

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

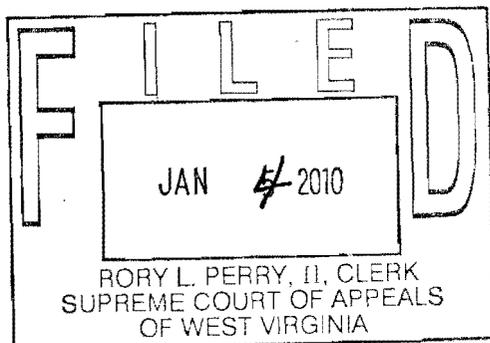
DIANNA BREKKE STORRIE,
Appellant

vs.

Docket No. 35289
(Berkeley County Civil Action No. 06-D-674)

CHRISTOPHER MICHAEL SIMMONS,
Appellee

BRIEF OF APPELLEE CHRISTOPHER MICHAEL SIMMONS



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Pursuant to Rule 10(b), Rules of Appellate Procedure, Christopher Michael Simmons, the Appellee, submits herewith his Brief in response to the Appellant's Brief received on December 3, 2009. This Reply Brief is timely filed because the thirtieth day was Saturday, January 2, 2010, making the Appellee's Brief due Monday, January 4, 2010. The Order of the Family Court of Berkeley County dated and entered November 21, 2008 should be affirmed because the Family Court of Berkeley County made no clearly erroneous findings of fact, nor did the Family Court abuse its discretion in following a clear legislative mandate [West Virginia Code, §48-9-101(b) and §48-9-403(d)] and the decisions of this Court that the best interests and welfare of the children is the "polar star" in custody matters.

I. Kind of Proceeding and Nature of Lower Tribunal's Ruling

At the time the parties were divorced, they entered into an Agreed Parenting Plan for their two (2) children, Austin Michael Simmons, born November 4, 2001 and Johnathen Hunter Simmons, born July 15, 2003. The Agreed Parenting Plan provided that the parties would have a "50/50" custody arrangement in the summer. During the school year, Mr. Simmons would have the children three (3) weekends per month, every Wednesday from 5:00 p.m. until 7:00 p.m. The parties split the Thanksgiving week. Each party has three (3) days with the children from the 22nd of December at 6:00 p.m. until the 25th of December at 6:00 p.m. and in alternating years the 25th of December at 6:00 p.m. until the 28th of December at 6:00 p.m. The parties' Agreed Parenting Plan also provided that all school holidays/vacations would "be split 50/50 between the parties".

Prior to the final divorce hearing, the Court had appointed Rev. Warren Watts as the Parenting Coordinator and directed in paragraph (g) of the Final Divorce Order that the parties continue to consult with Rev. Watts to coordinate a 50/50 custody arrangement if Mr. Simmons relocated to the children's school district. 7/2/07 Final Order, p. 4.

Around the time of the final hearing with notice to Rev. Watts and Appellant, Mr. Simmons had moved to Quincy, Pennsylvania, about a 45 minute drive from Martinsburg, to commence training as a State Farm agent and eventually to acquire his own State Farm agency. Mr. Simmons continued to faithfully exercise the custodial time allotted to him in addition to attending and participating in the children's activities occurring at other times as well. Even though the Order allotted Mr. Simmons three (3) weekends per month during the school year, the *de facto* arrangement between the parties allowed him to have the children all but one (1) weekend per month.¹

It is against this background that the Appellant filed her motion to relocate the children to North Carolina, near Camp LeJeune, a six (6) hour drive away, twelve (12) hours round trip. After hearing the testimony of Dr. Lewis, Ms. Lohman, Rev. Watts and the parties, the Court concluded:

"In applying the relocation statute, W.Va. Code §48-9-401, *et seq.*, the Court concludes the relocation does significantly impair Respondent's ability to exercise responsibilities he has been exercising; it is not practical to revise the parenting plan to both accommodate relocation and maintain the same proportion of custodial responsibility for each parent."

