Hot Topics in Family Law and Evictions Seminar

July 21, 2021 10:00 a.m. – 1:00 p.m.

Host: Legal Outreach Committee of the West Virginia State Bar

Location: West Virginia Bar Conference Center - Charleston, WV and via video conference.

CLE: 3 credits

Speakers/Topics:

Family Court Circuit Judges, **Patricia A. Keller, 6th Circuit,** and **Deanna R. Rock,** 23rd Circuit will lead a discussion on recent changes in family law and recent case law. Followed by **Katheryn E. Marcum** and **Susana Campos Duarte's** presentation on eviction and housing issues.

The Hon. Patricia A. Keller

Contact:

Cabell County Family Court
744 Fourth Avenue, Suite 300
Huntington, WV 25701

Telephone: (304) 526-8535
Facsimile: (304) 526-8534

patricia.keller@courtswv.gov

Education:

- J.D., West Virginia University College of Law
- B.S., Shepherd College

Bio:

Patricia Keller is a Family Court Judge in the Sixth Family Court Circuit (Cabell County), where she presides over domestic relations hearings, including divorce, child custody, visitation, guardianship, domestic violence, and support, as well as modification and contempt matters. Judge Keller serves on the Family Court education committee, where she is involved in planning continuing education conferences for family court judges. In addition to educational programs for her colleagues, she has also done presentations for the circuit court judges, law clerks and attorneys state-wide. Judge Keller serves on the Judicial Investigation Commission, which reviews ethics complaints against judges and determines whether probable cause exists to formally charge a judge. Prior to that she served on the Judicial Hearing Board.

In addition to her Family Court duties, Judge Keller was instrumental in implementing drug courts in Cabell County. In her work with the adult drug court, Judge Keller was one of three women featured in the Oscar nominated Netflix short documentary *Heroin(e)*, which shows the tireless struggle of those who attempt to fight against drugs by breaking the cycle of addiction one life at a time.

Judge Keller is an adjunct instructor at West Virginia University, where she has taught graduate classes in the Master of Legal Studies Program since 1999. She teaches both Law & Society (LEGS 630), as well as Family Law (LEGS 710.)

West Virginia
Supreme Court of Appeals

Domestic Appeals Summary
FY2020

- 425 appeals were filed between July 1, 2019 and June 30, 2020 (fiscal year 2020) from Family Court final orders to the Circuit Court.
- 69 appeals were refused during FY2020.
- 141 appeals were disposed during the fiscal year.
- 40 were remanded back to Family Court.
- Of those disposed, the average* age at disposal was 62 days.
- 49 petitioners represented themselves in their appeal.
- Of the subject matters reported for these appeals, the three most frequent were Domestic Violence (22%) Child Support (16%), and Custodial Allocations/Decision Making responsibilities (16%).

**Data collected from the Circuit Clerks is reported in a summarized format, monthly. Therefore, if a judge disposed of more than one case of a particular type during a single month the age at disposal was reported as an average of such cases. The average calculated for this report utilizes the data collected on such reports and, consequently, may average summarized information.*

Notes:
(1) The count of activities (refusals, dispositions, etc.) during the processing of appeals cannot be summarized as a percentage of the total annual filings since the counts of such also include cases pending at the beginning of the year. (2) Statewide reporting is a summary of those reports that were submitted to the Administrative Office from e ach county's Circuit Clerk. During fiscal year 2020, the following counties provided limited appellate reporting: Berkeley, Jefferson, Hardy, Monroe and Nicholas. (3) The following counties had limited data on, or did not report on Pro Se cases: Clay, Braxton, Nicholas, and Boone. (4)The following counties had limited data on, or did not rep ort on subject matter: Berkeley, Jefferson, Hardy, Monroe, Nicholas, and Summers.

State of West Virginia

Circuit Court

FY2020
July 2019 through June 2020

Domestic Appeals to Circuit Court Summary

Statewide

	Filings	Refused	Withdrawn	Dismissed	Remanded back to Family Court	Final Decision Order on Appeal	Automatic Transfer to Supreme Court	Other	Just Cause Orders Entered	# of Pro Se Cases Filed
Divorce w/ Child(ren)	86	24	1	20	12	22	0	3	0	17
Divorce w/out Child(ren)	43	16	0	16	10	9	0	1	0	10
Other Domestic Relations	6	1	0	1	1	2	0	1	0	1
Child Custody w/out Divorce	25	11	0	3	3	7	0	3	0	6
Child Support Only	22	10	0	4	1	5	0	4	0	1
Paternity	16	2	0	1	4	6	0	1	0	5
Grandparent Visitation	2	0	0	1	1	1	0	0	0	0
Annulment	0	0	0	0	0	0	0	0	0	0
Separate Maintenance	1	1	0	0	0	0	0	0	0	0
DV Appeals from Family Court	174	0	0	0	0	0	0	0	0	0
Other	50	4	1	13	8	13	0	2	0	9
State Totals	**425**	**69**	**2**	**59**	**40**	**65**	**0**	**15**	**0**	**49**

Notes: (1) The count of activities (refusals, dispositions, etc.) during the processing of appeals cannot be summarized as a percentage of the total annual filings since the counts of such also include cases pending at the beginning of the year. (2) Statewide reporting is a summary of those reports that were submitted to the Administrative Office from each county's Circuit Clerk. During fiscal year 2020, the following counties provided limited or no appellate reporting: Berkeley, Jefferson, Hardy, Monroe,and Nicholas.

State of West Virginia

Family Court Appeals Subject Matter

Circuit Court

FY2020
July 2019 through June 2020

Statewide

Number of Appeals Filed in Circuit Court by Subject Matter

Custodial Allocations/ Decision Making Responsibility	Visitation	Child Support	UIFSA	Paternity	Spousal Support	Equitable Distribution	Pension	Grandparent Visitation	Domestic Violence	Other	Total
57	35	57	3	6	17	27	5	5	77	56	**345**

Notes: (1) A single appeal may deal with multiple subject matters. Therefore, the total number of subject matters dealt with in appeals will not equal the total number of appeals for the same time period. (2) Statewide reporting is a summary of those reports submitted to the Administrative Office from each county's Circuit Clerk. During fiscal year 2020, Berkeley, Jefferson, Hardy, Monroe, and Summers county had incomplete submissions.

