IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

PHILLIP R.,
Respondent Below, Petitioner

v.) No. 25-ICA-123 (Fam. Ct. Wood Cnty. Case No. FC-54-2020-D-353)

KELLY R.,
Petitioner Below, Respondent

MEMORANDUM DECISION

Petitioner Phillip R. ("Father")[1] appeals the Family Court of Wood County's February 21, 2025, order that denied his motion to modify custody of the parties' children. Respondent Kelly R. ("Mother") and the children's guardian ad litem ("GAL") filed responses in support of the family court's order.[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.

The parties were married in 1997 and have five children, two of whom are now adults and not subject to this appeal. The three minor children were born in 2011, 2012, and 2014. In early August of 2020, the parties separated after Mother sought a domestic violence protective order ("DVPO") against Father on behalf of the children.

The family court granted Mother a 180-day DVPO on August 19, 2020. Under the DVPO, Father was prohibited from having contact with the children and the DVPO was set to expire on February 15, 2021. While the DVPO was in effect, Mother filed for divorce.

[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 William B. Summers, Esq. Mother is represented by Katharine L. Davitian, Esq. The GAL is Erica M. Brannon, Esq.

In January of 2021, the family court held a preliminary hearing in the divorce proceeding, awarding Mother primary custody of the children and awarding Father supervised visitation with the minor children for two hours each week. The family court's temporary order noted that Father was currently in counseling and attending meetings at a worship center. Father was ordered to undergo a psychological evaluation with SAAR Psychological Group, PLLC ("SAAR") and provide updates regarding his progression in counseling with his counselor and in worship center meetings. On March 16, 2021, Father completed the SAAR psychological evaluation and SAAR's evaluating psychologist prepared a report summarizing the results of the evaluations and setting forth their recommendations. SAAR's report concluded that, "[g]iven the high level of long-term aggressive and impulsive anger outbursts [Father] has exhibited, the extent to which he tried to justify his actions in this evaluation and the inherent difficulty in changing life-long personality traits and characteristics, [Father's] prognosis for improved parenting, within a reasonable degree of psychological certainty, is very poor."

At some point after the temporary order was entered, Father filed a motion for increased visitation with the children. On October 4, 2022, the family court held a final hearing in the divorce proceeding.[3] The final divorce order held the issue of custodial allocation in abeyance and ordered that the family court's previous orders providing Father with supervised visitation remain in full force and effect "given the substantial nature of abuse of the children . . . by [Father] and results of the . . . [SAAR] evaluation[.]" On November 2, 2022, the family court appointed a GAL for the children and ordered the GAL to investigate the matter, and file a written report and recommendation with the court prior to the final hearing on custodial allocation.

On February 10, 2023, the family court held the final hearing on custodial allocation; specifically, to address Father's motion for increased visitation and the GAL's investigation. During the hearing, the family court provided a copy of the GAL's report to counsel for the parties but prohibited the attorneys from disseminating the report directly to the parties. The GAL's report was subsequently filed under seal.

The GAL testified to the results of her investigation and her recommendations on the record. She stated that she met with the parties, all five children, and Father's counselor, and that she reviewed the children's school records and the SAAR report. Relevant to this appeal, Father had been in therapy for over two years at the time of this hearing. Further, the GAL's report stated that she spoke with Father's counselor, who reported that Father

[3] While neither the transcript nor the recording from the October 4, 2022, final divorce hearing was provided to this Court on appeal, the docket sheet indicates that subpoenas were issued to witnesses in August of 2022 in anticipation of the final divorce hearing. Relevant to this appeal, Father's counselor was subpoenaed to testify at that hearing.

was a "model client[,]" committed to being understanding, and was "honest about the things that happened." The GAL further explained that Father's counselor had stated that "trust building needs to occur and that could be done through family counseling." The GAL reported that Father stated that he had also been participating in parenting classes, and that he denied that the children were afraid of him. Rather, Father believed that "most of the problem was his yelling and screaming" and that he did not believe that his physical punishment of the children was excessive. According to the GAL's report, the adult children stated that they have chosen to have "zero to do with their father." Also, "all the [minor] children report fear of their father[,]" are afraid to be alone with him, and that "they would not be comfortable to seeing [him] without a supervisor there."

