

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

DIANNA BREKKE STORRIE,

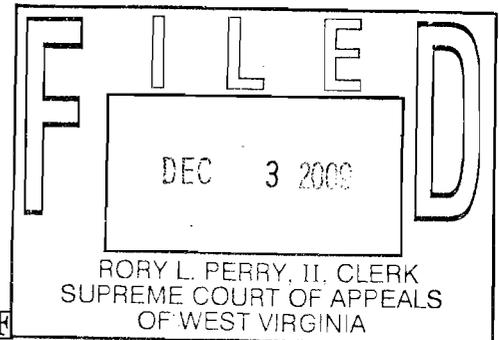
Petitioner Below/
Appellant,

v.

Appeal No. 35289

CHRISTOPHER MICHAEL SIMMONS,

Respondent Below/
Appellee.



APPELLATE BRIEF
IN SUPPORT OF APPEAL

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December 1, 2009

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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DIANNA BREKKE STORRIE,

Petitioner Below, Appellant,

v.

Appeal No. 35289

CHRISTOPHER MICHAEL SIMMONS,

Respondent Below, Appellee.

TABLE OF AUTHORITY

Appellant relies upon the following points and authorities:

1. W.Va. Code §48-9-401, *et. seq.*
2. W.Va. Code §48-9-403(d).
3. Arneault v. Arneault, 219 W.Va. 628, S.E.2d 720 (2006).
4. Nelson v. W. Va. Public Employees Ins. Bd., 171 W.Va. 445, 300 S.E.2d 86 (1982).
5. E.H. v. Matin, 201 W.Va. 463, 498 S.E.2d 35 (1997).
6. State v. Brandon B., 218 W.Va. 324, 624 S.E.2d 761 (2005).
7. In Re Visitation & Custody of Senturi N.S.V., 221 W.Va. 159, 652 S.E.2d 490 (2007).
8. W.Va. Code §51-2A-14.

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Respondent Below, Appellee.

APPELLATE BRIEF IN SUPPORT OF APPEAL

NOW COMES Appellant, Dianna Brekke Storrie, by counsel, Cinda L. Scales, Esq., and Stephanie E. Scales-Sherrin, Esq., of Martinsburg, West Virginia, and respectfully states pursuant to Rule 3 of the Rules of Appellate Procedure, as follows:

**I. KIND OF PROCEEDING AND NATURE OF THE RULING
IN THE LOWER TRIBUNAL**

The parties were previously divorced by Order of the Family Court of Berkeley County, West Virginia, dated July 2, 2007. Appellant then filed a Motion to Modify and Notice of Relocation on July 7, 2008, in the aforementioned Court. The parties have two children, namely Austin Michael Simmons, born November 4, 2001, and Johnathen Hunter Simmons, born July 15, 2003. The Appellant sought to modify the Court Order, which provided that the children would primarily reside with Appellant, and Appellee would have custodial responsibility during the school years every Wednesday from 5:00 p.m. to 7:00 p.m., three weekends a month and every other week during the summer, as well as holiday time. In response to the motion to relocate, counsel for Appellee filed a motion for a psychological evaluation, a motion for a custody investigation and a

motion to appoint a *guardian ad litem*. A temporary hearing was held on August 13, 2008, wherein the Court granted the motion for a psychological evaluation of the children and the motion for a custody investigation over the objections of Appellant. Appellee subsequently withdrew his motion for a *guardian ad litem*.

On November 21, 2008, an Order was entered by the Family Court denying the relocation. A Petition for Appeal from the Family Court was filed in the Circuit Court of Berkeley County on December 19, 2008. The Circuit Court of Berkeley County entered an Order on January 23, 2009, denying said Petition for Appeal. The Order of the Circuit Court of Berkeley County denying the appeal is the Order that your Appellant respectfully petitions this Honorable Court for an Appeal.