Family Courts
2020 Domestic Case Filings

	Total	Divorce	Domestic Violence	Other Domestic Relations	Total	Contempt	Modification
Barbour	186	79	85	22	46	15	31
Berkeley	1,136	510	306	320	422	174	248
Boone	307	124	143	40	49	25	24
Braxton	145	62	53	30	82	50	32
Brooke	202	69	89	44	56	26	30
Cabell	1,147	377	559	211	516	257	259
Calhoun	76	40	27	9	2	0	2
Clay	116	47	52	17	56	23	33
Doddridge	62	28	25	9	19	4	15
Fayette	448	182	155	111	324	161	163
Gilmer	61	27	27	7	1	1	0
Grant	137	45	70	22	102	42	60
Greenbrier	438	141	208	89	57	31	26
Hampshire	196	93	46	57	139	64	75
Hancock	274	96	106	72	35	8	27
Hardy	172	67	71	34	132	57	75
Harrison	732	265	370	97	242	93	149
Jackson	383	131	185	67	107	48	59
Jefferson	524	217	155	152	176	89	87
Kanawha	2,235	678	1,233	324	420	187	233
Lewis	181	73	79	29	57	27	30
Lincoln	282	103	140	39	153	50	103
Logan	642	175	402	65	150	42	108
Marion	595	227	276	92	145	72	73
Marshall	218	84	68	66	0	0	0
Mason	116	31	36	49	19	12	7
McDowell	202	95	71	36	41	10	31
Mercer	1,143	316	665	162	190	78	112
Mineral	271	110	94	67	138	65	73
Mingo	423	151	192	80	181	51	130
Monongalia	736	280	352	104	193	57	136
Monroe	186	57	97	32	22	14	8
Morgan	173	63	67	43	97	60	37
Nicholas	274	100	140	34	165	88	77
Ohio	346	113	142	91	104	56	48
Pendleton	74	31	35	8	49	25	24
Pleasants	80	35	36	9	5	4	1
Pocahontas	107	27	59	21	63	41	22
Preston	364	131	172	61	106	45	61
Putnam	574	259	227	88	110	44	66
Raleigh	990	383	477	130	270	125	145
Randolph	321	119	160	42	102	37	65
Ritchie	119	46	57	16	4	0	4
Roane	125	64	32	29	0	0	0
Summers	136	50	59	27	69	32	37
Taylor	149	73	52	24	43	15	28
Tucker	60	21	31	8	25	10	15
Tyler	92	28	49	15	0	0	0
Upshur	214	104	73	37	107	40	67
Wayne	392	191	130	71	230	133	97
Webster	118	54	47	17	68	46	22
Wetzel	152	66	56	30	0	0	0
Wirt	84	30	42	12	11	5	6
Wood	1,206	330	708	168	59	40	19
Wyoming	388	135	225	28	122	45	77
Total	**20,510**	**7,216**	**9,358**	**3,412**	**6,081**	**2,724**	**3,357**

Family Courts
2019 Domestic Case Filings

	Total	Divorce	Domestic Violence	Other Domestic Relations	Total	Contempt	Modification
Barbour	218	89	100	29	71	27	44
Berkeley	1,320	527	374	419	530	250	280
Boone	345	131	151	63	144	75	69
Braxton	171	68	72	31	105	71	34
Brooke	268	87	95	86	54	31	23
Cabell	1,365	473	634	258	819	468	351
Calhoun	83	37	37	9	35	10	25
Clay	141	61	61	19	115	75	40
Doddridge	80	32	34	14	33	10	23
Fayette	577	239	188	150	397	211	186
Gilmer	99	51	39	9	1	0	1
Grant	166	57	80	29	118	59	59
Greenbrier	479	155	229	95	140	94	46
Hampshire	283	122	75	86	151	65	86
Hancock	307	106	102	99	31	7	24
Hardy	191	79	67	45	139	72	67
Harrison	857	325	376	156	350	140	210
Jackson	439	144	212	83	192	94	98
Jefferson	585	211	160	214	234	136	98
Kanawha	2,971	953	1,497	521	1,107	572	535
Lewis	225	95	73	57	87	47	40
Lincoln	357	121	184	52	249	90	159
Logan	767	208	481	78	243	99	144
Marion	650	227	306	117	241	130	111
Marshall	262	101	70	91	136	53	83
Mason	379	128	168	83	143	76	67
McDowell	281	121	101	59	79	27	52
Mercer	1,391	409	741	241	432	223	209
Mineral	327	135	122	70	263	146	117
Mingo	549	199	252	98	236	90	146
Monongalia	908	294	450	164	274	119	155
Monroe	181	37	0	144	56	37	19
Morgan	217	73	73	71	116	62	54
Nicholas	386	155	166	65	242	137	105
Ohio	387	119	172	96	104	60	44
Pendleton	70	31	26	13	44	27	17
Pleasants	84	33	33	18	5	3	2
Pocahontas	112	38	51	23	71	46	25
Preston	432	138	220	74	161	71	90
Putnam	713	282	321	110	227	118	109
Raleigh	1,185	431	590	164	615	335	280
Randolph	191	75	81	35	151	64	87
Ritchie	152	43	80	29	6	0	6
Roane*	152	78	40	34	0	0	0
Summers	148	68	48	32	87	39	48
Taylor	183	89	64	30	67	27	40
Tucker	66	31	27	8	19	10	9
Tyler	126	44	58	24	32	15	17
Upshur	313	146	98	69	148	69	79
Wayne	460	229	144	87	331	166	165
Webster	121	62	39	20	111	79	32
Wetzel	164	59	58	47	59	20	39
Wirt	100	33	55	12	49	29	20
Wood	1,510	423	787	300	210	129	81
Wyoming	452	162	243	47	205	103	102
Total	**24,767**	**8,864**	**11,005**	**5,077**	**10,265**	**5,213**	**5,052**