The GAL acknowledged that Father was seeking a 50-50 parenting plan in his motion for increased visitation but stated that she did not believe that to be in the children's best interest and recommended no additional visitation for Father. On March 8, 2023, pursuant to the provisions of Rule 22(b) of the West Virginia Family Court Rules, the GAL prepared and submitted the proposed order from the February 10, 2023, final hearing to the family court and counsel for the parties.[4]

On April 6, 2023, prior to the family court's entry of the final order from the February 10, 2023, hearing, Father voluntarily had licensed psychologist, Dr. Edward Baker, perform a psychological and parental fitness examination. Dr. Baker's report dated April 15, 2023, noted that Father had informed Dr. Baker of the family court's February 10, 2023, hearing and the court's rulings from the bench. Dr. Baker's report acknowledged that "[Father] stated he is appealing" the family court's ruling.

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[4] Rule 22(b) of the Rules of Practice and Procedure for Family Court provides in relevant part that

> 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. If no objections are received, the court shall enter the order and findings no later than three days following the conclusion of the objection period. If objections are received, the court shall enter an order and findings no later than ten days after the receipt of the objections.

On May 10, 2023, after receiving no written objections to the proposed order, the family court entered a final order on custodial allocation, denying Father's motion seeking increased visitation. The family court specifically found that limiting factors existed pursuant to West Virginia Code § 48-9-209(a) due to the serious physical and emotional child abuse that Father inflicted upon the children as well as domestic violence.

The family court found that the parties' minor children, as well as the adult children, reported a lifelong history of physical and emotional abuse by Father and noted that "this is one of the worst cases of abuse that has ever been presented to this [c]ourt. There has been systematic lifelong abuse of the children and family starting from near birth – the children reported that the babies were hit for crying."

The family court explained that although Father had participated in counseling and parenting services, and received glowing recommendations from his counselor, that it did "not translate to additional contact with the children being in their best interest." The family court ordered "that the children SHALL NOT be forced to have visitation with [Father]" and allowed "that the children shall have discretion whether or not they want to visit with the Father." The family court also determined that after finding that Father had engaged in the limiting factors of child abuse and domestic violence pursuant to subsection (a) of West Virginia Code § 48-9-209, that subsection (b) required the family court to impose limits to protect the children or Mother from harm. The family court stated:

> Pursuant to W.Va. Code 48-9-209(b) this Court FINDS that it should impose limits on the Father's parenting time that are reasonably calculated to prevent the children from harm. The Court does ORDER that all contact with the Father shall be supervised by . . . an independent third party provider, and that the children shall have discretion whether or not they wish to attend visitation.

The family court also denied Father's motion for the children's respective counselors to make the decisions regarding increasing Father's visitation. Father did not appeal this decision.

On May 11, 2023, a day after the final parenting plan order was entered, Father filed a petition for contempt, alleging that Mother had interfered with the parenting plan by obstructing his supervised visits.[5] The family court held a hearing on Father's petition for contempt on June 27, 2023. There, Father argued that Mother's actions limited his court-ordered visitation and that while he understood that it was in the children's discretion, he

[5] Father's petition acknowledged that the court's final order from the February 10, 2023, hearing had not been entered yet and based his contempt motion on the court's oral rulings.

"would like at least some explanation if they're not going to have the visits." The family court explained that due to Father's lifelong abuse and the order that visitation was in the children's discretion that "none of [the children] have to go . . . if they don't want to go[.]" The family court, however, noted that it would be reasonable for Mother to notify the third-party provider if all three children did not want to visit with Father. By order entered October 16, 2023, the family court found that Mother was not in contempt, reasoning that some visits had occurred and that the children had the discretion to decline visits with Father. The family court reaffirmed its May 10, 2023, order and instructed Mother to notify the provider if all three children declined visitation.

On November 8, 2024, Father filed a motion to modify the May 10, 2023, final order, alleging that Mother's interference with his visitation, the third party provider cancelling his visits, the family court's failure to hear testimony at the February 10, 2023, hearing from Father's counselor regarding his compliance with therapy, and Dr. Baker's April 15, 2023, report of Father's psychological and parental fitness examination were substantial changes in circumstances that warranted a modification of the May 10, 2023, parenting plan.[6] Father alleged that he voluntarily completed a psychological evaluation on April 6, 2023, by Dr. Baker, who opined that Father "has the parental capacity to care, protect and change in order to provide adequately for his children[.]"

