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IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE THE MARRIAGE OF:

CHARLES D. KITTLE,
Petitioner,

and

Case No: 05-D-279
Appeal from Ohio County Family Court

SUSAN R. BURKE,
Respondent.

FINAL ORDER REFUSING APPEAL AND AFFIRMING FAMILY COURT FINAL ORDER ON THE RELOCATION ISSUE AND REMANDING FOR RECONSIDERATION ON THE CALUCLATION OF CHILD SUPPORT

Pending before this Court is the Petition for Appeal of a December 18, 2008 Family Court Order from the Honorable William F. Sinclair, the Family Court Judge of Ohio County West Virginia, denying Susan Burke's Motion for Relocation. The Final Order containing all pertinent Findings of Fact and Conclusions of Law necessary to the appeal was entered on 18th day of December 2008. The Petition for Appeal was timely filed on January 20, 2009. A Reply to the Petition for Appeal was filed by the guardian ad litem, David B. Cross. However, Charles D. Kittle did not file a response the Petition for Appeal.

Susan R. Burke, f/k/a Susan Kittle, asserts in her Petition for Appeal that the Family Court erred by 1) abusing its discretion by creating its own standard for determining whether to grant a request for relocation; 2) abusing its discretion in making a ruling based upon facts not in evidence; 3) abusing its discretion in attributing income to a mother who has chosen to stay at home to raise children of tender years; and 3) that the

guardian ad litem appointed by the court did not perform his duties to protect the children's interest in this matter.

FACTUAL HISTORY

Charles D. Kittle and Susan R. Burke were divorced in Berkley County, West Virginia on October 18, 2002. Two girls were born onto the marriage: K.K. born March 10, 1996 and H.K. born November 24, 1999. At the time of the divorce Susan R. Burke was denominated the custodial parent for all state and federal statutory purposes. The parenting plan entered by the parties did not set out specific times for either parent, but instead said the parties would work together so that the father would have custodial time with the children "at such times reasonable, convenient as the parties may agree on." For child support and other purposes they agreed that the split of time was 70% to the mother and 30% to the father.

In June of 2002 Susan Burke moved to Wheeling, West Virginia with the children. Charles Kittle remained in Martinsburg, West Virginia until September 2005 when also relocated to Wheeling to be closer to his children. Susan R. Burke remarried on October 8, 2004. She and her husband have two children together, both under school age.

The divorce case was transferred to Ohio County, West Virginia on August 12, 2005. On December 7, 2005 Charles Kittle moved for a modification of parenting time and child support and on February 22, 2006 the parties entered into a Shared Parenting Plan that was adopted by Order of the Court on May 12, 2006. This Shared Parenting Plan retained mother as the designated custodian for all state and federal statutory purposes but specifically divided the parenting time so that the children resided with both parents during the week and weekends were alternated. This parenting plan was drafted and agreed to

between the parties and neither party objected to it. The parenting plan child support calculation gave Mrs. Burke 183 overnights and Mr. Kittles 182 overnights.

On May 24, 2007, Mr. Kittle moved for a second time to modify child support. In this motion he asked to claim the children on his taxes since the mother had stopped working. By Order entered in September of 2007 the court modified child support by allowing the father to claim the children as dependents and a new calculation of the monthly support was made. The September 2007 Order credited the father with 191 overnights and credited the mother with 174 overnights .In the challenged 2008 Order the court states that the different allocation of days in the September 2007 Order was made to most accurately reflect the evidence presented at the prior hearing. The September 2007 Order attributed income to Mrs. Burke of $1,386.66 per month because Mrs. Burke was able to be employed; was not pursing a plan of economic self improvement; and chose to stay at home to take care of her two under school age children from her second marriage. No one objected to ruling contained in the 2007 Order and therefore the Court concluded that these determinations were res judicata.

In October of 2007 Susan Burke filed a Notice of Relocation seeking permission to relocate the children to Irmo, South Carolina with her and her new family. The relocation request was based upon Mr. Burke, Susan's husband, obtaining new employment in Columbia, South Carolina. She also filed a Petition to Modify the Parenting Time Due to A Relocation in which she proposed parenting time for Mr. Kittle of approximately 94 days a year. After the filing of the Motion to Relocate, the parties made cross claims of unfitness and accordingly the Court appointed a guardian ad litem for the parties minor children.

