

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED

August 27, 2026

**RACHEL B.,
Petitioner Below, Petitioner**

ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

v.) No. 25-ICA-322 (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 July 21, 2025, order on remand from this Court’s June 6, 2025, memorandum decision, which denied her petitions for modification of custody 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 no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the lower tribunal’s order is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure.

The issues currently on appeal were the subject of this Court’s prior decision in *Rachel B. v. Benjamin B.*, No. 25-ICA-8, 2025 WL 1604587, at *1 (W. Va. Ct. App. June 6, 2025) (memorandum decision) in which we, among other things, remanded the matter for a better order. Because that decision contains a recitation of relevant facts and the procedural history of the case, we need only briefly discuss the background facts of this case for decision.

The parties were married in 2011, share one child who was born in 2013, and were divorced in December 2018. The divorce order incorporated an equal (50-50) parenting plan with a 2-2-3 visitation schedule.

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.

After a series of petitions and hearings, the family court issued a final order modifying the parenting plan on October 19, 2023. This order incorporated the parties' agreement that beginning on September 13, 2023, Mother was to have unsupervised overnight parenting time on Wednesdays and Thursdays, but holidays and vacations would be supervised. Mother was prohibited from making negative oral or written statements about Father, and the parties were required to communicate through the Talking Parents App.

Less than a year later, on October 7, 2024, Mother filed a petition for contempt and a petition to modify the October 19, 2023, parenting plan order. In her petition for contempt, Mother alleged that Father has a medical marijuana card and smoked marijuana in the child's presence, talked poorly about her in front of the child, threatened, intimidated, and stalked her, interfered with her parenting time, threatened to publicly defame her, allowed third parties—step-children and paternal grandparents—to watch the child instead of him, and scheduled the child's medical appointments without notifying her.

In her petition for modification, Mother requested that the requirement of supervised visitation be completely removed, that she be named the primary residential parent, and that she be named the sole decision-maker for the child's sports because Father created a hostile environment for the coaches. Mother further requested that she be given the right of first refusal to care for the child if Father was unable to exercise his parenting time. In support of her petition for modification, Mother made repeated references to numerous facts that predated the October 19, 2023, order. Father filed a response to Mother's petition for modification, specifically noting her twenty-eight-page petition with her attached sixty-one exhibits in support thereof. There, while he admitted that he "allows his parents to assist in the caretaking of [the child], something that has always been the case[.]" he maintained that many of Mother's allegations should not be considered because they were addressed prior to the family court's October 19, 2023, order.

On November 7, 2024, Mother supplemented her petition with similar arguments as contained in her petition. She emphasized that the October 19, 2023, modification order did not require any future therapy appointments. Mother also relied on West Virginia Code § 48-9-402 (2022)³, asserting that the child, who was eleven at the time, was sufficiently mature and had previously expressed a preference to have equal parenting time with her.

On November 19, 2024, the family court held a final hearing on Mother's petitions. On December 2, 2024, the court entered an order denying Mother's petitions and awarding Father attorney's fees. The court's December 2, 2024, order found, among other things,

³ West Virginia Code § 48-9-402 permits a family court to modify a parenting plan without requiring a change in circumstances when the modification is in the child's best interest and accommodates the reasonable and firm preference of a child who is under the age of fourteen and is sufficiently mature to express a voluntary preference.

that Mother’s continued “therapy [was] not a substantial change as it was anticipated that she would remain in therapy[.]” Regarding Father’s involuntary loss of employment, the court found that Father “not working does not mean that there is a substantial change. He has the child 261 overnights per year to her 104 overnights per year.” As to the child’s preference, the court found that it was inadmissible hearsay and that his mental health care provider would “have to be present to testify as to what the child says in the course of treatment[.]” The court also found that there “was no evidence to support the allegation that the child is with the paternal grandparents more than the Father[.]” As such, the court determined that Mother failed to meet her burden showing a substantial change in circumstances had occurred. Mother appealed that order to this Court. By memorandum decision filed on June 6, 2025, this Court vacated the family court’s December 2, 2024, order. We remanded the matter with directions to provide further analysis and a better order on the issues of whether there was a substantial change in circumstances, the application of limiting factors contained in West Virginia Code § 48-9-209, whether a GAL should be appointed for the child, and the family court’s award of attorney’s fees.

