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

RACHEL B.,
Petitioner Below, Petitioner

v.) No. 25-ICA-8 (Fam. Ct. Cabell Cnty. Case No. FC-06-2018-D-415)

BENJAMIN B.,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Rachel B.[1] ("Mother") appeals the Family Court of Cabell County's December 2, 2024, order denying her petitions for modification and contempt. Respondent Benjamin B. ("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 that there is error in the family court's decision but no substantial question of law. For the reasons set forth below, a memorandum decision vacating the family court's decision and remanding for further proceedings is appropriate under Rule 21 of the Rules of Appellate Procedure.

The parties were married in 2011 and divorced by order entered in 2018. One child ("Child") was born of the marriage in 2013. In the original parenting plan, the parties had a 2-2-3 visitation schedule. In July 2021, the court entered an order requiring Mother's parenting time be supervised. Later in 2021, Mother underwent a court-ordered psychological evaluation.[3] She was diagnosed with moderate depression, anxiety, and post-traumatic stress disorder ("PTSD"). Between 2021 and 2023, Father filed four petitions for

[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 self-represented. Father is represented by Amy C. Crossan, Esq.

[3] The evaluation report states that Mother abused prescription medication when she was between ages twenty-four and twenty-seven years old. However, she has not abused drugs in thirteen years.

contempt against Mother.[4] In late 2023, Mother filed a petition for custody modification. An order was entered on October 19, 2023, reflecting the parties' agreement that Mother's Wednesday and Thursday visits would be unsupervised, but holidays and vacations would remain supervised.

Events leading to this appeal began when Mother filed petitions for contempt and custody modification in October of 2024. In her petition for contempt, Mother alleged that Father talked poorly about her in front of Child; he threatened, intimidated, and stalked her; he interfered with her parenting time and threatened to publicly defame her; and he routinely scheduled Child's appointments without notifying her. In her petition for modification, she requested that the requirement of supervised visitation be removed, she be named the primary residential parent with sole decision-making authority for Child's sports because Father created a hostile environment for the coaches, and that she be given the right of first refusal to care for Child if Father is unable to exercise his parenting time.

In support of her petition for modification, Mother stated that she had maintained employment with the same employer for fourteen years. She became a grant writer for a medical facility in 2021, and in 2024, she began work as a grant manager for a university. Mother averred that she has maintained stable housing within Child's school district and near his sporting events. Mother further stated that she is on Child's little league board of directors and leads their fundraising and social media. She further noted that she underwent a voluntary psychiatric evaluation and has successfully continued with therapy since 2021. Additionally, Mother stated that Father has discredited her to Child, regularly allowed a third party to watch Child even though Mother was available, and has failed to attend any of Child's games or batting lessons.

On December 2, 2024, the family court entered an order denying Mother's petitions, holding that she failed to prove any of the allegations from her contempt petition and failed to prove that a substantial change in circumstances had occurred. It is from this 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.

[4] It is unclear from the record what led to the first three petitions for contempt, but the fourth petition for contempt was filed because Mother took Child to see a movie and the supervisor (maternal grandmother) waited downstairs rather than inside the actual theater.

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, Mother raises seven assignments of error. Because several assignments of error are similar, we will consolidate them for our review. *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").

In her first, second, third, and fifth assignments of error Mother asserts that the family court acted contrary to Child's best interest by misapplying West Virginia Code § 48-9-102 (2022)[5] and § 48-9-401 (2022). In support of her arguments, Mother states that the family court erroneously failed to find that a substantial change in circumstances occurred and failed to address the alleged existence of limiting factors as required in § 48-9-209 (2024). We conclude that Mother's arguments have merit.

The statute governing a modification of a parenting plan applicable to these assignments of error provides that:

---

[5] West Virginia Code § 48-9-102 states:

> (a) The primary objective of this article is to serve the child's best interests by facilitating:
> (1) Stability of the child;
> (2) Collaborative parental planning and agreement about the child's custodial arrangements and upbringing;
> (3) Continuity of existing parent-child attachments;
> (4) Meaningful contact between a child and each parent, and which is rebuttably presumed to be equal (50-50) custodial allocation of the child;
> (5) Caretaking and parenting relationships by adults who love the child, know how to provide for the child's needs, and who place a high priority on doing so;
> (6) Security from exposure to physical or emotional harm;
> (7) Expeditious, predictable decision-making and avoidance of prolonged uncertainty respecting arrangements for the child's care and control; and
> (8) Meaningful contact between a child and his or her siblings, including half-siblings.
> (b) A secondary objective of this article is to achieve fairness between the parents consistent with the rebuttable presumption of equal (50-50) custodial allocation.

> 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 of Appeals of West Virginia ("SCAWV") 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).

The statute governing limiting factors is West Virginia Code § 48-9-209, which provides a list of factors to be considered when determining whether a 50-50 parenting plan is feasible and/or appropriate. The non-exclusive list includes considerations such as whether a parent has committed domestic violence, is addicted to controlled substances or alcohol, repeatedly causes the child to be in the care of a third party when the other parent is available, a parent's mental health, and whether a parent will encourage a positive relationship between the child and the other parent, to name a few. Here, the family court's final order failed to include sufficient analysis regarding Mother's personal improvements

and failed to address whether limiting factors existed and to what extent those factors affected either party's parenting. The Supreme Court of Appeals of West Virginia has previously remanded insufficient orders finding that:

> to properly review an order of a family court, "[t]he order must be sufficient to indicate the factual and legal basis for the [family court]'s ultimate conclusion so as to facilitate a meaningful review of the issues presented." *Province v. Province*, 196 W. Va. 473, 483, 473 S.E.2d 894, 904 (1996); *see also Nestor v. Bruce Hardwood Flooring, L.P.*, 206 W. Va. 453, 456, 525 S.E.2d 334, 337 (1999) ("[O]ur task as an appellate court is to determine whether the circuit court's reasons for its order are supported by the record."). "Where the lower tribunals fail to meet this standard—*i.e.* making only general, conclusory or inexact findings—we must vacate the judgment and remand the case for further findings and development." *Province*, 196 W. Va. at 483, 473 S.E.2d at 904.