The Family Court Judge heard over eighteen hours of testimony over several days and he conducted an in-camera interview of both children, before he made final rulings that contained ninety-eight findings of fact and twenty five conclusions of law. The guardian ad litem attended the hearings, interviewed the parties and the former employer of Mr. Burke, served written questions on Mr. Burke, was present during the in-camera interview of the children and provided his analysis to the Court for consideration. The guardian ad litem testified that he believed the relocation was in good faith and legitimate. However, he recommended that it was not in the best interest of the children to relocate. He opined that Mr. Burkes pay increase was not sufficient reason to uproot the children from the present environment, community ties, family interactions and connection with their father. The guardian ad litem also observed that Mr. Burke's salary in Wheeling was substantial in that it was double the median income in West Virginia and therefore, economic gain was not essential to the family.

Ultimately the Court determined that Mrs. Burkes relocation was in good faith and for a legitimate purpose, but was not reasonable in light of the substantial adverse impact it would have on Mr. Kittles parent/child relationship; the substantial travel between the households and costs associated with that travel; the adverse impact on the children's relationships with extended family and the adverse impact on the continuity of their schooling. Mrs. Burke did not present this issue to the Court and the wait for a decision. She has already moved to South Carolina. Therefore, because Mrs. Burke was already in South Carolina at the time of the final hearing, the Court utilized a basic shared parenting formula utilizing the income figures from the last modification of child support in 2007.

ANALYSIS

By law, the Court must review the Family Court's findings of fact under a clearly erroneous standard and the application of the law to the facts of the case under an abuse of discretion standard. W.Va. Code § 51-2A-14; Wilson v. Wilson, 214 W.Va. 14, 585 S.E. 2d 14 (W.Va. 2003). The issues raised by Petitioner are all within the sound discretion of the Family Court and its actions will not be disturbed on appeal unless it clearly appears that such discretion has been abused. An abuse of discretion occurs in three principal ways; (1) when a relevant factor that should have been given significant weight is not considered; (2) when all proper factors, and no improper ones, are considered, but the [Family Court Judge] in weighing those factors commits a clear error of judgment; and (3) when the [Family Court Judge] fails to exercise any discretion at all in issuing the order. Banker v. Banker, 196 W.Va. 535, 548, 474 S.E.2d 465, 478 (1996)

Mrs. Burke's first point of error is that the Family Court utilized some other standard than the "best interest of the child" in ruling on her Petition for Relocation. Her argument is that even if the Court found the move to be "unreasonable," it still had to consider the "best interest of the child" when ruling on her Motion for Relocation. In so arguing Mrs. Burke ignores all of what the Court said when it considered the "best interest of the child." The Court's summarized findings focus on the best interest of the child under West Virginia Code §49-9-102[1] and clearly demonstrate that it considered the totality of the circumstances in determining the "best interest of the child."

[1] West Virginia Code § 48-9-102: (a) The primary objective of this article is to serve the child's best interests, by facilitating:(1) Stability of the child; (2) Parental planning and agreement about the child's custodial arrangements and upbringing; (3) Continuity of existing parent-child attachments; (4) Meaningful contact between a child and each parent; (5) Caretaking relationships by adults who love the child, know how to provide for the child's needs, and who place a high priority on doing so; (6) Security from exposure to physical or emotional harm; and (7) Expeditious, predictable decision-making and avoidance of prolonged uncertainty respecting arrangements for the child's care and control.

Specifically, the Family Court found that the move was not reasonable in light of 1) The substantial adverse impact it will have on the father's parent/child relationship which speaks to the continuity of existing parent-child attachment and meaningful contact between a child and each parent; 2) The effective stripping away of the bond between the father and the daughters which speaks to the continuity of existing parent-child attachment and meaningful contact between a child and each parent; 3) The substantial travel between the parties respective households and the costs thereof which speaks to the stability of the child; 4) The adverse impact upon the children's relationships with extended family which speaks to the caretaking relationships by adults who love the child; and 5) The adverse impact upon the continuity of the children's schooling which speaks to the stability of the child.