¹ As averred in Mr. Simmons' Counter-Motion to Modify, paragraph 1, since the final divorce hearing, until he filed an opposition to Appellant's Motion for Modification Pursuant to her Notice of Relocation, Mr. Simmons had the children all but one (1) weekend per month.

11/21/08 Order, p. 7, para. 9

The Court also concluded that it must ultimately look to the best interests of the children (11/21/08 Order, p. 7, para. 10). In properly applying the "children's best interests" standard, the Court concluded:

"The overwhelming weight of the evidence establishes that relocation to North Carolina is not in the children's best interests. It would necessarily and significantly impair the strong bond of Respondent with the children, and it would notably impair their established relationships with extended family, including the paternal grandparents and Annie Clark."

11/21/08 Order, p. 8, para. 11

The Court properly denied the Appellant her request to relocate the children to North Carolina, near Camp LeJeune.

II. Statement of Facts

Mr. Simmons has always faithfully exercised all of the custodial time allotted to him and additional time agreed by the parties. On Wednesdays, when the Appellant was living in Martinsburg, he would drive from his residence and work location in Quincy, Pennsylvania, about 45 minutes each way, to spend two (2) hours with the children every Wednesday from 5:00 p.m. to 7:00 p.m.

In the instant relocation proceeding, upon motion of Mr. Simmons, the Family Court ordered a psychological evaluation by Bernard Lewis, Ph.D., Clinical Psychologist. The Court also ordered an investigation pursuant to the

West Virginia Code, §48-9-301. A detailed report of the psychological evaluation was issued by Dr. Lewis and admitted into evidence. A report of the custody investigation by Ms. Susan Lohman was likewise admitted. Both Dr. Lewis and Ms. Lohman, testified at the final hearing on November 14, 2008.

At the hearing, the Appellant testified, as found by the Court, that "the children love [Mr. Simmons] and want frequent time with him, . . .". This evidence is consistent with the report of Ms. Lohman that "the children want continued parenting time with their father" and that the most reasonable and practical resolution for the children would be for Appellant to remain in Martinsburg where she and Mr. Simmons could share custodial allocation of their sons 11/21/08 Order, p. 5, para. 7.

Appellant brought the children to the Court-ordered evaluation by Dr. Lewis, who testified that "both children clearly and spontaneously told him they wanted regular, alternating week, time with their dad. . ." 11/21/08 Order p. 6, para. 8. Dr. Lewis concluded that "the children have a very close relationship with their father and are strongly bonded with him, . . ." and that a move six (6) hours away would be "detrimental" to the children's bond with their father in that ". . .it would remove the children from a significant part of their lives and would practically remove the Father from their school activities, sports and extra-curricular activities; it 'would remove him to large degree as an emotional support figure for the children'; he would have 'significantly decreased impact' on their lives; . . ." 11/21/08 Order pp. 6-7, para. 8.

The Appellant states that moving the children to North Carolina "would not *significantly* reduce Appellee's custodial time with the children, in that he would have only two less overnights annually." (emphasis in original) This is

an incorrect statement. In paragraph 4 of her Motion to Modify, Appellant proposes Appellee would have the following minimal time with the children:

- (i) One-half (1/2) Summer vacation;
- (ii) One (1) week at Christmas;
- (iii) One-half (1/2) Thanksgiving and spring break; and
- (iv) Weekly telephone or web cam contact."

This is not even close to the weekly contact the children now have with their Dad.

At the hearing, Ms. Storrie testified sufficiently vaguely that "in addition to his times here, Ms. Storrie would bring the children here once a month to spend time with their father." She did not explain exactly how the Appellee would have all of his weekends with the children, as well as his Wednesdays and Father's Day without the children having to travel for twelve (12) hours round trip, multiple times per month.

Appellant's proposal to relocate the children to the Jacksonville, North Carolina area, she said, is necessitated by her husband's transfer to Camp LeJeune. However, Appellant's husband, according to her own testimony, is not likely to be there very much since he is deployed every two years for a minimum of six months each time. At the time of the November, 2008 hearing, Sgt. Ricks was scheduled for deployment April 1, 2009.