Family Courts
2018 Domestic Case Filings

	Total	Divorce	Domestic Violence	Other Domestic Relations	Total	Contempt	Modification
Barbour	195	82	77	36	104	51	53
Berkeley	1,172	520	356	296	574	273	301
Boone	390	150	168	72	196	93	103
Braxton	166	82	54	30	58	20	38
Brooke	223	82	78	63	29	15	14
Cabell	1,378	471	674	233	1,047	580	467
Calhoun	103	50	34	19	11	2	9
Clay	179	75	80	24	108	63	45
Doddridge	101	40	42	19	38	16	22
Fayette	625	244	225	156	387	192	195
Gilmer	81	40	28	13			
Grant	150	52	60	38	131	58	73
Greenbrier	569	200	248	121	169	107	62
Hampshire	277	117	60	100	126	57	69
Hancock	296	86	119	91	34	14	20
Hardy	199	76	81	42	139	60	79
Harrison	863	307	396	160	353	146	207
Jackson	434	171	191	72	209	119	90
Jefferson	579	206	216	157	234	120	114
Kanawha	3,315	969	1,827	519	1,217	610	607
Lewis	208	102	61	45	113	47	66
Lincoln	371	154	156	61	308	140	168
Logan	996	288	615	93	215	78	137
Marion	632	255	258	119	233	151	82
Marshall	236	99	57	80	99	46	53
Mason	405	154	176	75	161	83	78
McDowell	329	120	120	89	126	50	76
Mercer	1,327	397	676	254	480	270	210
Mineral	351	129	118	104	169	69	100
Mingo	642	224	291	127	295	104	191
Monongalia	917	301	466	150	296	106	190
Monroe	174	53	90	31	39	28	11
Morgan	211	91	58	62	86	39	47
Nicholas	406	164	169	73	237	129	108
Ohio	401	127	157	117	234	161	73
Pendleton	95	48	27	20	57	29	28
Pleasants	100	40	45	15	18	12	6
Pocahontas	129	41	66	22	73	48	25
Preston	480	161	230	89	191	89	102
Putnam	681	301	270	110	197	97	100
Raleigh	1,079	420	532	127	417	221	196
Randolph	322	137	126	59	139	60	79
Ritchie	155	63	72	20	12	8	4
Roane	207	113	48	46	4	1	3
Summers	152	60	61	31	62	23	39
Taylor	186	78	87	21	68	27	41
Tucker	76	27	41	8	36	17	19
Tyler	96	44	38	14	31	9	22
Upshur	324	128	120	76	92	36	56
Wayne	485	253	141	91	376	188	188
Webster	138	61	52	25	97	69	28
Wetzel	197	81	73	43	50	16	34
Wirt	101	38	48	15	37	22	15
Wood	1,601	464	807	330	280	167	113
Wyoming	378	138	195	45	183	72	111
Total	25,883	9,374	11,561	4,948	10,675	5,308	5,367

Family Case Law Update

Honorable Patricia Keller
6th Family Court Circuit

July 2021
WV State Bar

2020 Family Court Stats

- 20,510 new cases filed in Family Court – *17% decrease from 2019 cases filed.*
- Another 6,081 modifications and contempt proceedings in reopened cases.
- 806 guardianship cases filed in FC – *18% were removed to CC as "overlap" cases.*
- FCJs performed 469 weddings.

Summary of Domestic Appeals Filed in CC

FY2020

- 425 appeals filed.
- 69 appeals refused.
- 40 remanded back to FC.
- Average age of disposal 62 days.
- Most frequent subjects:
  - Domestic Violence (22%)
  - Child Support (16%)
  - Custodial Allocation & Decision-Making (16%).

Family Law Appellate Decisions

July 1, 2019 – June 30, 2021

21 Signed Opinions

40 Memorandum Decisions

JUDICIAL ATHORITY

Aaron v. Montgomery

State ex rel. St. Clair v. Howard

Rector v. Ross et al.

*Darnell P. v. Elizabeth P.**

Aaron W. v. Montgomery

03/12/21 (Kanawha Co.)

- Does a FCJ have the authority to disqualify an attorney appearing before him?
- Yes. Statutory authority granted to FCs to manage their own dockets clearly encompasses making decisions regarding the qualification of attorneys appearing before such courts.
- New Syl. Pt.

Aaron W. v. Montgomery

03/12/21 (Kanawha Co.)

Upon motion of a party, a family court, by its express authority under West Virginia Code section 51-2A-7(a) (eff. 2013), may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as to clearly call in question the fair or efficient administration of justice. Syl. Pt. 4.

State ex rel. St. Clair v. Howard

03/26/21 (Cabell Co.)

- If the CC accepts jurisdiction of a divorce pursuant to WV Code §51-2A-2(b) and a party subsequently seeks to contest the divorce or agreement, is the CC divested of jurisdiction?
- No. Available remedies: vacate prior orders and dismiss; take testimony/evidence to resolve contested issues; transfer to FC to resolve contested issues. Remedy within discretion of the CC.
- Two new Syl. Pts.

State ex rel. St. Clair v. Howard

03/26/21 (Cabell Co.)

A circuit court, having once accepted jurisdiction of an action for divorce pursuant to West Virginia Code §51-2A-2(b) (Supp. 2020), is not divested of jurisdiction where one or both parties subsequently seek to contest the divorce and/or the property settlement agreement. **Syl. Pt. 9.**

Where a circuit court has accepted jurisdiction of a divorce case pursuant to West Virginia Code §51-2A-2(b) (Supp. 2020) and one or both parties subsequently seek to contest the divorce and/or the property settlement agreement, the court may vacate any prior orders and dismiss the action from its docket; proceed to take testimony and/or evidence necessary to resolve the contested issues; or transfer the case to the family court for resolution of the contested issues. Which of these remedies is elected by the court is a matter within its sound discretion, based on the facts and circumstances of the particular case, and the court's decision will not be disturbed on appeal other than on a finding of abuse of discretion. **Syl. Pt. 12.**

Rector v. Ross et al.

06/10/21 (Harrison Co.)

- Convoluted procedural history spanning several proceedings.
- Was the monetary fine imposed on husband's attorney a contempt sanction, or was it made pursuant to the CCJ's inherent authority?
- A review of the record clearly shows it was a contempt sanction and as such he was entitled to a jury trial on the monetary sanction, per *In re Frieda Q.*

Rector v. Ross et al.

