

Docket No. 35445

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charles D. Kittle

Appellee

v.

**From the Circuit Court of
Ohio County, West Virginia
Civil Action No. 05-D-279
Honorable Ronald E. Wilson**

Susan R. Kittle

Appellant

**BRIEF ON BEHALF OF APPELLEE,
CHARLES KITTLE
Pro Se**

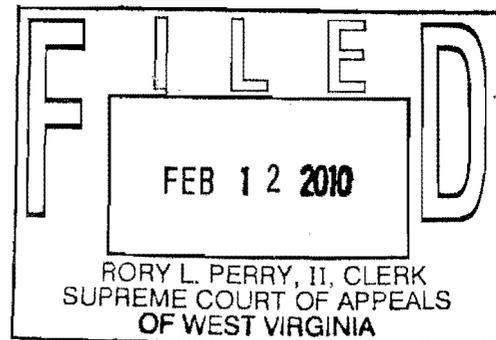


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This brief is filed pursuant to Rule 10 (b) of the Rules of Appellate Procedure, on behalf of the Appellee, Charles D. Kittle, who submits herewith his Brief in response to the Appellant's Brief received on February 5, 2010. The Order of the Family Court of Ohio County dated and entered on December 18, 2008 should be affirmed as well as the Order of the Circuit Court of Ohio County entered on April 8, 2009 because neither the Family Court of Ohio County or the Circuit Court of Ohio County made any clear erroneous findings of fact, nor did the Family Court abuse its discretion in following a clear legislative mandate [W. Va. Code, §48-9-101(b) and §48-9-403(d)] and the decisions of this Court that the best interest and welfare of the children is the "polar star" in custody matters.

**KIND OF PROCEEDING AND NATURE OF LOWER TRIBUNAL'S
RULING**

On October 18, 2002, the parties to this action were divorced by Order of the Family Court of Berkeley County, West Virginia dated October 18, 2002 and entered by the Clerk on October 21, 2002.

On December 7, 2005, Mr. Kittle filed a verified Petition for Modification in Ohio County, West Virginia (where the parties to this case relocated as stated in the Statement of Facts) wherein he requested a Shared Parenting Plan and modification to previously entered child support.

On February 22, 2006, the parties to this case entered into a Parenting Plan as consistent with the provisions of W. Va. code §48-9-205 through and including §48-9-206. Said Agreement was incorporated into an Order entered on May 12, 2006, by the Family Court of Ohio County, West Virginia.

On or about May 24, 2007, Appellee filed a Petition For Modification of Child Support. Said Modification was incorporated into an Order entered on September 18, 2007, by the Family Court of Ohio County, West Virginia.

On October 5, 2007, the Appellant, Susan R. Burke, f.k.a. Susan R. Kittle, filed a Petition To Modify Parenting Time Due To A Relocation pursuant to the provisions of W. Va. Code §48-9-401 and §48-9-403. This case came on for hearing on April 15, 2008, before the Honorable William F. Sinclair, Family Court Judge of Ohio County, West Virginia. The court appointed a Guardian Ad Litem, David B. Cross, Esq., to assist the Court in this matter.

On December 18, 2008, a Final Order was entered by the Judge William F. Sinclair, NUNC PRO TUNC, for the 29th day of August, 2008, at which time Judge Sinclair ruled that the Appellant's Petition to Modify Parenting Time Based Upon A Relocation should be **DENIED**.

On January 20, 2009, counsel for the appellant, Elgine Heceta McArdle, Esq., filed a Petition for Appeal on the Relocation Issue and on a Reconsideration on the Calculation of Child Support, through the Circuit Court of Ohio County.

The Honorable Ronald E. Wilson, Circuit Court Judge of Ohio County,
REFUSED the Petition for Appeal on the relocation issue and **REMANDED** for
Reconsideration of the Calculation of Child Support. This was entered the 8th day
of April, 2009.

STATEMENT OF FACTS

The parties herein were married in Marshall County, West Virginia on June 11th, 1994. Two (2) children were born of the marriage, K.K., born March 10th, 1996, and H. K., born November 24th, 1999. On October 18, 2002, the parties to this action were divorced by Order of the Family Court of Berkeley County, West Virginia dated October 18, 2002 and entered by the Clerk on October 21, 2002. Pursuant to the final Divorce Order entered on October 21, 2002, the mother (appellant) was denominated as the “custodial parent for all federal and statutory purposes.”