On February 6, 2025, the family court held a hearing on Father's motion to modify the May 10, 2023, parenting plan order. A review of the transcript indicates that after discussing the length and contents of Father's motion, counsel for Father argued that Dr. Baker's April 15, 2023, report justified a change in circumstances since the family court did not consider the report at the February 10, 2023, hearing. Counsel also argued that Father had been complying with therapy, that Mother had interfered with his visitation, and that the third-party provider terminated his visits because the children no longer wanted to visit with Father. Counsel for Mother argued that the GAL's report, which was filed in February of 2023 was not considered by Dr. Baker, and that the family court had heard all of Father's same arguments on February 10, 2023. Counsel for Mother asserted that Father's arguments did not support a change in circumstances since the entry of the May 10, 2023, final order. Specifically, counsel for Mother contended that Father "made the same arguments about his completion of therapy and such . . . . That was your position in February of 2023. It didn't change . . . [y]ou're just coming in two years later and trying it again, same thing."

The family court informed the parties that it would like to speak with the children since Father was arguing that the substantial change in circumstances was that Father had been rehabilitated since the May 10, 2023, order. The court stated that after it interviewed

[6] The third-party provider supervising his visitation discharged his case because the children stated they no longer wanted to continue visits with Father.

the children regarding Father's change, it would like to schedule a supervised visit with Father and reinterview the children. Specifically, the family court said it would ask them, "Did your dad seem different? Because you're claiming you're different now, right?" Father testified that, "I am no different than I was last summer except for I'm incrementally improved. . . [Mother's] whole argument is what happened four and a half years ago. Hold on. I take full responsibility for that." There were no objections regarding the family court's plan to interview the children regarding Father's change.

On February 7, 2025, the family court interviewed the children and subsequently held a brief hearing with counsel for the parties. Based on the court's discussion with the children, the court informed counsel that it would not require the children to visit with Father. On February 12, 2025, Father filed a notice of intent to continue the case requesting that the family court schedule another hearing on his motion to modify.[7]

By order entered February 21, 2025, the family court denied Father's motion to modify the May 10, 2023, final order. The family court recited four paragraphs of its findings and conclusions from its May 10, 2023, final order that discussed the GAL's report and recommendations, the limiting factors of domestic violence and child abuse, Father's continued participation in therapy and counseling, the children's best interest, the systematic lifelong abuse that Father inflicted starting when the children were infants, the children's discretion to visit with Father, and limiting Father's visitation to prevent the children from harm. The family court's order also discussed Father's May 11, 2023, petition for contempt that Mother was allegedly interfering with his visitation, the same argument he was using to support his petition to modify. The family court again noted that Father's visitation was in the children's sole discretion.

Additionally, the family court found that it was evident from Father's February 12, 2025, filing that he continued to lack accountability for the abuse he committed on his children as well as his continual blame of Mother for his lack of visitation. The court noted that the children have been given discretion concerning visitation with Father for the past three years and frequently chose not to visit. The order explained that after interviewing the children to determine whether a substantial change in circumstances had occurred in Father, the court would not "make the children visit with their [F]ather" and that visitation would continue as previously ordered in the May 10, 2023, final order. In other words, the family court's denial of Father's motion left the May 10, 2023, final order in full force and effect. Father now appeals the family court's February 21, 2025, order.

[7] In support of his motion, Father cited to West Virginia Code § 49-4-606 (2015), which governs the modification of dispositional orders in abuse and neglect proceedings before the circuit court. However, this statutory provision is not applicable to family court proceedings, which are governed by Chapter 48 of the Code.

When reviewing the order of a family court, 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).

The Supreme Court of Appeals of West Virginia ("SCAWV") has said "[q]uestions relating to . . . custody of the children are within the sound discretion of the [family] court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syl. Pt., in part, *Nichols v. Nichols*, 160 W. Va. 514, 236 S.E.2d 36 (1977). Further, in "custody matters, we have traditionally held paramount the best interests of the child." Syl. Pt. 5, in part, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996). Mindful of these principles, we consider Father's assignments of error.