06/10/21 (Harrison Co.)

- If contempt proceedings are stayed pending appeal, does the FC have jurisdiction to address the contempt once the appeal has been resolved?
- Yes. The stay was in place as long as the case was pending appeal; once dismissed, FC had jurisdiction to address the contempt issues.

Darnell P. v. Elizabeth P.

06/23/21 (Mercer Co.) Mem Dec

- Wife has no witness for her fault ground and both parties have inadequate financial statements.
- May the FCJ continue the matter on own motion, over the objection of husband who wants divorce dismissed?
- Yes. Rule 19(c) RPPFC for good cause.

Paternity

Corey D. v. Travis R.

Michael N. v. Brandy M.

*S.U. v. C.J.**

Corey D. v. Travis R.

06/02/21 (Upshur Co.)

- In a paternity action to establish support, can the FC disregard undisputed DNA results that show a statistical probability of paternity of more than 98%, and enter an order that legally establishes another man as the father of the child?
- No. Clearly violates WV Code §48-24-103; allows a defacto adoption by one man and termination of parental rights of another. Beyond jurisdiction of FC.
- New Syl. Pt.

Corey D. v. Travis R.

06/02/21 (Upshur Co.)

In accordance with the provisions of West Virginia Code §48-24-103 (2015), undisputed blood or tissue test results that show a statistical probability of paternity of more than ninety-eight percent are conclusive on the issue of paternity, and the court shall enter an order legally establishing the man as the father of the child. Syl. Pt. 2.

Michael N. v. Brandy M.

06/17/20 (Randolph Co.)

- May a putative father raise the issue of paternity if the child was born during a valid marriage between a woman and another man, and mother & husband oppose?
- Yes. Expands *State ex rel. Roy Allen S. v. Stone* (allows when clear & convincing evidence he has formed a substantial parent-child relationship) if actively trying and through no fault of his own, but the obstructive actions of another he is unable to form this relationship.
- 3-2 Decision (Dissents filed by J. Armstead & J. Hutchison)

S.U. v. C.J.

11/04/19 (Mason Co.) Mem Dec

- Parties have children through nontraditional means.
- Is there a rebuttable presumption that a woman who gives birth to a child is the child's mother?
- Yes. WV Code §16-5-10(e). Must have credible evidence to support mother is just gestational surrogate.

Custodial Allocation, Decision-Making

Benton B. v. Cassidy T.

Heather M. v. Richard R.

Benton B. v. Cassidy T.

03/23/20 (Jackson Co.)

- Can you overcome the presumption of shared decision-making?
- Yes. WV Code §48-9-207(b) to overcome presumption, there must be: (1) "a history of domestic abuse," or (2) "a showing that joint allocation … is not in the child's best interest."
- Shared decision-making not appropriate when evidence the parties disagree on significant life decisions for the child and do not have room to compromise.

Heather M. v. Richard R.

11/20/19 (Kanawha Co.)

- When supervised visitation requested, must the FCJ investigate or at least take evidence?
- Yes. When credible information or parent requests, WV Code §48-9-209 requires the FC to determine if a parent who would be allocated responsibility under a PP has abused, neglected or abandoned a child.
- Is the employed non-custodial parent entitled to claim the dependent child tax exemption if the custodial parent is unemployed?
- No. WV Code §48-13-801 gives presumption to custodial parent. Three circumstances may be rebutted; but not in this case.

Child Support

Amanda B. v. Hakeem M.

Hassan G. v. Tamra P.

*John T. v. Angel T.**

*In re A. W.**

*Frederick W. v. Mary F.**

Amanda B. v. Hakeem M.

03/26/21 (Berkeley Co.)

- In calculating child support, is the obligor parent entitled to a credit for social security disability benefits paid directly to the custodian of the dependent children?
- Only if the benefits paid to the children are because of the obligor's disability. WV Code §48-13-603(a).
- New Syl. Pt.

Amanda B. v. Hakeem M.

03/26/21 (Berkeley Co.)

Social security benefits paid directly to the child as a result of the obligor's disability entitle only the disabled obligor to the statutory adjustment or credit set forth in West Virginia Code §48-13-603(a) (2015). Syl. Pt. 4.

Hassan G. v. Tamra P.

11/26/20 (Kanawha Co.)

- When obligor parent has a long history of failure to pay full child support obligation, and has accrued significant arrears, may the FC use the unclean hands doctrine to exclude consideration of other factors (i.e. oblige had significant increase in income and two of the children no longer reside with her) to modify child support?
- No. Abuse of discretion not to consider obligee's increased income in calculating child support. Parties have changed to a split custody arrangement that provides for an offset of child support which must also be considered.

John T. v. Angel T.

06/25/20 (Hancock Co.) Mem Dec

- WV assumed jurisdiction of a child support order. In WV circumstances allow support to extend to age 20; the originating state only until 19.
- Is continuing support potentially until age 20 permissible?
- Yes. Since originating state allows post-secondary expenses to be paid as incident to child support.

In re A.W.

12/20/19 (Mineral Co.) Mem Dec

- Does failure to timely notify parent of medical bills bar later attempts to recover expenses?
- No. Nothing in the order indicates father is to be relieved if mother did not comply with the time frames.

Frederick W. v. Mary F.

01/20/21 (Taylor Co.) Mem Dec

- When only limited income information is provided, can the FC extrapolate income for child support purposes?
- Yes. Despite repeated warnings about the requirement to produce income records, father only submitted on quarter's worth of earnings. FC ok to multiply by four to get yearly income.

Relocation

Stacey J. v. Henry A.

*Nathan H. v. Ashley R.**

Stacey J. v. Henry A.

03/26/20 (Mercer Co.)

- If neither parent exercises a majority of custodial responsibility, or the relocation is not for a legitimate purpose, will the court allow relocation?
- If relocation is in the child's best interests. FC to conduct thorough analysis of the relevant statutory factors. WV Code §48-9-102; §48-9-403.
- 4-1 decision; Walker dissent.

Nathan H. v. Ashley R.

06/10/20 (Kanawha Co.) Mem Dec

- Does the CC have jurisdiction to hear a relocation case?
- No. Even though mother filed notice of relocation while their family court case was on appeal, there is no dual or concurrent jurisdiction.

