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

CASEY S.,
Petitioner Below, Petitioner

v.) No. 24-ICA-500 (Fam. Ct. Kanawha Cnty. Case No. FC-20-2022-D-679)

JAY P.,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Casey S.[1] ("Mother") appeals the Family Court of Kanawha County's November 15, 2024, final modification order granting the parties 50-50 custody. Respondent Jay P. ("Father") responded in support of the family court's decision.[2] Mother filed 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.

The parties were never married but share one minor child, born in 2016. By way of background, Mother was granted a Domestic Violence Protective Order ("DVPO") against Father in September of 2022. On April 13, 2023, an order was entered designating Mother as the primary residential parent of the child with Father having parenting time on certain weekends and paying $352.02 per month in child support. Father failed to pay his child support. On September 11, 2023, Mother filed petitions for modification and contempt. On November 13, 2023, a hearing was held on both petitions. A final order was entered on November 14, 2023, holding Father in contempt for failure to pay child support. The order also modified his parenting time to Fridays at 8:30 p.m. to Sunday at 4:30 p.m. The family court ordered that the child be picked up at Mother's residence and returned at the YWCA Monitored Visitation and Exchange Center.

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[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] Mother is represented by Paul S. Saluja, Esq. Father is self-represented.

In early February 2024, Father filed a petition for expedited modification of child support. On February 12, 2024, the family court entered an order decreasing child support to $296.32 per month. On April 23, 2024, Father filed a petition for modification stating that he had relocated to Kanawha County after relocating several times for professional football. Mother filed an answer and counterclaim on June 5, 2024, alleging that Father had only visited the child a few times per year, and at one point, had relocated to play football and stopped seeing the child altogether.

On August 26, 2024, a hearing was held on Father's petition and Mother's counterclaim. At that hearing, Father testified that he was concerned about the child's tardies, absences, and attention span during their FaceTime calls. He further testified that in February 2024, he relocated to Iowa to play professional football, later returned to West Virginia, relocated to Oklahoma in March 2024, returned to West Virginia in July 2024, relocated to Iowa in July 2024, and then returned to West Virginia in August 2024. The family court entered its order on November 15, 2024, finding a substantial change in circumstances due to Father's relocation to Kanawha County. The court ordered a 50-50 parenting plan with a week-on/week-off schedule, shared decision-making, and ordered Father to pay $136.93 in child support. It is from the November 15, 2024, order that Mother now appeals.

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.

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).

Mother raises two assignments of error on appeal. First, she asserts that the family court erred by failing to follow the requirements of West Virginia Code § 48-9-401 and granting the parenting plan modification. The statute governing a modification of a parenting plan applicable to this assignment of error provides that:

> Except as provided in § 48-9-402 or § 48-9-403 of this code, a court shall modify a parenting plan order if it finds, on the basis of facts that were not known or have arisen since the entry of the prior order and were not anticipated in the prior order, that a substantial change has occurred in the circumstances of the child or of one or both parents and a modification is necessary to serve the best interests of the child.

W. Va. Code § 48-9-401(a) (2022). The burden is on the party seeking the modification to establish the required substantial change of circumstances. *See Goff v. Goff*, 177 W. Va. 742, 356 S.E.2d 496 (1987) (holding that the burden of proof is on the parent seeking to modify the parenting plan).

To justify modifying a parenting plan upon a showing of changed circumstances pursuant to West Virginia Code § 48-9-401, the Supreme Court has held that the three following criteria must be established:

> *First*, the facts relevant to the change in circumstances must not have been "known" or "anticipated" in the order that established the parenting plan. *Ibid. Second*, the change in circumstances, whether "of the child or of one or both parents[,]" must be "substantial[.]" *Ibid. Third*, the modification must be "necessary to serve the best interests of the child."

Jared M. v. Molly A., 246 W. Va. 556, 561, 874 S.E.2d 358, 363 (2022). The Court went on to explain:

> "[U]nder the plain meaning of the statute, the relevant question is not whether a particular change in circumstance *could* have been anticipated, but whether the parenting plan actually did anticipate, and provide accommodation for, the particular change." *Skidmore v. Rogers*, 229 W. Va. 13, 21, 725 S.E.2d 182, 190 (2011). "The phrase 'not anticipated therein' does not mean that the change in circumstance could not have been anticipated generally, but rather that the parenting plan order does not make provisions for such a change."

Id. at 562, 874 S.E.2d at 364 (2022).

Here, the record reflects that Father was pursuing his goal of playing professional football (which required travel) at the time the parties' original parenting plan was adopted. Therefore, we cannot conclude that the family court erred in determining that Father's relocation to Kanawha County constituted a substantial change in circumstances, and we affirm the family court on this assignment of error.

In her second assignment of error, Mother contends that the family court erroneously failed to follow the requirements of West Virginia Code § 48-9-209 (2024) by not including specific findings of fact based on the evidence adduced. We disagree. West Virginia Code § 48-9-209 provides a list of factors to be considered when determining whether a 50-50 parenting plan is appropriate. In its order, the family court included thirty-three findings of fact and found that "both parties presented evidence regarding limiting factors, but the evidence did not rise to a level to overcome the statutory presumption [of 50-50 custody]." Because the family court heard evidence regarding limiting factors,

determined said evidence was insufficient to warrant a deviation from 50-50 custody, and issued a thorough order, we find no error in its decision.

Accordingly, we affirm the family court's November 15, 2024, order.

Affirmed.

ISSUED: June 6, 2025

CONCURRED IN BY:

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