We must note at the outset that Father's brief fails to comply with Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure because his arguments fail to "contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal." As such, this Court has discretion to "disregard errors that are not adequately supported by specific references to the record on appeal." W. Va. R. App. 10(c)(7).

On appeal, Father asserts five assignments of error. Because some assignments of error are similar, we will consolidate them and address them out of order for efficiency and clarity of 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").

For his third assignment of error, Father argues that the family court failed to apply the controlling statutory framework under West Virginia Code § 48-9-401(a) (2022) by disregarding uncontroverted evidence of a substantial change in circumstances alleged in his motion to modify. In support of his argument, Father contends that the family court ignored Dr. Baker's April 15, 2023, psychological evaluation that reflected a positive prognosis for reunification, his full compliance with all therapeutic recommendations, and his continued participation in supervised visitation until the third-party provider unilaterally discharged his visits because the children declined to attend, which all exhibit

there has been a substantial change in circumstances since the May 10, 2023, order. We disagree.

Modifications of child custody based upon a substantial change in circumstances are governed by West Virginia Code § 48-9-401, which states 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.

(Emphasis added).

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). Importantly, the substantial change in circumstances must be based on "facts that were not known or have arisen since the entry of the prior order and were not anticipated in the prior order." W. Va. Code § 48-9-401(a). Thus, a petition for modification of custodial allocation relying on a substantial change in circumstances must first be based on facts that were either not known when the previous order was entered or facts that arose after the order was entered and was not provided for in the order.

Here, a review of Father's motion to modify illustrates that his motion was based on "[Mother's] discretion over visitation", her "pattern of interference" with his visitation, and how the children's "discretion has become a tool for interference" by Mother.[8] Other facts Father relies on to justify a substantial change in circumstances are as follows: 1) Father's voluntary psychological evaluation; 2) the positive report of Father's counselor, which Father maintains would have been elicited through the counselor's testimony had the February 10, 2023, hearing not concluded without the opportunity to call the counselor as a witness; 3) Father's continued participation in therapy; 4) Mother's repeated non-compliance with the court's May 10, 2023, order by willfully obstructing Father's court-ordered supervised visitation with the children; and 5) the third-party provider discharging Father's supervised visits due to the children's refusal to attend.

Pursuant to the plain language of West Virginia Code § 48-9-401, the facts Father relies on to illustrate a substantial change in circumstances must have either not been

[8] Upon review, approximately twenty-two pages of Father's thirty-two-page motion to modify focuses on blaming Mother for his lack of visitation.

known at the time of the order's entry or arose after its entry and were not anticipated in the order. Based on the record, it is clear that the circumstances alleged in the Father's modification were known and anticipated by the family court. The family court verbally informed the parties from the bench during the February 10, 2023, hearing that "[i]f any of [the children] don't want to participate they don't have to. . . . any contact with this man is a potential detriment and danger to these children." Thus, as early as February 10, 2023, Father was aware of the court's directive that his visitation was subject to the desires and discretion of his children. Further, the May 10, 2023, order gave the children complete discretion over whether they wanted to participate in supervised visits with Father.

Father's reliance on Dr. Baker's April 15, 2023, report is equally misplaced. Again, Dr. Baker's evaluation and results thereof were known to Father *before* the May 10, 2023, order was entered. Dr. Baker's report even noted that Father stated that he was appealing the family court's decision, something which Father neglected to do. Thus, Father knew the results of Dr. Baker's report at the time the May 10, 2023, order was entered.

Father asserts that the fact that he has participated in counseling for more than a year provides a basis for his requested modification. Interestingly, in support of his motion to modify, Father argued that the family court did not get to hear his counselor's favorable testimony at the February 10, 2023, hearing because the hearing concluded and deprived Father of the opportunity to call the counselor as a witness. Specifically, Father indicates that his counselor "was prepared to testify regarding [Father's] progress, affirming that he has shown significant behavioral improvement, emotional regulation, and impulse control throughout therapy. However, a review of the February 10, 2023, hearing indicates that Father's counsel did not attempt or request to call Father's counselor as a witness after the GAL's testimony. Further, the record establishes that Father had been participating in counseling with the same counselor for more than two years at the time of the February 10, 2023, hearing. Therefore, Father was aware of his counselor's opinion and position regarding Father's treatment at the time the May 10, 2023, order was entered.