The parties parenting plan entered on June, 19, 2002 (as approved by the Family Court of Berkeley County, West Virginia) did not comply with the requirements of W. Va. Code § 48-9-205 through and including §48-9-209. Specifically it did not have provisions for the children’s living arrangements and for each parent’s custodial responsibilities. Said Parenting Plan and Order merely

stated for the father (Appellee) to have “custodial time with the children at such reasonable, convenient times as the parties may agree on.” In essence, the parties agreed to agree and for all intents and purposes, the Parenting Plan was unenforceable.

The Appellant relocated to Wheeling, West Virginia on or about June 6, 2002, with both of the minor children prior to the entering of the final divorce order in Berkeley County which was entered on October 21, 2002. It should be noted that both parties involved have extended family members residing in the Wheeling, West Virginia area. K.K. at the time of the relocation was 6 years of age and H.K. was approx. 2 ½ years of age. Therefore, the parties to this action last cohabitated in or about June 2002 in Berkeley County, West Virginia.

The Appellee made frequent trips from Martinsburg, West Virginia to Wheeling, West Virginia which is an approximate three (3) hour drive, to partake in his parenting time with his daughters, K.K. and H.K. prior to being able to gain employment in Wheeling, West Virginia in August of 2005, with the Ohio County Sheriff’s Office as a deputy sheriff. These visits consisted of holidays, birthdays and extended weekends from school, in which K.K. and H.K. would stay overnight with the Appellee at a relative’s home in Moundsville, West Virginia. The appellee also had K.K. and H.K. stay overnights at his residence in Martinsburg,

West Virginia for several weeks at a time during the summer months of 2003, 2004 and 2005 (prior to relocating to Wheeling, WV in August of 2005).

Prior to relocating to Wheeling, West Virginia in August of 2005, the appellee was a Patrolman for the City of Martinsburg and he applied for several law enforcement positions in the Wheeling, West Virginia area between 2003 and 2005 to relocate closer to his daughters. It is very difficult in the law enforcement field to just pick up and move to another agency due to waiting lists and other certain steps and criteria one in law enforcement has to go through prior to being hired. The Appellee was interviewed by the Ohio County Sherriff's Office in or around June of 2005 and he began as a deputy sheriff for them on September 11th, 2005. The Appellee moved to Triadelphia, West Virginia on August 28, 2005. It should be noted that the Appellee took an approximate \$14,000 a year pay cut in the transition from his employment in Berkeley County to his employment in Ohio County, for the sole purpose of living closer to his daughters. These facts are well established and documented throughout this entire case file. Immediately upon relocating to within ten minutes of his daughter's residence, the Appellee had K.K. and H.K. stay overnight on the weekends and at least two (2) to three (3) nights throughout the school week.

To ensure that the Appellant could not just "up and move" with the children once more, the Appellee, on December 7, 2005, filed a Modification of Parenting

time through the Ohio County Circuit Clerk's Office. Venue of this matter was transferred to the Family Court of Ohio County, West Virginia pursuant to the Order of the Family Court of Berkeley County, West Virginia entered on August 12, 2005. Said Parenting Plan was entered on February 22, 2006, by the Family Court of Ohio County, West Virginia. This Parenting Plan consisted of the Appellee having the first, third and fifth weekends of the month, as well as, every Wednesday and Thursday and the Appellant having the second and fourth weekends of the month, as well as, every Monday and Tuesday. Fridays were given to the parent with whom the children were to be with during that upcoming weekend. On February 22, 2006 it was established that the Appellant had 183 overnights and the appellee had 182 overnights, basically 50/50 Shared Parenting.

On June 19, 2007, the Appellee presented evidence to the Family Court of Ohio County that the Family Court had erred in the entrance of the February 22, 2006 order in regards to the amount of custodial time each party spent with the children. The Appellee presented to the Honorable William Sinclair that he in fact had the children 191 overnights (since he had the fifth weekends) and the Appellant had the children 174 overnights. In essence, splitting the parenting time by fifty-two percent (52%) to the Appellee and forty-eight percent (48%) to the appellant, thus establishing the Appellee as the primary parent for state and federal

statutory purposes. Child Support calculations were adjusted by the Family Court due to this error being pointed out as well.