UCCJEA

In re Z.H.

In re Z.H.

06/11/21 (Mercer Co.)

- Abuse and neglect case, as opposed to family court proceeding.
- If out of state parent gives birth to drug exposed child in WV hospital, does that make WV the child's home state per UCCJEA?
- No. Decision reviews four ways for a court to have subject matter jurisdiction under the UCCJEA.
- 4-1 decision; Walker dissent.

In re Z.H.

06/11/21 (Mercer Co.)

All courts must be watchful for jurisdictional issues arising under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), West Virginia Code §§48-20-101 to -404 (2001). Even if not raised by a party, if there is any question regarding a lack of subject matter jurisdiction under the UCCJEA then the court should sua sponte address the issue as early in the proceeding as possible. **Syl. Pt. 5.**

When determining whether a court has home state subject matter jurisdiction over the custody of a child who is less than six months old, West Virginia Code §§ 48-20-102(g) (2001) and 48-20-201(a)(1) (2001) direct the court to consider where the child lived from the child's birth to the commencement of the proceeding in which custody is at issue. Events prior to birth, and the child's living arrangements after the commencement of the proceeding, are not relevant to the determination of whether the court has home state subject matter jurisdiction. **Syl. Pt. 7.**

In re Z.H.

06/11/21 (Mercer Co.)

A newborn child's hospital stay incident to birth is insufficient to confer home state subject matter jurisdiction pursuant to West Virginia Code §§ 48-20-102(g) (2001) and 48-20-201(a)(1) (2001). **Syl. Pt. 8.**

One of the requirements under West Virginia Code § 48-20-201(a)(3) (2001) for a court to obtain subject matter jurisdiction over an initial child custody determination where another state has either home state jurisdiction or significant connection jurisdiction, is that a court of the other state must decline to exercise jurisdiction. This requirement is not satisfied by evidence that some other person or entity in the other state has declined jurisdiction. **Syl. Pt. 9.**

Grandparent Visitation

In re Grandparent Visitation of L.M., et al.

Megan S. v. Terry S.

In re Grandparent Visitation of L.M., et al.

06/08/21 (Nicholas Co.)

- FC orders therapeutic reunification schedule aimed at establishing visitation with paternal grandparents over the objection of a fit parent.
- Underscores need for FC to address all thirteen factors listed in WV Code §48-10-502 and attempts to define and quantify the "special weight" that a fit parent's preference is to be given.
- 3-2 Decision; Jenkins & Hutchison dissent; Wooten separate concurrence.

Meagan S. v. Terry S.

11/19/19 (Cabell Co.)

- Grandparent visitation awarded over the objection of a fit parent. FC court considered GAL report. Did not have an evidentiary hearing, take testimony or stipulations in the case.
- When a fit parent objects to grandparent visitation, what analysis is to be conducted by the FC?
- FC must consider the thirteen factors in WV Code §48-10-502, and address the special weight to a fit parent's decision.

Guardianship

M.H. v. C.H.

A.A. v. S.H.

David C. v. Tammy S.

Terrence E. v. Christopher R.

M.H. v. C.H.

11/20/19 (Kanawha Co.)

- Does the FC have jurisdiction to consider a minor guardianship petition when the petition contains various allegations of abuse and neglect?
- No. Though FC and CC both have jurisdiction in guardianship matters, the FC's jurisdiction is subject to the removal provisions in Rule 13, RPPMGP.

A.A. v. S.H.

11/22/19 (Mingo Co.)

- Does the FC have subject matter jurisdiction to hear a petition to modify/terminate guardianship when it is opposed do to concerns of parental neglect and abandonment?
- NO. FC guardianship granted over the natural parent's objection based on substantial allegations of abuse and neglect does not provide a permanent solution for child custody such that it obviates the need for an abuse and neglect petition.

David C. v. Tammy S.

03/12/21 (Kanawha Co.)

- FC hearing between mother and grandmother to terminate guardianship.
- Father, without proper notice of the proceeding or copy of the GAL report, attends hearing to request visits. FC denied termination of guardianship and sua sponte modified the order denying father contact, based on info in GAL report.
- Father denied fair hearing.

Terrence E. v. Christopher R.

04/06/20 (Cabell Co.)

- Must a fit parent demonstrate a material change in circumstances to terminate a temporary guardianship?
- No. Father only had to show the justification for a temporary guardianship no longer exists by demonstrating either no "immediate need exists" or no "period of transition into the custody of a parent is needed"

Adoption

In Re Adoption of J.S. and K.S.

Murrell B. v. Clarence R.

In re Adoption of J.S. and K.S.

05/15/21 (Webster Co.)

- In granting adoption, can CCJ restrict adoptive parent's right to make decisions for his/her child?
- No. When granting an adoption, court finds it to be in the best interests of the child. Presumption fit parent acts in the best interests of their child.
- New Syl. Pt.

In re Adoption of J.S. and K.S.

05/15/21 (Webster Co.)

Unless otherwise permitted by law, where a circuit court grants a petition for adoption of a child pursuant to the procedures set forth in West Virginia Code §§48-22-701 to -704 (2015), the court may not include any provision in the final order of adoption that would limit, restrict, or otherwise interfere with the adoptive parent's right to make decisions concerning the care, custody, and control of the child. Syl. Pt. 5.

Murrell B. v. Clarence R.

11/18/19 (Boone Co.)

- Petitioners were the child's guardians in a FC case; later becoming adoptive parents. Non-relatives had visitation in the guardianship case; which continued informally following adoption. Parties had a falling out and visitation denied.
- If you formed a psychological relationship with child prior to adoption, can that be the basis to establish post-adoption visitation with the child?
- No. The adoption divested them of any visitation they may have had prior to the adoption. The adoption order did not state visitation was to continue after the adoption.

Agreements

Murrell B. v. Clarence R.

11/18/19 (Boone Co.)

An "agreement" for purposes of West Virginia Code §48-22-704(e) (2015) is a mutual manifestation of assent by the adoptive parent(s) and a third party as to visitation or communication with the adopted child that is either stated in full in the final adoption order or explicitly referenced in that order and made an exhibit to it. All parties to the agreement must endorse the final adoption order and any agreement incorporated by reference. Syl. Pt. 5.