Here, every fact that Father relies on to support a substantial change in circumstances was either known to him at the February 10, 2023, final hearing or when the May 10, 2023, order was entered. While the family court may not have considered Dr. Baker's report or Father's counselor's testimony in its initial decision, this was of no fault of the court. Father failed to call his counselor as a witness at the February 10, 2023, hearing, did not file an objection to the GAL's proposed order, failed to utilize West Virginia Code § 51-2A-10 (2001) to ask the family court to reconsider its order based on Dr. Baker's report, and failed to appeal the May 10, 2023, order.[9] The general principles

[9] West Virginia Code § 51-2A-10 provides that

> Any party may file a motion for reconsideration of a temporary or final order of the family court for the following reasons: (1) Mistake, inadvertence,

of judicial economy prohibit granting relief to the party who, after creating the problem, now seeks relief. *See Young v. Young*, 194 W. Va. 405, 409, 460 S.E.2d 651, 655 (1995). The party who caused the error should not be advantaged on appeal by that same error. *Id*.; *see also Comer v. Ritter Lumber Co.*, 59 W. Va. 688, 689, 53 S.E. 906, 907 (1906) (finding that one of the parties "has invited the error and must accept its results.").

As such, we cannot conclude that the family court abused its discretion by not finding that Father had proven a substantial change in circumstances due to his reliance on facts that occurred on or before the May 10, 2023, order's entry. *See Amanda A. v. Kevin T.*, 232 W. Va. 237, 245, 751 S.E.2d 757, 765 (2013) ("[A] family court's decision is entitled to significant deference. Absent an abuse of discretion, this Court must refrain from substituting its judgment for that of the family court, even if this Court might have decided a case differently."). However, we note that this decision does not preclude Father from filing a petition for modification in the future, particularly if his petition alleges a substantial change of circumstances based on facts that occurred after the May 10, 2023, order and were not anticipated in the order.[10]

Next, for his first and fourth assignments of error, Father argues that the family court erred by relying solely on the GAL's report and the in camera interviews of the children without conducting an evidentiary hearing on his motion to modify. We disagree.

West Virginia Code § 48-9-303 (2001) states that "[t]he court, in its discretion, may interview the child in chambers or direct another person to interview the child, in order to obtain information relating to the issues of the case." A review of the hearing illustrates that the family court informed the parties that it would interview the children asking about Father's behavior since he testified that he had incrementally changed since the May 10, 2023, order was entered. No objections were made when the court informed the parties of

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> surprise, excusable neglect or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been available at the time the matter was submitted to the court for decision; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) clerical or other technical deficiencies contained in the order; or (5) any other reason justifying relief from the operation of the order.

[10] We recognize that the passage of time can be an important consideration when dealing with a parent's rehabilitation. *See also In Tevya W. v. Elias Trad V.*, 227 W. Va. 618, 626, 712 S.E.2d 786, 794 (2011). However, to avoid any misunderstanding, we wish to clarify that Father's motion to modify based on substantial changes in circumstances either reasserted the same grounds as those in his initial motion for increased visitation or relied on facts that were known to Father prior to May 10, 2023, order, and as such, did not comply with the prerequisite showing set forth by West Virginia Code § 48-9-401.

this procedure. Rather, Father testified to his opinion of which children would speak to the court. "Generally[,] the failure to object constitutes a waiver of the right to raise the matter on appeal." *State v. Asbury*, 187 W. Va. 87, 91, 415 S.E.2d 891, 895 (1992). By failing to object to the children's interviews during the family court proceeding, Father waived his right to raise this issue, and we decline to address it on appeal.

In support of Father's argument regarding the GAL and her report, he avers that he was neither provided a copy of the GAL's report nor given the opportunity to cross-examine the GAL prior to the family court's ruling. This argument is unsupported by the appendix record in this matter. The GAL submitted her written report to the family court at the beginning of the February 10, 2023, final hearing. The family court provided copies of the GAL report to counsel for the parties but directed counsel not to distribute the report directly to the parties because of the sensitive information that the children disclosed about Father. The GAL testified to her investigation, the contents of her report, and was subject to cross-examination. A review of that hearing shows that counsel for Father neither requested to cross-examine the GAL nor objected to her testimony. As the May 10, 2023, order from that hearing is no longer appealable, and because Father failed to pinpoint when and how this issue was presented to the family court in his brief, we decline to address it on appeal. *See* W. Va. R. App. P. 10(c)(7).