On October 5, 2007, the Appellant filed a Petition To Modify Parenting Time Due To A Relocation through the Family Court of Ohio County, West Virginia, once again trying to relocate the parties' minor children away from the Appellee. Said Petition was requested due to the Appellant's current husband, Sean Burke, quitting his job in Wheeling, West Virginia and taking a job in Columbia, South Carolina, prior to any final issuance of a court order granting the relocation in question. The Appellant's Notice of Relocation failed to provide a physical residential address in which she failed to follow the West Virginia Code's technical requirements outlined in §48-9-403. The Appellant simply stated that she wanted to relocate to Irmo, South Carolina with the children but with no specific address. The relocation to Irmo, South Carolina never even occurred when in fact, the Appellant relocated to Columbia, South Carolina. Upon receipt of said Notice, the Appellee hired an attorney, Fred Risovich, Esq. and the Family Court appointed David B. Cross, Esq., as the Guardian Ad Litem to assist the court in determining the children's best interest. David B. Cross, Esq. testified at the final hearing on August 29, 2008.

At the final hearing, William F. Sinclair, Family Court Judge of Ohio County, West Virginia, with the Guardian Ad Litem, David B. Cross, interviewed

the children, in camera, minus the parties involved and their counsel. Based on the children's testimony, the lower Court found that it is "patently apparent that the mother's relocation has caused substantial anguish and emotional turmoil to both children and that it was clear that both children find themselves in the proverbial middle (being caused to choose between their mother and their father)" (12/18/08 Order, Finding of Fact #23). At least "one (1) of the children expressed to the Court a desire not to continually travel between West Virginia and South Carolina" (12/18/08 Order, Finding of Fact #32) and the Court established that the "subject children have a very close relation, therefore keeping them together is necessary for their welfare" (12/18/08 Order, Finding of Fact #31).

At the final hearing, the Court found that the "appellant's relocation was in good faith and for a legitimate purpose as the same is defined by W. Va. Code §48-9-403(d)(1) inasmuch as it was to be with her spouse who was pursuing significant employment" (12/18/08 Order, Finding of Fact #42). However, the Court found that the "**relocation is not reasonable in light of** the substantial adverse impact it will have on the father's parent-child relationship, the effective stripping away of the bond between the father-daughter, the substantial travel between the parties' respective households, the adverse impact upon the children's relationship with extended family (all whom live in the

Wheeling, West Virginia area), and the adverse impact upon the continuity of the children's schooling" (emphasis added), (12/18/08 Order, Finding of Fact #44).

The Guardian Ad Litem further testified that the "appellant's spouse's base compensation packet at the job he quit in Wheeling, WV was Eighty-two Thousand Six Hundred Eighty Dollars (\$82, 680.00), not including his benefit package" (12/18/08 Order, Finding of Fact #56). The Guardian Ad Litem continued to state that the "appellant's spouse's income was a very substantial amount of earnings for a person living in West Virginia and at least double the median income of a family living in West Virginia" (Order 12/18/08, Finding of Fact #56).

It was found at the final hearing that the "appellant's spouse's gross income at his new employment was somewhere between Thirteen Thousand Dollars (\$13,000.00) and Fifteen Thousand Dollars (\$15,000.00) more per year" (12/18/08 Order, p. 15, line item 41). At this hearing, the "appellant presented no substantial, credible evidence as to the net affect this "pay increase" would have on her household's disposable income" (12/18/08 Order, Finding of Fact #41). Yet, for purposes of lowering her child support, the Appellant presented at the May 18, 2009 hearing that she pays Ten Thousand Eight Hundred and Sixty Dollars (\$10,860.00) a year, in addition to Seventy-Five Dollars (\$75.00) a year in tolls, for the Seventeen (17) hour round trip to travel back and forth between Columbia,

South Carolina and Wheeling, West Virginia (8/31/09 Order, hand-written attachment). The Appellant also presented at the May 18, 2009 hearing, for purposes of lowering her child support, that her spouse pays an annual insurance premium of Eight Thousand One Hundred and Two Dollars and Eighty-Six Cense (\$8,102.86) (8/31/09 Order, hand-written attachment). In essence, the Appellant's spouse's "pay increase" is spent on travel and insurance and then some.