II. Statement of Facts of the Case

The parties herein were married in Loudoun County, Virginia, on the 18th day of November, 2000. Two (2) children were born of the marriage, namely Austin Michael Simmons, born November 4, 2001, and Johnathen Hunter Simmons, born July 15, 2003. During the marriage, Appellee was a member of the United States Marine Corps and was often deployed. The parties were divorced by Agreed Final Order of the Family Court of Berkeley County on the 2nd day of July, 2007; that pursuant to said Order and by agreement of the parties, Appellant was granted primary custodial responsibility for the children. Appellee was granted custodial responsibility every Wednesday, from 5:00 p.m. until 7:00 p.m. during the school year, three (3) weekends per month from Friday at 6:00 p.m. to Sunday at 6:00 p.m.; and at other reasonable and convenient times as the parties agree. During the summer months, the parties would equally share custodial allocation on an alternating weekly basis, and a specific holiday schedule was also established by the Court Order. Said Order was not amended; however, a Contempt Order entered on the 20th day of December 2007,

found Appellee in contempt due to his failure to pay child support as previously Court Ordered. When the parties separated, Appellant was living in Berkeley County, West Virginia, and Appellee was living in Jefferson County, West Virginia. Appellee later relocated to Quincy, Pennsylvania, approximately one hour away from the children, without any notice to Appellant after the Final Order was entered.

Appellant remarried on July 9, 2007, to Robert Ricks, who is an active duty member of the U.S. Marines and was stationed at Camp Lejeune. Appellant filed a Motion to Modify and a Notice of Relocation on the 7th day of July, 2008, to allow her and the children to relocate to Camp Lejeune, North Carolina; said relocation was to be effective September 15, 2008. Appellant submitted a proposed parenting plan to be effective after relocation in which Appellee would receive eight (8) weeks in the summer, one weekend a month and one-half (½) of the Thanksgiving, Christmas and spring breaks from school each year; the proposed parenting plan afforded Appellee substantially the same custodial allocation as he currently has under the Court Order dated the 2nd day of July, 2007.

In applying the relocation statute, the Family Court made the statutory mandated findings in that the Court found that “Appellant has been exercising a significant majority of custodial responsibility, the relocation is in good faith and for a legitimate purpose and to a reasonable location in light of the purpose”. Page 7, paragraphs 9 and 10 of the Family Court Order dated the 21st day of November, 2008. Appellant alleges that the Family Court erred when it failed to apply the clear mandates and language of the statutes and held that the Court must ultimately look at the children’s best interest, pursuant to W.Va. Code §48-9-403(d) by utilizing §48-9-401, *et. seq.*, as a basis of denying Appellant’s motion for relocation. The Family Court ruled that the motion for

relocation should be denied after a hearing on the merits, stating that said move was not in the children's best interests.

III. ASSIGNMENTS RELIED UPON APPEAL

1. Did the Family Court abuse its discretion and err in its application of W.Va. Code §48-9-403(3), entitled *Relocation of a Parent* and W.Va. Code §48-9-401, *et. seq.*, entitled *Custody of Children*?

The Family Court denied a motion for relocation, even though the Court found Appellant has been exercising a significant majority of custodial responsibility, that the relocation is in good faith and for a legitimate purpose, and to a reasonable location in light of the purpose. The Court did so notwithstanding the fact that Appellant's proposed relocation plan would not *significantly* reduce Appellee's custodial time with the children, in that he would only have two less overnights annually.

IV. MANNER IN WHICH THE ASSIGNMENTS OF ERROR WERE DECIDED IN THE LOWER TRIBUNAL

The Family Court denied a parent's motion for relocation pursuant to W.Va. Code §48-9-403(d) and used W.Va. Code §48-9-401 as the basis for denial.

V. DISCUSSION OF LAW

The Family Court of Berkeley County, West Virginia, misapplied the statutory mandates of W.Va. Code §48-9-401, *et. seq.* and §48-9-403 as it did not properly follow the clear and plain language of the statute. This is an issue of first impression as this Court has not previously ruled on how these two statutes should be interpreted together.

The Family Court found that "Appellant has been exercising a significant majority of custodial responsibility, and relocation is in good faith and for a legitimate purpose and to a reasonable location in light of that purpose." [page 7, paragraph 10 of said Order] However, the

Court then erred in finding that it “must ultimately look to the children’s best interest, pursuant to W.Va. Code §48-9-403(d)” and in using W.Va. Code §48-9-401 *et seq.* as a basis for denying Appellant’s Motion for Relocation [page 7, paragraph 9 and 10 of Order].