Moving on to his next point, Father maintains that the family court committed reversible error by denying his motion to modify without conducting an evidentiary hearing in violation of his due process rights. He contends that the denial of an evidentiary hearing resulted in "what is functionally a termination of visitation, which constitutes significant infringement on [his] parental rights." We are unpersuaded by this argument.

Father does not aver that he did not have notice or an opportunity to be heard at the final hearing. Instead, he argues that the family court issued its decision without *any* final hearing whatsoever, denying him the opportunity to call witnesses to testify in support of his motion. The appendix record does not align with this contention.

On December 23, 2024, the family court entered an order scheduling a one-hour final hearing for February 6, 2025, on Father's motion to modify. While Father asserts that he was denied the opportunity to call his counselor, the visitation supervisor, or any fact witnesses to testify at a final hearing, a review of the February 6, 2025, transcript indicates otherwise. Specifically, while discussing the length and contents of Father's motion, counsel for Father stated, "[this] is why I wanted to send [sic] it as a pretrial. I mean there's a lot in this and a lot of people *I'm going to have to call as witnesses*[.]" Additionally, a review of the docket sheet indicates that Father had not subpoenaed any witnesses to testify at the hearing. Thus, while the February 6, 2025, hearing was scheduled as a final hearing, Father was not prepared to call any witnesses. The SCAWV has long held that "[t]he most fundamental due process protections are notice and an opportunity to be heard." *State ex*

rel. Bd. of Educ. of Cty. of Putnam v. Beane, 224 W. Va. 31, 35, 680 S.E.2d 46, 50 (2009). Father was given adequate notice of the final hearing, was permitted to testify in support of his motion, and his counsel argued vehemently against counsel for Mother's arguments that he was attempting to make the same arguments from the February 10, 2023, hearing. Thus, we are unable to determine that the family court violated Father's due process rights.

Additionally, as previously discussed above, Father asserted no facts to support his contention that a substantial change in circumstances had occurred since the May 10, 2023, order in support of his motion to modify. Rule 21(a) of the Rules of Practice and Procedure for Family Courts gives family courts the discretion to grant a hearing on a petition for modification.[11] Given that the family court had already held a full hearing on Father's initial motion for increased visitation and had considered substantially indistinguishable arguments, there was no need for a subsequent evidentiary hearing. *See Brian H. v. Amanda H.*, No. 13-0238, 2014 WL 620499, at *2 (W. Va. Feb. 18, 2014) (memorandum decision) (upholding the family court's denial of a father's motion to modify custody without an evidentiary hearing because the grounds stated in his most recent motion were substantially similar and had already been addressed and adjudicated at a prior hearing).

Next, for his second assignment of error, Father argues that the family court abused its discretion by delegating complete authority to the minor children to determine whether Father's visitation would occur. We disagree.

When entering a temporary or permanent parenting plan order, West Virginia Code § 48-9-209(a) contains limiting factors for a court to consider, which provides, in pertinent part, that "the court shall consider whether a parent . . . [h]as abused, neglected, or abandoned a child . . . or . . . [h]as committed domestic violence[.]" Additionally,

> [i]f a 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. The limitations that the court shall consider include . . . [t]he allocation of exclusive custodial responsibility to one of the parents.

[11] Rule 21(a) of the Rules of Practice and Procedure for Family Court states:

> A party may file a petition for contempt/order to show cause or modification of any order of the court. If grounds pled warrant a contempt/show cause and modification hearing, the hearing shall take place within 45 days of the filing of a petition for contempt/order to show cause or modification. If grounds pled not warrant a hearing then the court shall enter a dismissal order within 20 days.