It has been established that the "Appellee earns approximately Thirty-one Thousand Dollars (\$31,000.00) to Thirty-two Thousand Dollars (\$32,000.00) per year as an Ohio County Deputy Sheriff" and the Court found by "a preponderance of evidence that it would be **extremely** difficult for the father to afford the costs of any significant travel for parenting time if the children were permitted to relocate to the State of South Carolina" (12/18/08 Order, Finding of Fact #49). Continually, the Court noted that the "appellant established residency in Columbia, South Carolina" at the time of the final hearing (she moved on April 30, 2008 and has lived there to present) and that "her relocation will significantly impair the father's ability to exercise responsibilities for the subject children which have been consistently exercised since the entry of the last Order in this case establishing shared parenting" (12/18/08 Order, Finding of Fact #43).

The Guardian Ad Litem testified that it "would **not be in the children's best interests** to grant the mother's request for relocation" (emphasis added)

(12/18/08 Order, Finding of Fact #55) and that the “mother and her present spouse should have taken into consideration the effects of the relocation on the parties’ children before accepting and relocating to South Carolina” (12/18/08 Order, Finding of Fact #59). Furthermore, the Guardian Ad Litem testified that the “proposed relocation would significantly impact and deprive the father of his parenting time” and “impact the father-child relationship” (12/18/08 Order, Finding of Fact #60). It has been clearly established that the Appellee is heavily involved in his children’s lives and activities by “partaking in athletic events, school events, extracurricular activities, time at home, and all other activities anticipated and expected of a father” (12/18/08 Order, Finding of Fact #48).

Furthering the facts of this case, the Appellee located an Internet Blog after the Petition for Relocation was filed on a public forum written by the Appellant. The Appellant’s internet blog had comments about “her husband’s addiction to cocaine, drug abuse, and/or prescription drug abuse” (12/18/08 Order, Finding of Facts #61). The Appellant said that “these comments were a mistake.” The Appellant further admitted that “she filed for divorce on November 28, 2006 premised upon allegations of her husband’s drug use and/or abuse” (12/18/08 Order, Finding of Fact #62). The Appellant stated again that “this was a mistake” at the final hearing. However, on “November 26, 2006, the mother swore under oath that Sean Burke was addicted to drugs,” and that she had “written on a blog

that Sean Burke was addicted to crack cocaine,” and then she “indicated that she was not lying when she made the blog” (12/18/08 Order, Finding of Fact #67). The Family Court of Ohio County stated that “in light of the totality of evidence it did not believe the appellant’s testimony that she was mistaken about the same” (12/18/08 Order, Finding of Fact #63).

Furthermore, the Appellant’s father-in-law testified that her spouse has had “prior problems with drug abuse, his rehabilitation, relapses, further rehabilitation, relapses, etc.” thus the Court finding the “appellant’s testimony not credible as it relates to her current spouse’s drug abuse and addiction” (12/18/08 Order, Finding of Fact #64). The Court also noted that the Appellant’s father-in-law “readily admits that his son, Sean, has had difficulties with drug abuse” (12/18/08 Order, Finding of Fact #72). Then, on cross-examination at the final hearing the Appellant admitted that her spouse is a “recovering addict” (12/18/08 Order, Finding of Fact #66).

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 Circuit Court’s error in its analysis of the record presented for purposes of an application of the West Virginia Relocation Statute in W. Va. Code §48-9-403, and that the Family Court abused its discretion in creating a new standard for relocation, the Appellant’s real complaint is that the Courts and the Guardian Ad Litem did not conduct an investigation or finding of facts that favored the Appellant’s relocation, or in other words, was not “fair” to them. This argument ignores the fact that the trial court has discretion to weigh the evidence and the fact that the court has the power to determine what is in a child’s interest, as stated in the following two (2) cases:

“The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the final 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).

“...the trial court retains the ultimate power of disposition in this case, and the best interest 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).

Response to Assignment of Error

The Family Court of Ohio County and the Circuit Court of Ohio County **did not** abuse its discretion in denying the Appellant's request to relocate the parties' children to South Carolina because:

- (a) The Family Court considered all evidence in the case, including the effect the relocation would have on the children and concluded that it is in the best interest's of the children to remain in Wheeling, West Virginia.
- (b) The Family Court made a ruling based on several factors, including the fact that the appellant did not fulfill her burden by not presenting any evidence of a less disruptive alternative to relocating eight and a half (8 ½) hours away.
- (c) The Family Court did not abuse its discretion in denying the 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.
- (d) The Guardian Ad Litem conducted an in-depth investigation, and given the surrounding circumstances, did not believe that it was in the

children's best interest to conduct an interview or to have the children be witnesses before the parties. Nonetheless, Judge William F. Sinclair and the Guardian Ad Litem conducted an in camera interview with the children and with the Guardian Ad Litem present to further the investigation.