The Family Court was not just dealing with the desire of the Appellant to move to North Carolina with her new husband and take the children with her. The Court also considered the quality of the relationship of Mr. Simmons with his children. The Court found him to be a dedicated, interested and able father heavily involved on a weekly and almost daily basis in the lives of his children. The Court concluded, consistent with the psychologist's findings, ". . .

unequivocally that a move to North Carolina would not be in the children's best interests - it would harm the children and would harm the relationship between the children and their dad, . . .". Final Order 11/21/08, p. 7, ¶ 8.

The Court concluded that the proposed relocation ". . . does significantly impair Appellee's ability to exercise responsibilities he has been exercising; it is not practical to revise the parenting plan to both accommodate relocation and maintain the same proportionate custodial responsibility for each parent." Final Order 11/21/08, p. 7, ¶ 9.

As noted in the initial section, the Court concluded that the "overwhelming weight of the evidence establishes that relocation to North Carolina is not in the children's best interests. . . ." Final Order 11/21/08 , p. 8, ¶ 11.

III. Standard of Review

The following standard of review is set forth in Syl. pt. 1, *In re: Visitation and Custody of Senturi N.S.V.*, 221 W.Va. 159, 652 S.E.2d 490 (2007) (*per curiam*):

"In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law, to the facts under an abuse of discretion standard. We review questions of law de novo." Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004)."

Although the Appellant couches her appeal in terms of the Court's failure to abide by an explicit statutory provision, the Appellant's real complaint is that the Court did not place sufficient emphasis on or, find as credible, some evidence presented by Appellant. This argument ignores the fact that the trial

court has the discretion to weigh the evidence.

"The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syl. pt. 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).

Gonzalez v. Conley, Syl. pt. 4, 199 W.Va. 288, 484 S.E.2d 171 (1997)

and, in custody/visitation cases,

". . . the trial court retains the ultimate power of disposition in this case, and the best interests determination must be rendered by the court exercising its independent judgment and the court's judicial power."

State ex rel. Jeanne U. v. Canady,
210 W.Va. 88, 97, 554 S.E.2d 121 (2001)

IV. Response to Assignment of Error

The Family Court of Berkeley County did not abuse its discretion in denying Appellant's request to relocate the parties' children to North Carolina because:

(a) The Legislature and this Court have mandated that the best interest of the children is the paramount and controlling factor in all decisions affecting custodial allocation.

(b) The West Virginia Code, §48-9-403 must be read in *pari materia* with the other provisions of the West Virginia Code, §48-9-101 et seq.

(c) The Family Court did not abuse its discretion in denying Appellant's request to relocate the children because the overwhelming weight of the

evidence established that such relocation is not in the children's best interests and there is another alternative less disruptive to Mr. Simmons' relationship with his children.

V. Discussion

It is an inescapable tenet of our law that Family Court decision affecting children's relationship with their parents who are not living together must consider the children's best interests as the paramount and controlling factor.²

(b) The Legislature finds and declares that it is the public policy of this state to assure that **the best interest of children is the court's primary concern** in allocating custodial and decision-making responsibilities between parents who do not live together. In furtherance of this policy, the Legislature declares that **a child's best interest will be served by assuring that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children**, to educate parents on their rights and responsibilities and the effect their separation may have on children, to encourage mediation of disputes, and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or divorced. (emphasis added)

W.Va. Code §48-9-101(b)

² See, for example, *State ex rel. Treadway v. McCoy*, 189 W.Va. 210, 429 S.E.2d 492 (1993); *Anderson v. Woods*, 154 W.Va. 816, 179 S.E.2d 569 (1971); Syl. pt. 2, *Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948); *Boos v. Boos*, 93 W.Va. 727, 117 S.E. 616 (1923); *Cariens v. Cariens*, 50 W.Va. 113, 40 S.E. 335 (1901); *Arnold v. Arnold*, 112 W.Va. 481, 164 S.E. 850 (1932); *Finnegan v. Finnegan*, 134 W.Va. 94, 58 S.E.2d 594 (1950); *Porter v. Porter*, 171 W.Va. 157, 298 S.E.2d 130 (1982); *Thomas v. Thomas*, 174 W.Va. 387, 327 S.E.2d 149 (1985); *Murredu v. Murredu*, 160 W.Va. 610, 236 S.E.2d 452 (1977), overruled on other grounds, *Patterson v. Patterson*, 167 W.Va. 1, 277 S.E.2d 709 (1981); *J.B. v. A.B.*, 161 W.Va. 332, 242 S.E.2d 248 (1978), modified on other grounds, *David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989).