The Family Court found that when applying the relocation statute, the Court must ultimately look at W.Va. Code §48-9-401, *et seq.*, and apply a best interests standard, which is contrary to the language of W.Va. Code §48-9-403. The Family Court concluded that the relocation does significantly impair Appellee’s ability to exercise responsibilities he has been exercising; it is not practical to revise the parenting plan to accommodate both the relocation and maintain the same proportion of custodial responsibility for each parent (see Page 7, paragraph 9 of Family Court Order), and therefore denied the relocation for the primary custodial parent to live in the area where her husband and the children’s step-father was stationed with the U.S. Marines.

W.Va. Code §48-9-403 states that a relocation for a legitimate purpose is reasonable unless its purpose is shown to be substantially achievable without moving or by moving to a location that is substantially less disruptive of the other parent’s relationship of the child. In the instant case, Appellant was moving with her husband to the place where he had been stationed by the U.S. Marines. It could not be accomplished without moving or by moving to a location that is substantially less disruptive. Additionally, the Court ignored the fact that Appellant’s proposed parenting plan would allow Appellee to substantially maintain the same proportion of custodial responsibility.

Pursuant to W.Va. Code §48-9-403(a), relocation of a parent constitutes a substantial change in circumstance under §48-9-401(a) only when it significantly impairs either parent’s ability to exercise responsibilities with the child. In the instant case, Appellant’s revised parenting plan does not significantly impair Appellee’s ability to exercise custodial time with the children, as he

would have essentially the same amount of time with the children as he currently enjoys. Under the proposed parenting plan, there would be no harm to the children as two less overnights per year with Appellee is not a significant reduction in time. The application of law to the facts in the instant case by the Family Court ignores the fact that Appellant's proposed relocation plan would provide Appellee with essentially the same number of overnights he has been exercising with the children, in that Appellant proffered in her testimony that she would bring the children to West Virginia one (1) weekend per month, in addition to Appellee having eight weeks of the children's summer break from school and one-half of every Christmas, Thanksgiving and spring break. The language of the statute is clear that the children's best interests are served by allowing the relocation and revising the parenting plan to allow the Appellee to exercise substantially the same amount of custodial allocation as before the modification.

The Court erred when it did not follow the clear language set forth in W.Va. Code §48-9-403 *et seq.* entitled Relocation of a Parent. The best interest standard set forth in W.Va. Code §48-9-401 *et seq.* should be considered by the Court when modifying the parenting plan after the proper relocation factors in W.Va. Code §48-9-403 *et seq.* have been established.

West Virginia Code §48-9-403(d) states when a relocation constituting a change in circumstances under subsection (a) of this section renders it impractical to maintain the same proportion of custodial responsibility that is being exercised by each parent, the Court ***shall modify the parenting plan*** (emphasis added) in accordance with the child's best interest and in accordance with the following principles: (1) a parent who has been exercising the significant majority of custodial responsibility for the children ***should be allowed to relocate*** (emphasis added) with the children so long as the parent shows that the relocation is in good faith for a legitimate purpose and to a location that is reasonable in light of that purpose.

The Court cannot ignore the use of the word shall in the statute. “It is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.” (as quoted in Arneault v. Arneault, 219 W.Va. 628, 634, 639 S.E.2d 720, 726 (2006)). See also Nelson v. W. Va. Public Employees Ins. Bd., 171 W.Va. 445, 300 S.E.2d 86 (1982), E.H. v. Matin, 201 W.Va. 463, 498 S.E.2d 35 (1997), and State v. Brandon B., 218 W.Va. 324, 624 S.E.2d 761 (2005).

Once the Court has determined (1) who exercised the majority of custodial responsibility and (2) if the relocation is in good faith for a legitimate purpose to a reasonable location, the Court *must* then modify the parenting plan while considering the best interests of the child.

Pursuant to W.Va. Code §48-9-403, the “Family Court is *required* (emphasis added) to modify the parenting plan in accordance with the child's best interests and in consideration of whether such relocation is in good faith for a legitimate purpose and to a location that is reasonable in light of the purpose.” In re Visitation and Custody of Senturi N.S.V., 221 W.Va. 159, 164, 652 S.E.2d 490, 495 (2007)(internal quotations omitted).