Collisi v. Collisi, 231 W. Va. 359, 363-64, 745 S.E.2d 250, 254-55 (2013). Therefore, we vacate and remand on the first, second, third, and fifth assignments of error with directions for the family court to issue a new order sufficient for appellate review addressing the applicable limiting factors in West Virginia Code § 48-9-209.

In her fourth assignment of error, Mother contends that the family court erred when it refused to admit her medical treatment letters and records into evidence. We disagree. West Virginia Code § 51-2A-8 (2017) states that the West Virginia Rules of Evidence apply to family court proceedings. Rule 901(a) of the West Virginia Rules of Evidence states that a proponent of evidence "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Rule 901(b)(1) then states that this can be accomplished through "testimony of a witness with knowledge." Because Mother failed to produce a witness to authenticate her documents, we cannot find that the family court's decision to exclude the evidence was erroneous or an abuse of discretion, and we find no error on this issue.

Sixth, Mother argues that the family court erred by refusing to appoint a guardian ad litem ("GAL") for Child. We agree. While West Virginia Code § 48-9-302 (2001) gives family courts discretion to appoint a GAL, we also find it important to note that Mother requested the appointment of a GAL and offered to pay for it. Mother expressed that Child wishes to have additional parenting time with her, and the appointment of a GAL would be an effective means to obtain Child's wishes, particularly when Mother is willing to cover the cost. Further, both parties raised concerns about the other party's parenting and a GAL could effectively investigate those concerns. Therefore, we direct the family court to either appoint a GAL for Child or provide analysis regarding its belief that a GAL is not necessary. *See Kevin R. v. Megan H.*, No. 24-ICA-135, 2024 WL 4591046 (W. Va. App.

Ct. Oct. 28, 2024) (memorandum decision) (holding that the family court failed to supply a sufficient rationale to support its decision to deny parent's request to appoint a GAL).

In her seventh and final assignment of error, Mother asserts that the family court erred when it awarded attorney's fees to Father. We agree. While the family court has discretion to award attorney's fees, Syllabus Point 4 of *Banker v. Banker*, 196 W. Va. 535, 474 S.E.2d 465 (1996), mandates that a "wide array of factors" must be considered when granting a request for attorney's fees, and the SCAWV listed the following six factors which should be considered:

> [T]he party's ability to pay his or her own fee, the beneficial results obtained by the attorney, the parties' respective financial conditions, the effect of the attorney's fees on each party's standard of living, the degree of fault of either party making the divorce action necessary, and the reasonableness of the attorney's fee request.

Here, the family court's order simply stated that the $1,500 attorney's fee award was reasonable, and that Father's attorney obtained good results. No consideration was given regarding Mother's ability to pay, Father's lack of employment, or the degree of fault in making the action necessary. Because this matter is vacated and remanded with directions for reasons stated above, we also vacate and remand on the issue of attorney's fees with directions for the family court to reevaluate its decision, pursuant to the factors set forth in *Banker*, after further analysis of the facts is provided in a new final order.

Accordingly, we affirm, in part, the family court's decision regarding the admission of evidence consisting of her medical treatment letters and records. As to the remainder of the issues raised by Mother on appeal, we vacate the court's December 2, 2024, order and remand this matter to the family court with directions for the court to provide further analysis on the issues of limiting factors addressed in West Virginia Code § 48-9-209, substantial change of circumstances, whether a GAL should be appointed, and its award of attorney's fees.

Affirmed, in part, and Vacated and Remanded, with Directions.

ISSUED: June 6, 2025

CONCURRED IN BY:

Chief Judge Charles O. Lorensen
Judge S. Ryan White

DISSENTING:

Judge Daniel W. Greear

GREEAR, Judge, dissenting, in part:

I respectfully dissent, in part, from the majority's opinion as to the sufficiency of the family court's December 2, 2024, order to establish that Mother did not show a change in circumstances. In paragraph two of its order (subsections c, d, e, f, g, h and i), the court provided detailed reasonings for its finding on the issue of change in circumstances. Specifically, the court found that Father's change in employment, Father missing one therapy appointment, and Mother's continued participation in therapy were not substantial changes of circumstances. Further, the court determined that there was no evidence to support Mother's contention that the child was with the paternal grandparents more than the Father. As this Court has repeatedly cited, it is within the sole province of the family court, as factfinder, to decide issues of credibility and this Court will not reweigh the evidence simply because it may have viewed the evidence differently. *See Mulugeta v. Misailidis*, 239 W. Va. 404, 408-09, 801 S.E.2d 282, 286-287. Accordingly, I dissent, in part, from the majority's opinion and conclude that the family court's December 2, 2024, order contained sufficient findings of fact to permit meaningful appellate review of the issue of change in circumstances.