The Legislature's findings and declarations are the guiding principle which is firmly embedded in West Virginia jurisprudence.

Contrary to the Appellant's assertion, the relocation statute, West Virginia Code, §48-9-403, does not stand on an island by itself. Rather, it is a part of Chapter 48, Article 9, which deals with the allocation of custodial responsibility.

Although the case of *In re: Visitation and Custody of Senturi N.S.V.*, 221 W.Va. 159, 652 S.E.2d 490 (2007), relied upon by Appellant, is factually dissimilar to the case at Bar, this Court made clear how it expects Family Courts to address issues regarding custodial allocation:

Therefore, we urge family and circuit courts to be ever vigilant when issuing rulings **to protect the best interests of children** to assure that the rights of those children's parents are not unnecessarily trammled in the process of administering justice. (emphasis added)

Id. 652 S.E.2d at 500.

This Court and the Legislature have made absolutely clear that the polar star is the best interests and welfare of the children, not the best interests of the mother or the father. This case is not just about the desire of the Appellant to move to North Carolina to be with her new husband³ and take the children with her. The Court is most concerned with the welfare of children who are very bonded to their devoted father who is heavily involved in their lives. That relationship is vital to the children. This Court has recognized that:

The best interests of a child are served by preserving

³ At the time the Appellee's Reply to the Petition for Appeal was filed, the Appellant's husband was not even in the State of North Carolina, much less in the continental United States.

important relationships in that child's life.

Syl. pt. 2, *State ex rel. Treadway v. McCoy*, supra.

Although in a different context in *McCoy* (no biological parent involved), the principle is no less applicable to this case. To allow Appellant to move the children to North Carolina at their young age, under the facts of this case, when they are so dependent upon and bonded to their father, would undeniably harm them.

Appellant says she relies on the *Senturi* case. *Senturi* is a *per curiam* decision involving a dispute between persons alleging themselves to be psychological parents of a child and the child's mother. This Court found that the lower court had improperly preferred allegedly psychological parents of the child over the rights of the mother, a fit parent. This Court found that the allegedly psychological co-parents, were not the psychological parents of the child.

The dispute came to this Court upon the mother's notice of relocation to Texas. The lower court took custody from the mother and gave it to the allegedly psychological co-parents of the child. This Court reversed saying that the rights of a fit parent are paramount to the rights of third persons and the lower courts should not have trampled the rights of the mother in this manner.

In the instant case, the Family Court's ruling does not change the status of either parent in terms of their custodial allocation. The Court has simply denied the mother's request to move the children to North Carolina. She is still the primary custodial parent. Her custody rights have not been taken from her as had happened to the mother in *Senturi*. Still the Family Court

recognizes that a modification can only occur "in accordance with the child's best interests" and in consideration of whether the relocation is "in good faith for a legitimate purpose and to a reasonable location." *Senturi*, 221 W.Va. at 164, 652 S.E.2d at 495. See also, West Virginia Code, §48-9-403(d) (" . . . the Court shall modify the parenting plan in accordance with the child's best interests . . .")

West Virginia Code, §48-9-403 must be read *in pari materia* with the other sections in Article 9 which relate to the same persons or class of persons, not in a vacuum by itself.

Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in pari materia* to assure a recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly. Syl. pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975); Syl. pt. 1, *State ex rel. Lambert v. County Commission of Boone County*, 192 W.Va. 448, 452 S.E.2d 906 (1994).

Syl. pt. 12, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995)

The evidence was overwhelmingly clear that moving the children to North Carolina would do harm to them. The Family Court properly considered all of the evidence and was compelled by the weight of the evidence and the "best interests" standard to deny the mother's Petition for Relocation. The Court was left with a definite and firm conviction that these children would be harmed by such a move, particularly when there is an alternative, namely Petitioner's husband, when he is back from deployment, traveling to Berkeley County on his

weekends off. This is certainly preferable to the children having to repeatedly make that trip.