The Family Court determined that both parties were fit and proper persons to share in the custodial responsibilities and decision-making responsibilities and parenting time for the children and that no matter what decision the Court made, it was going to substantially affect the personal relationships of the children.

In addition to her allegation that the Court failed to take into consideration the best interest of the child, Mrs. Burke asserts that the Family Court is required, and failed, to consider the history of past performance of caretaker functions of the child prior to the separation in determining the best interest of the child.

That argument is not supported by the Family Court's findings. The Family Court heard testimony on the historical caretaking of the children and how the parties were splitting the time with their children at the time the Motion for Relocation was filed. Mrs. Burke claims that the Family Court should have considered the entire formative years of

the children and the history of caretaking functions from the birth on rather than the last few years before the modification was filed. It does not appear that Mrs. Burke is arguing that she should have been determined to have exercised a significant majority of the custodial responsibility pursuant to W.Va. Code §48-9-403(d)(1). This Court has considered this "formative years" argument to mean that this should have been a factor considered by the Court. It was not an abuse of discretion for the Family Court, under the factual situation presented in this case, to consider the caretaker functions during the more recent time rather than to give undue weight to the historical actions of a primary caretaker. Further, the Court recognized that the children had spent several years in the care of their mother after the divorce in 2002. However, the court correctly considered that the father moved to Wheeling in 2005, was granted equal parenting time in February of 2006 and developed a significant relationship with the children.

The second point of error asserted by Mrs. Burke is that the Court abused its discretion in making a ruling based upon facts not in evidence. Specifically, she argues that the Family Court's finding that the contemplated move was unreasonable was based upon the Courts own assumptions that Mr. Burke could have found employment in a closer local than South Carolina. The Court specifically found that Mr. Kittle presented no evidence in his case in chief that Mr. Burke could obtain similar employment in the Wheeling-Pittsburgh area. Likewise, Mrs. Burke presented no evidence to indicate that Mr. Burke could not retain similar employment by moving to a location that would be substantially less disruptive of the other parent's relationship with the children such as Columbus, Akron, Cleveland or Cincinnati, Ohio.

This 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. Instead, the Court had to look to West Virginia Code §48-9-403(d)(2) that states that if neither party is exercising a majority of the custodial responsibility for the child, the court shall reallocate custodial responsibility based upon the best interest of the child. Since we have already addressed that the Court did consider the best interest of the child, the court did not abuse its discretion in making rulings that were not essential to the case.

Mrs. Burke's third assignment of error is that the Family Court erred in attributing income to a mother who has chosen to stay at home to raise children of tender years. The origin of this complaint stems from a decision made by the Family Court Judge by Final Order dated September 18, 2007. At a modification hearing attended by both parties the Court determined that the mother would be attributed income of $1,386.66 per month despite her decision to stay at home to take care of a child less than school age. The Court determined it was appropriate because the child was not the Petitioner's child. Neither party appealed the September 18, 2007 Order of the Court. The Court utilized this income figure to determine the child support award when the children begin to reside primarily with Mr. Kittle. Neither side presented any testimony on the issue of the income of the parties for purposes of the calculation of child support at the Relocation hearings.

The Supreme Court of West Virginia has addressed this issue and stated that "[a] family law master or circuit court may not attribute income to a parent who is unemployed

or under-employed because the parent has chosen to devote time to care for children (including those who are above pre-school age or those to whom the parties do not owe a joint legal responsibility for support) under circumstances in which a reasonable, similarly-situated parent would have devoted time to care for the children had the family remained intact or, in cases involving a non-marital birth, had a household been formed." Syl. Pt. 5, In re Destiny G.A. 211 W.Va. 401, 566 S.E.2d 288 (2002); Syllabus Point 6, State ex rel. West Virginia Dept. of Health and Human Resources, Bureau for Child Support Enforcement v. Gibson, 207 W.Va. 594, 535 S.E.2d 193 (2000). When a family court judge or a circuit court, in the exercise of discretion, chooses to attribute income to a parent who is providing care to children, there must be a full explanation on the record why it is in the best interests of the children that the parent be employed rather than providing care to the children.