Spousal Support

Campbell v. Campbell

*Heather H. v. Shane H.**

*Curtis J. v. Laura J.**

Campbell v. Campbell

02/24/20 (Kanawha Co.)

- Late in career husband had inflated earnings; parties divorce and spousal support set. When his employment contract ends, he retires. Spousal support now exceeds monthly income. Grounds for modification?
- Yes. A payor spouse must have the ability to pay the award. It is a change in circumstances when current assets not sufficient to pay the spousal support ordered.

Heather H. v. Shane H.

06/17/20 (Kanawha Co.) Mem Dec

- FC awards permanent spousal support, three times amount wife requested (and she only requested for five years.). CC reversed, finding wife's needs could be met by the child support obligation.
- FC amount was excessive, but not proper to deny entirely and expect her financial needs to be met by children's support award.
- Workman (concur/dissent) makes pitch for spousal support formula for greater uniformity.

Curtis J. v. Laura J.

04/20/21 (Berkeley Co.) Mem Dec

- Husband wanted the most valuable marital assets: the marital home, accrued annual leave and Ameritrade account. As a result, monthly his expenses exceeded his net income.
- Can you minimize "available income" to pay spousal support by taking the majority of the marital assets (and related debt)?
- No. Inequitable to utilize debts willingly assumed as a basis for arguing he was unable to pay spousal support.

Equitable Distribution

Raymond H. v. Cammie H.

*Kovach v. Kovach**

*Richardson v. Richardson**

*Roberts v. Roberts**

Raymond H. v. Cammie H.

11/19/19 (Mercer Co.)

- Spouse conveys security interest in separate real property by deed of trust and fails to give notice to spouse per WV Code §43-1-2. Parties divorce within five years of conveyance.
- Statute ambiguous and case of first impression. FC and CC disagree on how to determine value to include in equitable distribution.
- New Syl. Pt.

Raymond H. v. Cammie H.

11/19/19 (Mercer Co.)

Under West Virginia Code §43-1-2, where a spouse conveys a security interest in his or her separate real property by deed of trust and fails to give notice of the conveyance to the non-title holding spouse within thirty days of the transaction, then in the event of a subsequent divorce within five years of the conveyance, said separate real property shall be deemed a part of the conveyancer's marital property for purposes of determining equitable distribution or awards of support, and assigned a value equal to its fair market value, net of debt, at the time of the conveyance. **Syl. Pt. 3.**

Kovach v. Kovach

11/04/19 (Monongalia Co.) Mem Dec

- Divorce order required husband to make payments to wife for forty-eight months to satisfy equitable distribution. Wife files contempt; FC grants judgment and sets payment schedule.
- Must FC credit husband for non-required payments that he made on wife's behalf to third parties?
- No. OK for FC to just enforce order; not required to make decisions regarding alleged side agreements.

Richardson v. Richardson

12/07/20 (Braxton Co.) Mem Dec

- To encourage marriage, husband agrees to transfer title of his separate home into both their names. Three years later, transfers his remaining interest to wife. Was it because of his looming IRS debt or because wife caught him cheating?
- FC finds transfer was not an irrevocable gift, but rather joint decision by parties to avoid tax liability.

Roberts v. Roberts

05/20/21 (Greenbrier Co.) Mem Dec

- Parties' marital home was deeded to husband by his father during the marriage. According to deed, $105,000 paid to father as consideration. At time of divorce, husband claims no money really exchanged.
- Is the marital home separate property?
- No. In signing document, father declared he had received money. Plus, another transfer he made to son earlier listed no compensation having been paid.

Domestic Violence

*J.C. v. J.M.**

*Anthony L. v. Shelbi P.**

J.C. v. J.M.

05/20/21 (Richie Co.) Mem Dec

- Hot mess of a family dispute. Niece asked to leave and does not. Things escalate and uncle very belligerent. Law enforcement called and witnessed some of the events. Uncle arrested. Niece granted a DVPO against the aunt.
- Niece never testified she feared for her safety. She was only afraid family members might be hit by aunt's car, and she just wanted aunt to leave her alone.
- DVPO reversed. Instructions to purge order from law enforcement files and seal any court files with order.

Anthony L. v. Shelbi P.

01/13/20 (Harrison Co.) Mem Dec

- Girlfriend alleged boyfriend sexually assaulted her and files for DVPO.
- FC conducts hearing, finds she told him "no" and "please stop" multiple times and makes no finding to contradict lack of consent, but still denies DVPO.
- Abuse of discretion for FC not to realize 'no means no" in this state.

Appellate Practice

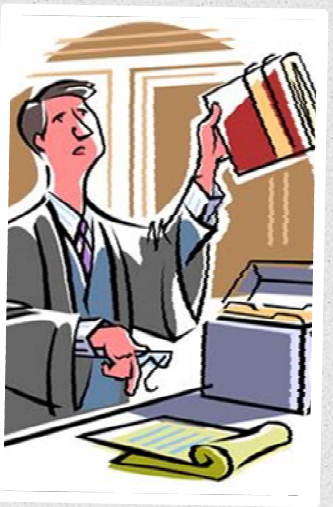
*Ethan B. v. Tracy W.**

*Mulugera v. Misailidis**

*Kevin D. v. Beth G.**

*Vladimirov v. Vladimirov**

*Stacy J. v. Christapher H.**



Ethan B. v. Tracy W.

11/02/20 (Lewis Co.) Mem Dec

- Father requested and was granted a ten-day extension to file appeal of FC decision.
- On the last day, instead of filing appeal in clerk's office, he dropped it in the mail, so it arrived late.
- Does mailing extend your time period to appeal?
- No. Mailing does not equate to filing under the FC rules.

Mulugera v. Misailidis

01/13/20 (Berkeley Co.) Mem Dec

- Appeal filed and CCJ issues order directing wife to file a copy of the hearing DVD within twenty-one days. Two weeks after order, but one week before due, counsel requests copy of the DVD from FC office.
- CCJ did not receive the DVD on Friday due date, so dismissed appeal on Monday. Wednesday counsel provides DVD with a motion to reconsider dismissal. Denied.
- Reversed and remanded; drastic sanction not appropriate.