On July 21, 2025, the family court entered an order from this Court’s remand directives. The family court found, among other things, that Mother failed to establish a substantial change of circumstances from the October 19, 2023, order to warrant modifying the parenting plan. Regarding attorney fees, the family court examined the *Banker* factors, finding that Father was unemployed and that his home was recently destroyed by a fire. The court concluded that Mother failed to properly prepare her case and “failed to subpoena any witnesses to testify to her exhibits and move her documents into evidence.”⁴

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 Regarding this Court’s directions to provide further analysis on the issues of West Virginia Code § 48-9-209 factors, the family court found that limiting factors “have been previously established in the matter” and specifically addressed that Mother had “committed acts of domestic violence” and suffered from mental illness. The court found that the most significant factor was the child’s security from exposure to physical or emotional harm pursuant to West Virginia Code § 48-9-102(6) and explained that the appointment of a GAL for the child was premature until Mother “prove[d] by a preponderance of admissible evidence the resolution or management of her previously found limiting factors thereby rebutting the same.”

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 or concern related topics, they will be consolidated for our review.

In several assignments of error, Mother argues that the family court failed to conduct a proper analysis of the child's best interest by misapplying West Virginia Code § 48-9-102 (2022) and § 48-9-401 (2022). She also contends that the family court's analysis of the relevant list of factors contained in West Virginia Code § 48-9-209 focused solely on her, exempting Father from any analysis regarding the allegations in support of her petition for modification. Mother maintains that the family court failed to consider the evidence she filed in support of her petition and presented during the hearing, and improperly recycled findings from its 2021 and 2022 orders. We disagree.

West Virginia Code § 48-9-401 governs the modification of parenting plans when there is a substantial change in circumstances, and states, in part, as follows:

(a) 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.

The family court's order on appeal addresses the same issues as those discussed in the family court's December 2, 2024, order, and we find that the family court's supplemental findings of fact and conclusions of law satisfy this Court's June 6, 2025, remand instructions. The family court found that Mother failed to prove a substantial change in circumstances since the October 19, 2023, parenting plan was entered. The family court's finding that there was no substantial change in circumstances obviated any necessity to further analyze whether the parenting plan should be modified for purposes of West Virginia Code 48-9-401(a). As a result, we find that Mother fails to establish clear error or abuse of discretion by the family court in failing to modify the October 19, 2023, parenting plan order.

Mother also contends that the family court conducted the final hearing unfairly by excluding her evidence, while admitting Father's evidence without issue, in contradiction of Rule 102 of the West Virginia Rules of Evidence.⁵ She maintains that the court's failure

⁵ Rule 102 states that "[t]hese rules shall be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development

to consider her testimony and certain documents⁶ hindered the court's ability to appropriately determine whether a modification would be in the child's best interests. We disagree.

A review of the recorded hearing demonstrates that Mother was self-represented and Father was represented by counsel. During the hearing, Mother testified to a number of exhibits attached to her petition. For example, Mother testified to her belief that she should be awarded an increase of parenting time due to Father's use of third parties and paternal grandparents more often than not to care for their child which effectively decreased his parenting time. However, the family court ruled that the exhibits attached to Mother's petition for modification were inadmissible hearsay and that Mother was required to authenticate her exhibits through appropriate witness testimony. Although Father's counsel raised no objections, the family court excluded all of Mother's exhibits as unauthenticated documents containing hearsay. "As for the evidence that [Mother] argues was improperly excluded by the family court, we have long held that such rulings 'are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary...rulings...under an abuse of discretion standard.'" *Brian L. v. Heather E.*, No. 14-1155, 2015 WL 6955142, at *7 (W. Va. Nov. 6, 2015) (memorandum decision) (citations omitted). We find that the family court did not abuse its discretion or commit a legal error in its evidentiary rulings.