Unlike the family and circuit courts in *Senturi*, the Family Court of Berkeley County recognized that the public policy of this State, legislative intent, statutory mandate and the decisions of this Court all require that consideration be given, first and foremost, to the over-arching principle that the best interests of the children are the primary concern. The Appellant's assertion that this is a case of first impression defies this long history mandating that the best interests of the children are paramount and controlling.

The Appellant would have this Court apply what amounts to a mathematical calculation to the relocation issue if a parent has the children 70% or more of the overnights⁴ and the Court finds the proposed move of the children is in good faith for a legitimate purpose and to a location in light of that purpose.

Applying this standard to the case at Bar, Mr. Simmons has custodial time with his children every week (except during the summer when he has them every other week). Measured in quality parenting time, the children's waking hours when they are not in school, if a "formula" of this nature is to be applied, Mr. Simmons exercises custodial responsibility much more than thirty percent of the time. Certainly, if the Legislature meant "overnights" as used in the calculation of child support, it would have said so.

⁴ The statutory language "[t]he percentage of custodial responsibility that constitutes a significant majority . . . is seventy percent or more" does not say that seventy percent of the time is measured in overnights. Appellant incorrectly argues that the statutory "seventy percent or more" is calculated in terms of overnights, including time when the children are sleeping. The term "overnight" or "overnights" appears nowhere in West Virginia Code, §48-9-403.

The Appellant wants to play a numbers game and put the Court in a catch-22 situation forcing it to disregard the best interests of the children.

The Appellee believes that the law will never countenance the best interest of children being overridden by the application of a formula which results in the destruction of the relationship between a fit and involved parent and his children. The Family Court did not abuse its discretion in denying the Appellant's request to relocate the children to North Carolina because the overwhelming weight of the evidence showed that it is not in their best interest and because the purpose of the move is substantially achievable without moving as suggested by Ms. Lohman in her report.

VI. Conclusion

This is not a case about whether "shall" means "shall" or whether the Family Court is required to blindly ignore the best interests of the children or render those interests asunder at the mercy of some mechanical formula. Rather, as the Family Court correctly observed, West Virginia Code, §48-9-403(d) requires priority consideration be given to the children's best interests.

WHEREFORE, Appellee prays that this Court affirm the Order of the Family Court of Berkeley County, West Virginia dated November 21, 2008 in Civil Action No. 06-D-674 denying the Appellant's motion to relocate the parties children to North Carolina and assessing costs in the underlying action and that this Court grant the Appellee his costs in this appeal, and for such other and further relief as the Appellee's cause may require.

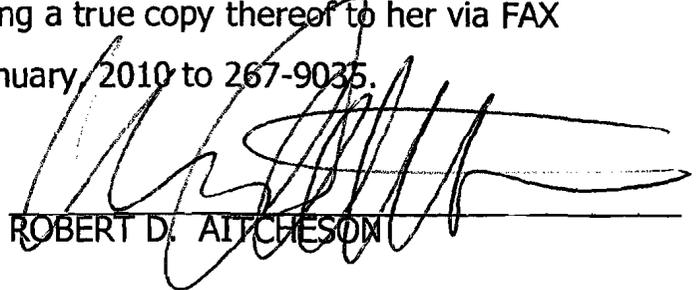
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CERTIFICATE OF SERVICE

I, Robert D. Aitcheson, Attorney for Appellee, do hereby certify that I have served a true copy of the attached Brief of Appellee Christopher Michael Summons upon the Appellant by mailing a true copy thereof to her Counsel of Record, Cinda L. Scales, at her office address of 112 E. King Street, Martinsburg WV 25401, mailed by U.S. Mail, postage prepaid, this 4th day of January, 2010 and by forwarding a true copy thereof to her via FAX Transmission this 4th day of January, 2010 to 267-9035.


ROBERT D. AITCHESON