W. Va. Code § 48-9-209(b)(1)(C) (emphasis added).

In *James M. v. Jennifer M.*, No. 22-ICA-165, 2023 WL 4029216 (W. Va. Ct. App. June 15, 2023) (memorandum decision), this Court affirmed a family court order that found it was not in the best interest of the children to be forced to have contact with their father and placed his visitation in the children's discretion. On appeal, the SCAWV affirmed this Court's ruling. *See James M. v. Jennifer M.*, No. 23-450, 2025 WL 1513158, at *3 (W. Va. May 28, 2025) (memorandum decision). In *James M.*, the family court based its ruling on its determination that the father had engaged in the limiting factor of domestic violence. *Id*. at *2. To protect the children from harm, the family court allocated exclusive custodial responsibility to the mother and gave the children discretion concerning the father's visitation. *Id*. at *3. The SCAWV agreed that the "family court acted within its authority to allocate sole custody of the children to [the mother] and to define the nature and scope of the noncustodial parent's visitation pursuant to West Virginia Code § 48-9-209(a)(3) and 48-9-209(b)(1)(c) (2021)." *Id.*

Likewise, in the case at bar, the family court found in its May 10, 2023, order that Father inflicted upon the children the limiting factors of child abuse and domestic violence, which required the court to then impose limits to protect the children from Father. The court specifically found that all five children "reported a *lifelong* history of physical and emotional abuse" by Father. The February 21, 2025, order on appeal reflects the family court's earlier findings that "[f]or the past three years, the children have been given discretion concerning visitation with their [F]ather and often times chose not to visit . . . the [c]ourt believes it is in the best interest of the children to continue to exercise their discretion concerning visitations with their [F]ather."

The February 21, 2025, order on appeal did not modify the existing May 10, 2023, order by giving the children sole discretion over when they were to visit with Father. Rather, by denying Father's petition to modify custody, the May 10, 2023, order remained undisturbed and continued in full force and effect. In this appeal, our review is confined to the family court's denial of Father's motion to modify pursuant to West Virginia Code § 48-9-401. Thus, because Father's argument centers on a ruling contained in the May 10, 2023, order, it is time barred. Accordingly, we find no error or abuse of discretion by the family court on this issue.[12]

[12] In other words, Father's challenge to custodial allocation is nothing other than a challenge to the original ruling entered by the family court on May 10, 2023. Notably, the SCAWV has continuously recognized that a petition to modify child support cannot be used to relitigate the findings made in a prior support order absent proof of a substantial change in circumstances. *See Allen v. Allen*, 226 W. Va. 384, 389, 701 S.E.2d 106, 111 (2009) (citing *Ray v. Ray*, 216 W. Va. 11, 602 S.E.2d 454 (2004), *overruled in part on other grounds by Allen*, 226 W. Va. at 386, 701 S.E.2d at 108, syl. pt. 4). We find that this

Lastly, Father argues that the family court's final order denying his motion to modify fails to include adequate findings of fact or conclusions of law, rendering appellate review impossible and constituting reversible error. We disagree.

The SCAWV has said 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.").

Collisi v. Collisi, 231 W. Va. 359, 363-64, 745 S.E.2d 250, 254-55 (2013).

Here, in consideration of Father's motion to modify, the family court stated that its ruling was based upon its review and reliance upon the domestic violence and child abuse committed by Father, his SAAR evaluation, the February 21, 2023, final divorce order, the May 10, 2023, final order, the GAL's report, Father's contempt proceeding, Father's motion to modify, the children's interviews, and Father's notice of intent to continue the case filed on February 12, 2025. Thus, the foundation of the court's ruling was based upon a thorough consideration of the entire record.

The order on appeal recited language from the May 10, 2023, order. The family court stated that the prior order denied Father's motion for increased visitation after finding that pursuant to West Virginia Code § 48-9-209, the limiting factors of child abuse and domestic violence were applicable. As such, the court was required to limit Father's parenting time to prevent the children from harm. The family court stated that the prior order found that the children "SHALL NOT be forced to have visitation" with Father and that it emphasized that "the children shall have discretion" regarding whether or not they wished to visit Father. The court went on to recite the prior order's finding that the five children had reported a lifelong history of physical and emotional abuse by Father starting from near birth.

