("second judge") after Father's motion to disqualify was granted by administrative order of the Supreme Court of Appeals of West Virginia, entered on August 21, 2023. Second judge held a hearing on April 9, 2024, during which the parties placed an agreed parenting plan on the record. On May 23, 2024, prior to

[1] To protect the confidentiality of the juvenile 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 James M. Pierson, Esq. Mother is represented by Erica Lord, Esq.

[3] The record is unclear regarding how the parties shared parenting time prior to Mother filling her petition for custodial allocation.

the parties' agreed order being entered, Mother retained new counsel. Due to an alleged conflict of interest between Mother's counsel and second judge, the case was reassigned to a third family court judge.

On June 3, 2024, still prior to the entry of the agreed order, Mother filed objections to the entry of the custody order. She alleged that she never agreed to a 50-50 arrangement beforehand, that Father had never exercised 50-50 custody, and that the child's paternal grandmother cared for the child during most of Father's parenting time. Mother also alleged that "voluntariness" of the agreement was never placed on the record, the April 9, 2024, hearing was not a final hearing, and that her former counsel refused to communicate with her after that hearing, forcing her to retain new counsel. Mother further alleged in her objections that the entire hearing was under seven minutes long, neither party testified, and no specific details regarding pick-up time or drop-off time were placed on the record. For those reasons, Mother requested a full evidentiary hearing.

On June 10, 2024, Father filed a motion to enforce settlement agreement and motion for entry of agreed final order. In support of his motion, Father asserted that neither party indicated any opposition to the terms of the agreement during the hearing, both parties were represented by counsel, and Mother did not allege mistake or fraud. That same day, the family court entered the agreed final order which reflected the following provisions:

1. No part of the agreement would be appealed.
2. The parties stated they entered into the agreement knowingly and voluntarily.
3. The parties agreed to shared decision-making.
4. The parties agreed to alternate their designation as legal custodian for tax purposes every year.
5. Father's parenting time was Monday and Tuesday, Mother's time was Wednesday and Thursday, with the parties alternating weekends.
6. The parties agreed to work together on a holiday schedule.
7. The child would attend counseling.

On June 24, 2024, Mother filed a motion to set aside judgment. In her motion, she alleged that the court failed to inquire whether the parties waived the temporary hearing, as required by Rule 21(b) of the West Virginia Rules of Practice and Procedure for Family Court.[4] The family court scheduled a hearing on Mother's objections and motion to set aside judgment for July 9, 2024.

[4] Rule 21(b) deals with converting a temporary hearing to a final hearing and states, "[b]y agreement of all parties placed on the record, any hearing may be converted to a final hearing if sufficient evidence is presented to sustain the cause of action and resolve all issues."

During this hearing, Mother's counsel informed the court that she had just been made aware that her staff used artificial intelligence to draft the motion to set aside. On July 10, 2024, Mother's attorney filed an artificial intelligence disclosure, as directed by the family court.

Mother's former attorney was subpoenaed and appeared at the June 9, 2024, hearing. He testified that he went over all provisions of the agreement with Mother and that she agreed to them. When asked why Mother wanted to disavow the agreement, the attorney invoked the attorney-client privilege. The family court found that Mother placed herself in an adversarial position and she waived the attorney-client privilege. Her former attorney then testified that Mother wanted to disavow the agreement because Father had alcohol issues and left the child with third parties.

By order entered July 19, 2024, the family court issued an order setting aside the agreed final order entered June 10, 2024, and converting it to a temporary order. In its new order, the court made the following findings of fact: (1) the hearing was completed in six minutes and forty-five seconds; (2) no testimony was elicited on whether the agreement was voluntary; (3) there was no testimony about the child's best interest; and (4) there was no official notice or acknowledgement by either party on the record that the hearing was a final hearing. On a temporary basis, the court designated Mother as the residential parent, ordered 50-50 parenting, and scheduled a final hearing for August 14, 2024. The court also ordered specific parenting exchange locations and times.

On July 24, 2024, Father filed objections to the July 19, 2024, order setting aside the agreement. The final custody allocation hearing took place as scheduled on August 14, 2024. On August 22, 2024, Mother's counsel filed the proposed final custodial allocation order. On August 28, 2024, Father filed objections to the proposed final allocation order, and filed amended objections on August 29, 2024, at 12:45 p.m. The final allocation order was entered on August 29, 2024, at 4:15 p.m. and included the following findings of fact and conclusions of law:

1. Father was adjudicated to be the father of the child.
2. The parties were granted 50-50 custody with a week-on/week-off schedule.
3. When school is not in session and during summer, the parties will exchange the child at 6:00 on Sundays.
4. When school is in session, drop-off and pick-up shall take place at the child's school on Monday.
5. Mother will be the primary residential parent during even years and Father will have odd years.
6. The parties shall operate by the court's holiday schedule.