Discussion

A.

It has been established in the Family Courts and Legislature of West Virginia that the best interest of children is the paramount and controlling factor in distributing custodial responsibility and decision-making responsibility between parents who do not reside together. W. Va. Code §48-9-101(b) states,

(b) The Legislature finds and declares that it is in 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)

The Family Court of Ohio County and the Circuit Court of Ohio County found that the Appellant's relocation was not in the children's best interest (12/18/08 Order, Finding of Fact #55), thus awarding more frequent and continuing contacts with the appellee in accordance with W. Va. Code §48-9-101(b). The Family Court found in its analysis that the Appellant's relocation put the children in the "proverbial middle" of both parents which is disapproved of greatly by all West Virginia Laws concerning child custody (12/18/08 Order, Finding of Fact #23). The Family Court of Ohio County, nor any court, have ever established that the Appellee has not acted or performed any act that is not in the children's best interest.

The Court also applied W. Va. Code 48-9-403(d)(2) to this case which states:

(2) If a relocation of a parent is in good faith for a legitimate purpose and to a location that is reasonable in light of the purpose and if neither parent has been exercising a significant majority of custodial responsibility for the child, the court shall reallocate custodial responsibility based on the best interest of the child, taking into account all relevant factors including the effect of the relocation on the child.

The court found that the relocation was in good faith, but not "in light of the adverse impact" that it would have on the "parent-child relationship" (12/18/08 Order, Finding of Fact #44). In addition, neither parent has ever solely had the children seventy percent (70%) or more in their entire lives. The Court also

established and took into consideration that the relocation “has caused substantial anguish and emotional turmoil to both children” (12/18/08 Order, Finding of Fact #23).

Furthermore, one cannot ignore the fact that the Appellant’s spouse has a substance abuse problem. Although the Family Court of Ohio County did not completely delve into his abuse of crack cocaine and relapses thereof, one could not reasonably articulate or conclude that it would be in the children’s best interest to reverse the ruling of the Family Court of Ohio County based on this fact alone. The Court also noted that the Appellant “has filed domestic violence petitions against Mr. Burke (her spouse) which were later rescinded or terminated” (12/18/08 Order, Finding of Fact #93).

Contrary to the Appellant’s assertion, the Family Court placed a significant amount of emphasis on the effect that the relocation would have on the children’s lives and considered **All** relevant factors. Thus, the Court established that a relocation eight and a half (8 ½) hours from the children’s home town which includes extended family members, their schools that they have attended since 2002, their dance studio, their softball teams, their Girl Scout troops, their friends and their father that had them more than fifty percent (50%) of the time, was not in their best interest.

The Appellant also claims that the Court and Guardian Ad Litem did not abide by the W. Va. Code §48-9-102(a) and that they only based their decision on W. Va. Code §48-9-102(b) which is to achieve fairness between the parents. The appellant is basing this entire argument on one (1) part of one (1) finding in the Guardian Ad Litem's testimony. The Guardian makes several findings in the December 18, 2008 Order including what he found to be in the children's best interest, (12/18/08 Order, Finding of Facts #42, #55, #58 and #59).

The Appellant also claims that the Guardian and the Court "punishes" the mother for making a decision to relocate. The Court gives the Appellant the option to continue with the Shared Parenting Plan that was in place if she did not relocate to South Carolina or if she chose to relocate than the Court would implement the proposed parenting plan by the Appellee (12/18/08 Order, Conclusion of Law #5 and #6). By the Family Court making this ruling, this clearly does not constitute a "punishment". The Family Court did this in accordance with W. Va. Code §48-9-101(b), ensuring that the minor children have continuing and frequent contact with their parents whom act in their best interest.