The Court erred here by failing to modify the parenting plan and by failing to allow Appellant’s relocation, which is mandated by statute when the parent has been exercising a significant majority of custodial responsibility and the relocation is in good faith for a legitimate purpose and to a location that is reasonable in light of that purpose. Here, the Court was required to grant Appellant’s motion to relocate and was then required to modify the existing plan in accordance with the children’s best interest as set forth in W.Va. Code §48-9-403.

The Circuit Court further committed error by failing to reverse the Order of the Family Court. Pursuant to W.Va. Code §51-2A-14, the Circuit Court shall review the findings of

fact made by the Family Court Judge under a clearly erroneous standard and shall review the application of law as to the facts under an abuse of discretion standard. By failing to follow the plain language of the statute, the Family Court abused its discretion and should have been reversed by the Circuit Court of Berkeley County.

VI. CONCLUSION

In conclusion, because the Family Court of Berkeley County did follow the clear mandates of W.Va. Code §48-9-403, said Order dated the 21st day of November, 2008, should be reversed.

VII. RELIEF PRAYED FOR

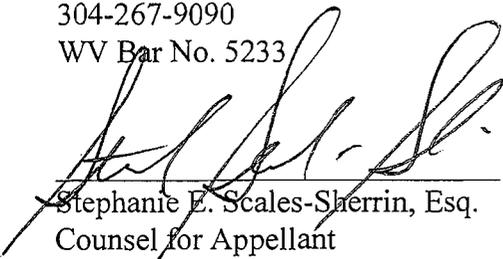
Appellant prays that this Honorable Court grants this Petition for Appeal; and, upon briefing and oral argument, reverses the Final Order of the Family Court of Berkeley County, West Virginia, and the Order denying the appeal of the Circuit Court of Berkeley County, West Virginia.

DIANNA BREKKE STORRIE

By Counsel



Cinda L. Scales, Esq.
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Stephanie E. Scales-Sherrin, Esq.
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STATE OF WEST VIRGINIA,

COUNTY OF BERKELEY, to wit:

Dianna Brekke Storrie, Appellant named in the foregoing "Appellate Brief in Support of Appeal", being first duly sworn, deposes and says that the facts and allegations therein contained are true and correct, except insofar as they are therein stated to be upon information and belief, and insofar as they are therein stated to be upon information and belief, she believes them to be true.

Dianna Brekke Storrie
DIANNA BREKKE STORRIE

2009. Taken, subscribed and sworn to before me this 1 day of Dec

AMY L. MATT
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires March 18, 2012
Amy L. Matt
My Commissioner Public



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Charleston

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Appeal No. _____

CHRISTOPHER MICHAEL SIMMONS,

Appellee.

MEMORANDUM OF PARTIES AND COUNSEL

NOW COMES Appellant, Dianna Brekke Storrie, and provides the following memorandum of persons and parties:

1. Cinda L. Scales, Esq.
WV Bar No. 5233
Stephanie E. Scales-Sherrin, Esq.
WV Bar No. 10900
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2. Robert D. Aitcheson, Esq.
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Appellee.

DESIGNATION OF THE RECORD

NOW COMES Appellant, Dianna Brekke Storrie, and for her designation of the record, respectfully states as follows:

Appellant hereby designates the record below in Civil Action No. 06-D-674, from the date of the Final Divorce Order dated the 2nd day of July, 2007, until the Order denying the Appeal dated January 23, 2009.

DIANNA BREKKE STORRIE

By Counsel



Cinda L. Scales, Esq.
Counsel for Appellant
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Martinsburg, WV 25401
304-267-9090
WV Bar No. 5233

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CERTIFICATE OF SERVICE

I, Cinda L. Scales, attorney for Appellant, Dianna Brekke Storrie, do hereby certify that I have served a true copy of the foregoing TABLE OF AUTHORITY, APPELLATE BRIEF IN SUPPORT OF APPEAL, MEMORANDUM OF PARTIES AND COUNSEL, DESIGNATION OF THE RECORD AND DOCKETING STATEMENT upon Appellee by mailing a true copy thereof to his counsel, Robert D. Aitcheson, Esq., at his mailing address of P.O. Box 750, Charles Town, WV 25414, by United States first-class mail, postage prepaid, on this 2 day of December, 2009.



Cinda L. Scales, Esq.
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