7. Mother did not meet her burden of proving that Father's alcohol use qualifies as a limiting factor under West Virginia Code § 48-9-209(a), but neither party shall consume alcohol within twenty-four hours of their parenting time.

On September 4, 2024, Father filed a motion to reconsider his objections to the proposed final allocation order, arguing that the family court entered the final order slightly before the Rule 22(b)[5] objection period had concluded and that the court had likely entered the order mistakenly without reading Father's objections. On September 6, 2024, the family court issued an order denying Father's motion to reconsider because Father e-filed them as "supporting documents" rather than as a "letter to judge," which prevented the motion from showing up in the family court judge's queue and did not otherwise let the family court know he was filing objections. As an additional reason for denying Father's motion to reconsider, the family court stated that Father's objections appear to be an attempt to relitigate issues previously determined. However, the family court addressed each of Father's objections and attached its remarks to an order entered on September 6, 2024, denying his motion for reconsideration. It is from the September 6, 2024, order that Father now appeals, requesting this Court remand the matter with instructions to reinstate the parties' custody agreement.

For these matters, we apply 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.

[5] Rule 22(b) of the West Virginia Rules of Practice and Procedure for Family Court states, in part:

> In proceedings in which one or both parties are represented by attorneys, the court may assign one or more attorneys to prepare an order or proposed findings of fact. An attorney assigned to prepare an order or proposed findings shall deliver the order or findings to the court no later than ten days after the conclusion of the hearing giving rise to the order or findings. Within the same time period the attorney shall send all parties copies of the draft order or findings together with a notice which informs the recipients to send written objections within five days to the court and all parties.

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).

Father raises five assignments of error on appeal, several of which are similar; therefore, we will consolidate them in our discussion. *See generally Tudor's Biscuit World of Am. v. Critchley,* 229 W. Va. 396, 402, 729 S.E.2d 231, 237 (2012) (stating that "the assignments of error will be consolidated and discussed accordingly").

First, Father asserts that the family court erred when it failed to deny Mother's motion to set aside judgment, order sanctions against Mother's attorney, or refer her to the office of disciplinary counsel for using artificial intelligence to draft her motion. We disagree. West Virginia Code § 51-2A-7(a)(1) & (5) (2013) gives authority to the family court to "manage the business before them" and to "discipline attorneys." Here, Mother's attorney advised the family court about the use of artificial intelligence as soon as she was made aware. The family court ordered her to issue a disclosure, and she timely complied. Given the family court's discretion, we find no basis in law to warrant Father relief on this assignment of error. *See In re Tiffany Marie S.*, 196 W. Va. 223, 231, 470 S.E.2d 177, 185 (1996) (A reviewing court may not overturn a family court's finding simply because it would have decided the case differently).

In his second, third, fourth, and fifth assignments of error, Father contends that the family court erred when it failed to consider his objections to the August 29, 2024, final custodial allocation order and entered the final order prematurely. He also argues that the court erred when it rejected his motion to reconsider his objections. We disagree. While the family court noted that Father's objections were not properly filed within the electronic filing system at the time the final allocation order was entered, the family court nevertheless endeavored to address those objections when ruling upon Father's motion to reconsider. Upon review of the final custodial allocation order and the order denying Father's motion to reconsider, we find no error by the family court. Rather, the order denying the motion to reconsider shows that the family court adequately addressed those objections before ultimately declining to disturb the final allocation order. Thus, because the family court addressed each of Father's objections, and attached its responses to the objections to the order denying Father's motion to reconsider, we conclude that Father's assignments of error on this issue are moot.[6]

Accordingly, we affirm the family court's September 6, 2024, order.

[6] Although we affirm on these assignments of error, we also remind the family court that timely submitted objections must be addressed, regardless of the method in which they are filed. *See Thomas M. v. Robyn C.*, No. 23-ICA-554, 2024 WL 3594332 (W. Va. Ct. App. July 30, 2024) (memorandum decision).

Affirmed.

ISSUED: June 6, 2025

CONCURRED IN BY:

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