To further this argument, the Appellant refers to *Hager v. Hager*, 591 S.E.2d 177; 214 W.Va. 619 (2003), that "[t]he award of child custody, [], should not be an exercise in the punishment of an offending spouse. In punishing the offending spouse one may also punish the innocent child, and our law will not tolerate that

result.” It should be noted that this case uses language from the W.Va. Supreme Court Case of *J.B. v. A.B.*, 161 W.Va. 332, 242, S.E. 2d 248 (1978), in which the “offending spouse” is a mother whom commits acts of sexual misconduct (i.e. adultery) and it is established that this should not be used against her for custody issues. Not only is there not an “offending spouse” in this case, the Appellant is not being “punished.” Simply put, the children’s best interest are being protected and served.

The Appellant also tries to convince the Court that the Appellee has not been a caretaker in the children’s lives until February 22, 2006. She does so by referring to W. Va. Code §48-9-206, which states:

Unless otherwise resolved by agreement of the parents under section 9-201 or unless manifestly harmful to the child, **the court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parent’s separation or, if the parents never lived together, before the filing of the action, except to the extent required under section 9-209 or necessary to achieve any of the following objectives: (emphasis added)**

- (1) to permit the child to have a relationship with each parent who has performed a reasonable share of parenting functions;
- (2) To accommodate the firm and reasonable preferences of a child who is fourteen years of age or older, and with regard to a child under fourteen years of age, but sufficiently matured that he or she can intelligently express a voluntary preference for one parent, to give that preference such weight as circumstances warrant;

- (3) To keep siblings together when the court finds that doing so is necessary to their welfare;
- (4) To protect the child's welfare when, under an otherwise appropriate allocation, the child would be harmed because of a gross disparity in the quality of the emotional attachments between each parent and the child or in each parent's demonstrated ability or availability to meet a child's needs;
- (5) To take into account any prior agreement of the parents that, under the circumstances as a whole including the reasonable expectations of the parents in the interest of the child, would be appropriate to consider;
- (6) To avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child's need for stability in light of economic, physical or other circumstances, including the distance between the parents' residences, the cost and difficulty of transporting the child, the parents' and child's daily schedules, and the ability of the parents to cooperate in the arrangement;
- (7) To apply the principles set forth in 9-403(d) of this article if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the amount of custodial responsibility that would otherwise be ordered under this section; and
- (8) To consider the stage of a child's development.

W. Va. Code §48-9-206(1) is guidelines for the Court to allocate custody immediately after the separation of parents. In analyzing the Appellee's and the Appellant's custodial responsibilities **prior to their separation** in 2002, both parents lived one-hundred percent (100 %) of the time with the children. It has been found by the Court that the Appellant has been a stay-at-home mom, more specifically that "[t]he mother has no income. She has not pursued any career

opportunities or a plan of economic self-improvement according to her own testimony. She has **chosen** to remain at home to care for the children of her **current spouse (as opposed to the children of the parties herein)**” (12/18/08 Order, Finding of Fact #50).

Meanwhile, the Appellee has always been the sole source of income for the children, all the while performing caretaking functions for the children. The Appellant also **claims** that she performed “at least” seventy percent (70%) of the caretaking function between 2002 and 2006 after the parties’ divorce up until the Shared Parenting hearing before the Family Court of Ohio County. This cannot be substantiated by either party since their parenting plan did not designate specific dates and times that the children spent with either parent. **The Appellant’s description of the Appellee being physically separated from his children for a period of at least three years while residing in Martinsburg, West Virginia and the Appellant living in Wheeling, WV could not be any further from the truth.** As stated in the Appellee’s argument, the Appellee had continuing contact with his children during the timeframe in question by spending numerous extended weekends with his children on not only regular weekends but also on holidays, birthdays, extended weekends from school and especially several weeks at a time during the summer months. Furthermore, the Appellee relocated to the Wheeling,

West Virginia area in August of 2005 and immediately had the children for more overnights.

It was found by the Court “based upon the testimony of numerous witness,” that the Appellee “is fully involved in the children’s lives by partaking in athletic events, school events, extracurricular activities, time at home, and all other activities anticipated and expected of a father” (12/18/08 Order, Finding of Fact #48). In addition, the Appellee has been a PRO (Prevention Resource Officer) Officer through the Ohio County Sheriff’s Office, in which he has been placed at the same school as his eldest daughter and his work hours are the same as his children’s school hours. He is able to take his children to and from school, as well as spend all evening and weekends with his children.