Kevin D. v. Beth G.

05/26/20 (Kanawha Co.) Mem Dec

Vladimirov v. Vladimirov

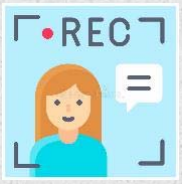
01/13/20 (Kanawha Co.) Mem Dec

"...Judges are not like pigs, hunting for truffles buried in briefs."

- Court declines to address appeals that do not cite to the record and make vague arguments not supported by factual or legal authority.

Stacy J. v. Christapher H.

02/02/21 (Putnam Co.) Mem Dec



- Wife appeals equitable distribution award but fails to provide a transcript or recording of the FC hearing.
- Inadequate record to review.

FAMILY LAW UPDATE

(Fall Term 2019 – Spring Term 2021)

WV State Bar Family Law Webinar
July 21, 2021

Honorable Patricia Keller
6th Family Court Circuit

JUDICIAL AUTHORITY

1. **Aaron W. v. Montgomery**, 244 W. Va. 583, 855 S.E.2d 891; March 12, 2021; (No. 20-0126); Kanawha County.

Issue: Does a FCJ have the authority to disqualify an attorney appearing before him?

Background: Husband, represented by counsel, files for divorce; wife is pro se. Husband's attorney previously represented husband and wife in a personal injury action – husband injured in auto accident and wife claimed loss of consortium. Near, but prior to conclusion of divorce, husband's attorney obtained waiver of wife's claim for loss of consortium, as not likely to result in recovery. Wife dismissed from the civil suit and husband reaches a confidential settlement, which is not disclosed to the wife. At FC hearing on equitable distribution of property, wife testified she waived any claim to his civil suit. Final order did not include his settlement proceeds and neither party appealed.

Wife obtains counsel who alleges attorney had a conflict; files motion to disqualify and to modify the equitable distribution in final order. Husband files writ of prohibition in CC to prevent FC from hearing or ruling on the motion, claiming FC lacked jurisdictional authority to decide matters pertaining to the disqualification of attorneys. CC denied the requested writ of prohibition.

Ruling: The statutory authority granted to FC to manage their own dockets clearly encompasses making decisions regarding the qualification of attorneys appearing before such courts.

New Syllabus Point: Upon motion of a party, a family court, by its express authority under West Virginia Code section 51-2A-7(a) (eff. 2013), may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as to clearly call in question the fair or efficient administration of justice. Syl. Pt. 4.

AFFIRMED

2. **State ex rel. St. Clair v. Howard**, ___ W. Va. ____; 856 S.E.2d 638; 2021 WL 1153099; March 26, 2021; (No. 20-0442); Cabell County.

Issue: Once a CC accepts jurisdiction of a divorce pursuant to WV Code §51-2A-2(b), if a party subsequently seeks to contest the divorce or agreement is the CC divested of jurisdiction? If the CC retains jurisdiction, may it transfer the case to FC?

Background: The parties' divorce action was filed in CC pursuant to WV Code §51-2A-2(b). There were no parenting issues and a signed property settlement agreement was filed with husband's petition, wife's answer, and skeletal financial statements. The disclosures had nothing but names, addresses, birth dates, ages, and phone numbers, followed by a hand-written notation (by husband) that both parties waive formal disclosure of assets and liabilities per separation agreement. Husband, a lawyer, drafted all the documents, picked the forum, and did not notify wife when the divorce was filed or granted. Answer signed by wife contained language accepting service of the petition and waiving formal service of process. Wife, who did not work outside the home during the marriage, was a self-represented litigant who clearly did not want to divorce and believed that husband was open to the possibility of reconciliation. Without conducting a hearing, the CC entered its final order, which was prepared by the husband and signed by both parties. Wife was unaware for several weeks that the CC had entered a final order without a hearing or notice to her.

One year later, wife files a motion to vacate and set aside the final divorce order. She had retained counsel and only recently learned the potential value of the marital estate. (Husband has an interest in several real estate companies that allegedly generated more than five million dollars in income during their six-year marriage; he contends separate property.) Husband has already remarried. CC conducted a hearing on the Rule 60(b) motion and issued an order granting the motion in part and transferring the case to FC. CC held that wife failed to prove she lacked capacity to enter into the settlement agreement or to waive her rights to certain property; that she failed to prove she executed the settlement agreement under duress; and that she failed to prove she was prevented from obtaining financial information after the divorce had been entered. But the CC found she was entitled to the relief sought. Wife's expressed desire not to proceed with the divorce implicitly included disavowal of the terms set forth in the separation agreement. For justice to be served, the portion of the order approving and adopting the separation agreement must be vacated. CC transferred case to FC – better equipped to determine the equitable distribution of property and spousal support. FCJ directed the parties' counsel to participate in a final settlement conference. Husband filed petition for writ of prohibition.

Ruling: Granting wife Rule 60(b) relief within the CC's discretion and no clear legal error meriting extraordinary relief because: (1) parties did not exchange any financial information (settlement agreement does not excuse parties from statutory obligation because only upon full financial disclosure can the circuit court determine if the separation agreement was fair and reasonable); (2) the CC did not hold a hearing (without a hearing, the court could not determine if the agreement was inequitable); (3) circumstances of the parties should have raised a red flag (prudent for the court to make some inquiry to determine that the terms of the agreement were equitable and the wife freely agreed); and (4) the amount in controversy is substantial. Dismissal of the action and requiring the parties to file a new action in FC and begin again was not a viable option under the facts of this case, because husband

had remarried. Dismissal of the case would make his new marriage voidable, possibly exposing him to a charge of bigamy and causing harm to an innocent third party. While the CC could take evidence and determine property and support matters, the decision to remand the case to FC was well within its sound discretion and therefore not in excess of jurisdiction.

New Syllabus Points: A circuit court, having once accepted jurisdiction of an action for divorce pursuant to West Virginia Code §51-2A-2(b) (Supp. 2020), is not divested of jurisdiction where one or both parties subsequently seek to contest the divorce and/or the property settlement agreement. Syl. Pt. 9.