The denial of the request for relocation resulted in a modification of the parenting plan by the Family Court from an Extended Shared Parenting Plan to a Basic Shared Parenting Plan providing the father as the primary residential parent. This modification is a significant change in the allocation of responsibility and justified a modification of child support. The fact that the Court had previously attributed income without complaint does not preclude Mrs. Burke from raising the issue on the new child support calculation.

The Family Court did not provide any explanation for why it was in the best interest of the children to attribute income to the mother for purposes of child support. The Court did not analyze the increased cost of travel to the mother to exercise her parenting time in light of the Court's decision to make the father the primary residential parent. Therefore, the Court did abuse its discretion in attributing income to Mrs. Burke without

making the requisite explanation for such attribution in accordance with In Re Destiny G.A.

Mrs. Burke's final assignment of error is that the guardian ad litem failed to perform his duties to protect the children's interest in this matter. The crux of the argument is that the guardian ad litem did not independently or privately speak to the children, but only sat in on the in camera interview with the children and posed questions in that setting.

West Virginia has never addressed to what extent a litigant can claim error based upon the recommendations of a guardian ad litem or even if Mrs. Burke has standing to assert error involving proper role of guardian ad litem. Here the guardian ad litem functions as an investigative agent of the Court, charged with assisting in the determination of what is in the best interest of the child. Within that context a guardian ad litem is bound by the rules of professional conduct which direct that he act with reasonable diligence. Since the guardian ad litem's recommendations are not binding and the parties have the ability to address the recommendations with the Court, it is ultimately for the Court to determine the quality of the investigation and what weight if any should be given to the guardian ad litem's recommendation.

Mrs. Burke asserts that the guardian ad litem was derelict in his duties for failing to interview the children outside of the in camera interview with the Court. Assuming arguendo that this is a proper issue for appeal and that Mrs. Burke has standing to assert this issue on appeal, it is incumbent on the guardian ad litem to "make a full and independent investigation of the facts involved in the proceeding and make recommendations to the court by testimony or in writing, unless otherwise ordered by the

court." Trial Court Rule 21.03. Obviously, the recommendations may or may not be identical to those the child would make to the court, left entirely to his or her own choices. However, in the case of a child, justice is clearly best served by requiring that the guardian ad litem and the judge exercise their respective best judgment, and that the judge have the benefit of a guardian ad litem's candid and independent assistance in determining the best interests of a child. The court is not bound by nor does it need to accept the recommendations of a guardian ad litem. The 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.

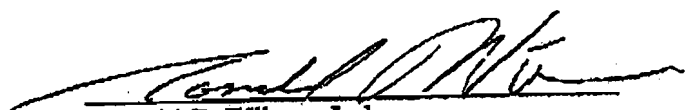
This Court has considered the Petitioner's grounds for appeal, reviewed the Family Court Judge's findings and Final Order entered on the 5th day of December, 2008. Based on this Court's review of the relocation issues raised by Mrs. Burke in her Petition for Appeal and the Family Court's decisions as set forth in its December 18, 2008 Order, it is this Court's opinion that Petitioner failed to raise an issue for this Court to review. However, it is the Court's decision that the Family Court did abuse its discretion in attributing income to Susan R. Burke in the December 5, 2008 Order and this issue is **REMANDED** *for reconsideration of the calculation of Child Support. All other issues raised by Susan Burke are* **DENIED**.

It is therefore **ORDERED** that Susan Burke's Petition for Appeal of the relocation issue is **REFUSED** and the Final Order of the Family Court remains the Final Order on the relocation issue. The appeal is hereby dismissed and is **ORDERED** removed from the docket of this Court.

Motions for reconsideration of this Refusal Order, or renewal of a Petition for Appeal is not permitted. See *Rule 30(b) of The West Virginia Rules of Practice and Procedure for Family Court.* However, Petitioner may seek review of this Court's Order by the West Virginia Supreme Court of Appeals. West Virginia Code § 51-2A-15(b).

Copies of this Order have been forwarded from this office to: Elgine McArdle, 80 Twelfth Street, Suite 206, Wheeling, WV 26003, David B. Cross, 737 Charles Street, Wellsburg, WV 26070; Charles D. Kittle, RR 1 Box 157, Triadelphia, WV 26059.

ENTER this 8 day of April, 2009:



Ronald E. Wilson, Judge