The Appellant also attempts to make an argument for sub-sections (2), (3), (4), (5) and (8) of W. Va. Code §48-9-206, in which the courts address in their Finding of Facts. Please refer to the December 18, 2008 Final Order, Finding of Facts #18-#33, for the Court’s analysis of the testimony of the children in response to W. Va. Code §48-9-206 (2). The Appellant asks this Court to conduct an independent review of the children’s in camera interview because she believes that the children’s testimony is more probative than any other testimony presented by either party at the hearing. One would presume that the Appellant Mother would not know this unless she coached the children on what to say, asked the children

what they did in fact say, or the Appellant and/or her counsel watched the in camera interview that was accidentally mailed to them by the Family Court of Ohio County, West Virginia.

In regards to W. Va. Code §48-9-206 (3) the Appellant cites keeping the siblings together when the court finds that doing so is necessary to their welfare. The Appellant proceeds to interject that the subject children have half-siblings, in which the Court took note (12/18/08 Order, Finding of Fact #34). However, the Appellant raises the issue that the Guardian Ad Litem stated that the subject children and their half-sibling's relationship is paramount to the relationship with any other extended family member in the Wheeling area. When in fact, the Guardian recognizes that the whole picture needs to be considered in making a decision and that the subject children have close relationships with all of their relatives (extended family, half-siblings, parents, etc.) and that the relocation is not in their best interest since it will have a substantial impact on these relationships (12/18/08 Order, Finding of Fact #26). The Guardian also states that the **subject children** have a close relationship and should not be separated (12/18/08 Order, Finding of Fact #31).

In regards to W. Va. Code §48-9-206 (4) of the Appellant's brief, the Appellant raises the argument that the Family Court of Ohio County failed to protect the children's welfare because it failed to consider the gross disparity in the

quality of the emotional attachment between the children and their mother. The Family Court recognized that the children were emotional by the fact of being put in the “proverbial middle” of both parent and that they have an emotional attachment to **both** parents. However, by the Appellant relocating eight hours away before the Final Order was even established, she in essence forfeited her emotional attachment between herself and her children and her ability to meet the children’s daily needs.

Furthermore, the Appellant states that the Family Court reallocated custodial responsibility to the father who delegated the children’s daily needs to his significant other. In making such argument, the Appellant fails to take into consideration that the Family Court of Ohio County recognized that the Appellee did not delegate the children’s daily needs to his significant other but was **INDEED** heavily involved with his children. The Family Court of Ohio County also considered the emotional attachment that the children have with the father as well, along with his ability and availability to meet the children’s daily needs.

With regards to W. Va. Code §48-9-206 (5), pertaining to prior custody agreements of the parents, it has already been addressed that the Appellee had frequent contact with the children between 2002 and 2005 to exercise his parenting time and that it cannot be substantiated on the amount of time that either parent enjoyed since the parenting plan did not specify actual visitation dates.

Furthermore, the prior arrangement to the relocation was that the Appellee had the children 191 overnights or fifty-two percent (52%) of the time and the Appellant had the children 183 overnights or forty-eight percent (48%) of the time.

Finally, the Appellant argues W. Va. Code §48-9-206 (8) concerning the stage of the child's development. This is a non-issue since the Appellant felt comfortable enough to leave the children in the care of the Appellee when she moved on April 30, 2008 before the Final Order was granted. Besides, the Appellant makes several arguments that the Appellee's significant other cares for the children, whom they have had a relationship with for eight (8) years and who so happens to be the same gender as the children.

Yet, the Appellant's counsel conveniently leaves out subsections six (6) and seven (7) of W.Va. Code §48-9-206 in her argument which state:

(6) To avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child's need for stability in light of economic, physical or other circumstances, including the distance between the parent's residences, the cost and difficulty of transporting the child, the parents' and child's daily schedules, and the ability of the parents to cooperate in the arrangement;

(7) To apply the principles set forth in 9-403(d) of this article if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the amount of custodial responsibility that would otherwise be ordered under this section, and

It was found by the Family Court that the relocation would be **extremely** difficult financially for the Appellee to afford the cost of transporting the children

between West Virginia and South Carolina for his parenting time (12/18/08 Order, Finding of Fact #49). Furthermore, the children's daily schedules consist of going to school in Ohio County, West Virginia where they have been attending since 2002, attending their dance studio which they have attended weekly since 2006, participating in their Girl Scout Troops which they have been a part of since 2007, and for the youngest child, playing with her softball team that she has been a part of since 2003. The children would be uprooted from all of their activities that they have been involved in for years if the proposed relocation had been granted. Thus, the Court did not err in keeping a stable life for the children and by not interfering with their daily schedule. Furthermore, the Court recognized that the Appellee is the sole financial provider for the children and that the relocation would affect the children economically if the Appellee would have to pay for transportation for the seventeen (17) hour round trips to partake in his parenting time.