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recognition applies with equal force to custodial allocation when a modification is sought based on a substantial change in circumstances. Therefore, the process of modifying custody under West Virginia Code § 48-9-401 cannot be used in lieu of an appeal from the previous order without proof of a substantial change in circumstances that complies with the code. *See also id.*

The family court found that pursuant to the February 6, 2025, hearing on Father's motion to modify, the court interviewed the children to determine whether a substantial change in circumstances had occurred. After interviewing the children, the court determined that it would not "make the children visit with their [F]ather" and "[F]ather's lack of accountability is evident by his repeated pleading attempts for increased visitations as well as his continual blame of [Mother] for his lack of visitation with the children." The family court concluded its order by stating that

> For the past three years, *the children have been given discretion* concerning visitation with their [F]ather and often times chose not to visit. At this time, the [c]ourt believes it is in the best interest of the children to continue to exercise their discretion concerning visitations with their [F]ather. Accordingly, [Father's] Motion to Modify Final Order is hereby DENIED.

While we agree with Father's argument that the family court's order failed to articulate with specificity whether a substantial change in circumstances had occurred, under West Virginia Code § 48-9-401, that alone does not justify a modification of custody. It must also be shown that a modification would materially promote the welfare of the children. *See* W. Va. Code § 48-9-401. The SCAWV has continuously emphasized that a modification of a parenting plan requires both, that "a substantial change has occurred in the circumstances of the child or of one or both parents" and that the modification is "necessary to serve the best interests of the child." *See Czaja v. Czaja,* 208 W. Va. 62, 537 S.E.2d 908 (2000). Hence, if a family court properly analyzes and concludes that a modification would not be in a child's best interest, it would be irrelevant for the court to analyze whether a substantial change occurred since both are required to warrant a modification. In *Andrea H. v. Jason R.C.*, 231 W. Va. 313, 319, 745 S.E.2d 204, 210 (2013), the SCAWV opined that "[b]ecause . . . the change in custody did not serve the best interests of the children, we need not examine whether the [facts alleged] constituted a change in circumstances."[13]

[13] This Court, in a previous decision, reviewed a family court order that we found was "barely sufficient to facilitate a meaningful review" and held that

> the order is sufficient because in these circumstances the factual and legal basis for the family court's ultimate conclusion is clear: it is not in the best interest of the children for the parties to have an equal parenting plan because [the father] does not peacefully co-parent with [the mother]. Such a conclusion by the family court is supported by the record.

Ashton B. v. Megan E., No. 23-ICA-96, 2024 WL 794612, at *3 (W. Va. Ct. App. Feb. 27, 2024) (memorandum decision).

Here, after the family court reviewed the entire history of the case, discussed and recited findings from prior orders, and found that the children had been given discretion for the past three years, it then determined that Father continued to lack accountability for his life-long abuse of the children, and ultimately concluded that maintaining the visitation schedule in the prior May 10, 2023, order was in the best interests of the children.[14]

Accordingly, for the foregoing reasons, we cannot conclude that the family court abused its discretion or clearly erred in its ruling and thus, affirm the family court's February 21, 2025, order.

Accordingly, we affirm.

Affirmed.

ISSUED: September 30, 2025

CONCURRED IN BY:

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

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[14] In matters such as the one before us, "the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 1, in part, *State ex rel. Cash v. Lively*, 155 W. Va. 801, 187 S.E.2d 601 (1972) (citation omitted). Of utmost importance in a custody proceeding, it is necessary that a court *must* consider the needs of the innocent minor child. *See* Syl. Pt. 1, in part, *Allen v. Allen*, 173 W. Va. 740, 320 S.E.2d 112 (1984) ("In a contest involving the custody of infant children, their welfare is the guiding principle by which the discretion of the trial court will be controlled[.]") "[T]he paramount and controlling factor must be the child's welfare: 'all parental rights in child custody matters . . . are subordinate to the interests of the innocent child.'" *Brittany S. v. Amos F.*, 232 W. Va. 692, 699, 753 S.E.2d 745, 752 (2012) (quoting *David M. v. Margaret M.*, 182 W. Va. 57, 60, 385 S.E.2d 912, 916 (1989)). Considering the record, we acknowledge that the family court's order, although minimal, visibly prioritized the children's welfare. However, we remind family courts that it is essential to articulate their findings and explain their reasoning for making such findings. *See Dusti A. v. Jonathan A.*, No. 23-ICA-125, 2024 WL 794624, at *5 (W. Va. Ct. App. Feb. 27, 2024) (memorandum decision).