In Mother's fourth assignment of error, she asserts that the family court failed to properly apply the factors contained in Syllabus Point 4 of *Banker v. Banker*, 196 W. Va. 535, 474 S.E.2d 465 (1996) to support its award of attorney's fees. *Banker* mandates that a "wide array of factors" must be considered when granting a request for attorney's fees, and the SCAWV listed the following factors that 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.

Id. Here, the family court considered and analyzed the factors contained in *Banker*. Our review of the order on appeal shows that the family court provided a heading for each factor listed in *Banker*, and a discussion after each heading. As such, the family court provided

of evidence law, to the end of ascertaining the truth and securing a just determination." W. Va. R. Evid. 102 (2014).

⁶ It is undisputed that Mother's documentary evidence was attached and filed with her petition.

adequate reasoning for its determination that an award of attorney fees was appropriate. As such, we find no error.

For Mother's fifth assignment of error, she argues that the family court erred by failing to appoint a GAL to represent the child. In support of her argument, she contends that despite the allegations of harm, the child's preference, and this Court's remand directives, the court abused its discretion by determining that a GAL appointment was premature. We disagree.

The family court's order on appeal found that pursuant to West Virginia Code § 48-9-102(a)(6) the "most significant factor" regarding the best interests of the child was "security from exposure to physical or emotional harm," and that the court's findings required the court to protect the child and the other parent from harm pursuant to West Virginia Code § 48-9-209(c). Rule 47 of the West Virginia Rules of Practice and Procedure for Family Court (2017) requires a family court to appoint a GAL for a child when there are "substantial allegations of domestic abuse" or "serious issues relating to the child's health and safety." Further, Rule 1 provides that if the Rules conflict with any other statute or rule, the Rules of Practice and Procedure for Family Court are to apply.

Here, however, the family court denied Mother's motion for the appointment of a GAL. While Mother alleged a substantial change in circumstances because the child was sufficiently mature to express a firm and reasonable preference to have equal parenting time with her, the court nevertheless found differently. The order suggests that the family court wanted independent testimony before it would appoint a GAL and determine whether the child was sufficiently mature for a custodial preference. We are unable to conclude that the family court abused its discretion or clearly erred.

For Mother's sixth assignment of error, she argues that the family court clearly erred by finding that she had committed domestic violence. Rather, she contends that she is a victim of domestic violence and the record contains no evidence to support the court's finding. Here, nothing in the record supports the court's finding that Mother committed acts of domestic violence. The family court relies on the incident referenced in the September 28, 2021, order addressing Mother's threat to escape to France. However, the September 28, 2021, order was not premised on domestic violence, and the record does not contain any substantiated evidence that mother previously committed domestic violence. As such, we conclude that the family court's finding that Mother previously committed acts of domestic violence was erroneous, but it constitutes harmless error.

Mother's seventh assignment of error pertains to judicial bias and the SCAWV's refusal to grant the family court judge's voluntary request for recusal. However, we decline to address this issue. *See In re C.S.*, 251 W. Va. 147, 151-52, 909 S.E.2d 819, 823-24 (Ct. App. 2024) (decisions regarding disqualification of judges are made by the Chief Justice of the SCAWV and are not the province of this Court.). Thus, to the extent that Mother

claims any error due to the failure to disqualify the family court judge or asks this Court to appoint a special judge, we decline to address these issues because they are not within the province of this Court.

Accordingly, we affirm the family court's order but note that the court's finding that Mother committed acts of domestic violence was erroneous, albeit harmless error.

Affirmed.

ISSUED: August 27, 2026

CONCURRED IN BY:

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