Yet, in complying with West Virginia Code §48-9-206 then one must refer to section 48-9-403(d) of this article if a parent chooses to relocate. In which case, "neither parent had the children seventy percent (70%) of the parenting time with the minor children under the existing Parenting Plan," (12/18/08 Order, Finding of Fact #19). The Family Court did not abuse its discretion when allocating custody by complying with the legal standards and the mandates of the West Virginia Law.

B.

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. Contrary to the Appellant's assertion that she proved her burden that her spouse could not have gained employment that is substantially less disruptive, the Appellant did not prove anything of the sorts. She did not prove why it was necessary for her spouse to quit the job that he currently had.

The Appellant stated why her husband desired to quit his job (to get a job in management), but not why he had to. The Appellant attempted to convince the Court that there were not jobs in the Wheeling, West Virginia area that were conducive to her spouse's job skills by presenting testimony of the very recruiter that recruited her spouse to work for his company. A recruiter's job is to advocate for their own company, not other companies. The Courts found that the Appellant's spouse's desire to get a job in management did not justify uprooting the children and that a less disruptive alternative should have been sought (i.e. keeping the job that he had or only quitting if a closer opportunity arose).

Also, when the "appellant's spouse was presented with written questions

from David B. Cross, the Guardian Ad Litem, he **failed** to provide the written answers to those questions (including Question No. 16 regarding efforts to locate a position within the Ohio County area in a managerial position and/or enhancing his income)” (12/18/08 Order, Finding of Fact #53).

The Family Court also made a finding that the Appellee did not present any evidence in his case in chief that the Appellant’s spouse could have obtained similar employment closer to the Wheeling, West Virginia area, however **it is not the Appellee’s burden** to provide such evidence. Yet, the Circuit Court of Ohio County stated it best when it found that “[t]his is a non-issue. Because the Court found that neither party exercised a majority of the care taking functions under West Virginia Code §48-9-403(d)(1), the “reasonableness” assessment was not essential because **neither party was presumed to be allowed to relocate**” (emphasis added) (10/5/2009 Circuit Court Order, pg. 8). Therefore, the Court did not abuse its discretion in making rulings that were not essential to the case.

C.

Judge William F. Sinclair of the Family Court of Ohio County, along with David B. Cross, the Guardian Ad Litem, did an in camera meeting to **interview** the children based on Rule 17 of the Family Court Rules. Judge Ronald E. Wilson of the Circuit Court of Ohio County made a correct assessment by stating that “[t]he

fact that this guardian ad litem has taken a position contrary to that taken by Mrs. Burke does not make the conduct of the guardian ad litem unduly or unfairly prejudicial to the interests of the child” (10/5/09 Circuit Court Order, pg. 11). The Guardian Ad Litem and the Court applied the correct legal standards and considered the best interest of the children in this case.

Conclusion

This case is not primarily based on what is “fair” to one parent or the other, but on considering the children’s lives and well-being and taking all laws, facts and evidence into consideration to determine what is in their best interests. As the Family Court and Circuit Court of Ohio County correctly observed, W Va. Code, §48-9-403(d) requires priority consideration be given to the children’s best interest.

The children’s best interest in this case was to have the motion for relocation denied, and this ruling should be affirmed in all respects. Wherefore, Appellee prays that this Court affirms the Order of the Family Court of Ohio County, West Virginia dated December 18, 2008 in Civil Action No. 05-D-279 denying the Appellant’s motion to relocate the parties children to South Carolina and the Circuit Court’s affirmance thereof, assessing costs in the underlying action and that

the Court grant the Appellee his costs in the appeal, and for such other and further relief as the Appellee's cause may require or as the Court finds just and proper.

CERTIFICATE OF SERVICE

Service of the foregoing Brief on Behalf of Appellee, Charles Kittle, was made upon the Appellant and Guardian Ad Litem by mailing a true copy thereof, U.S. mail, postage prepaid, on the 11th day of February, 2010, as follows:

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