Where a circuit court has accepted jurisdiction of a divorce case pursuant to West Virginia Code §51-2A-2(b) (Supp. 2020) and one or both parties subsequently seek to contest the divorce and/or the property settlement agreement, the court may vacate any prior orders and dismiss the action from its docket; proceed to take testimony and/or evidence necessary to resolve the contested issues; or transfer the case to the family court for resolution of the contested issues. Which of these remedies is elected by the court is a matter within its sound discretion, based on the facts and circumstances of the particular case, and the court's decision will not be disturbed on appeal other than on a finding of abuse of discretion. Syl. Pt. 12.

WRIT DENIED

3. **Rector v. Ross et al.**, ___ W. Va. ___, ___ S.E.2d ___; 2021 WL 2374376; June 10, 2021; (No. 19-1037); Harrison County.

Issue: Was the monetary fine imposed on husband's attorney a contempt sanction, or was it made pursuant to the CC's inherent authority? Did the FC have jurisdiction to address contempt matters after appeal dismissed?

Background: Wife went to a bar to find husband and when he exited the bar laughing with a female, wife got into husband's truck, pulled his pistol out, and emptied the gun in his direction. He was seriously injured. Convoluted procedural history spanning several proceedings. There were three actions total: (1) criminal prosecution of wife, wherein there was significant restitution ordered in favor of husband to be paid by wife; (2) personal injury case wherein there was a judgment against wife in favor of husband; and (3) the divorce, wherein there was a significant award to wife to effectuate equitable distribution.

FC enters a decree of divorce. Husband appeals to CC. He did not file a motion for stay in conjunction with appeal. Wife is incarcerated. Her GAL files a petition for contempt because husband failed to provide wife's family her separate property, in violation of divorce order. FCJ issued a rule to show cause and scheduled a hearing. CC affirmed divorce order. Husband then files motion for stay in CC, though he had not yet filed for appeal to the SC. FC held a hearing on the wife's contempt (only involving her separate property and no issues that had been on appeal), but time on docket ran out before matter concluded. FC set hearing to resume/conclude contempt matter the following day. After the FC contempt hearing Part I, but before Part II, the CC granted husband's request for a stay of proceedings. Copy of order was sent to FCJ but did not specifically address the pending contempt

proceeding in FC, nor did it address the wife's separate property. Husband and attorney do not appear for FC contempt hearing Part II. FC reschedules contempt hearing and husband files a motion with CC to enforce the previous stay. CC enters order granting motion to enforce stay and clarifying the order that the FC contempt hearing was also stayed. CC made no finding FC violated prior stay order due to its lack of clarity. Two months later, the parties enter into a settlement and husband files motion with the SC to dismiss his appeal, which was granted. Thereafter, FC entered an order and issued a rule to show cause and setting a hearing. The rule was against husband and his attorney for failure to appear at the FC contempt hearing Part II.

Husband files a complaint and then an amended complaint asserting the FC is without jurisdiction to schedule and/or hold any hearing regarding the non-appearance of the plaintiff and/or his counsel at the contempt hearing Part II. Husband's amended complaint sought a writ of prohibition from the CC to prohibit FC from holding this hearing. CC then ordered husband to serve FCJ with the amended complaint; the FCJ to respond within thirty days after receiving service; and husband's attorney to prepare an order. Two months later, at the next hearing, CC learns FCJ never served; attorney never prepared order; and neither husband nor his attorney appeared for the CC hearing. CC issued an order scheduling further hearing and issuing a rule to show cause. Order directed husband's attorney to appear and show cause why he should not be held in contempt. CC held the show cause hearing directed toward husband's counsel to show cause why he should not be held in contempt for failing to serve the FCJ, prepare the directed order, and not appearing at the last hearing. In addition, the CCJ recited concerns with this attorney from seven additional cases. Ultimately, the CCJ entered an order directing husband's attorney to pay a $5,000 penalty to the circuit clerk by a date certain. Husband's attorney unsuccessfully filed motions to alter or amend the penalty. CC made several inquiries as to whether it had been paid; eventually informing counsel that $50 would be added each day it went unpaid. This was characterized as a civil contempt penalty. The CC denied another motion to alter/amend the amount and entered an order stating the penalty was imposed pursuant to its inherent authority to regulate judicial proceedings. This appeal is the result of a hearing conducted two months later. At that time, the CC granted a judgment against husband's attorney for $6,500 and dismissed the writ of prohibition husband sought to prevent the FC from proceeding with the contempt proceeding.

Ruling: A review of the record shows the monetary sanction was imposed as a contempt sanction. The rule to show cause specifically says it is to determine if he should be held in contempt. CCJ also told him that at beginning of hearing. After recounting the attorney's problematic conduct, the CCJ said he was imposing a monetary sanction based on misconduct. Over a year later, CCJ issued an order to clarify the sanction was issued pursuant to the Court's inherent authority. But that does not change the fact that this was a criminal contempt because it was entered to punish counsel for his misconduct and the amount of the fine was a determined amount payable to the State or the court. Under the Court's holding *In re Frieda Q.*, 230 W. Va. 652, 742 S.E.2d 68, counsel was entitled to a jury trial on the monetary sanction. (In footnote, Court states this opinion should not be read to suggest that a CC lacks inherent authority to sanction an attorney under appropriate circumstances.)

As for the writ of prohibition against the FCJ, it was properly dismissed. FC proceedings were stayed pending appeal. The FC took no further action until after this Court dismissed husband's appeal.

According to the CC order, the stay in this matter was in place as long as the case was pending appeal. The FC had jurisdiction to address contempt issues once the petition for appeal was dismissed.

AFFIRMED, IN PART, REVERSED, IN PART, AND REMANDED WITH DIRECTIONS

Hutchison, joined by Wooten, concurring in part, and dissenting in part: Concur with decision to dismiss writ of prohibition against FCJ. However, disagree the monetary fine was a contempt sanction warranting a jury trial. Instead believed the CC properly exercised its inherent authority to impose a sanction.

4. **Darnell P. v. Elizabeth P.**, Not Reported in S.E.2d, 2021 WL 2577513; W. Va. June 23, 2021; (No. 20-0462); Mercer County.

Issue: When a final hearing cannot forward because the parties are not prepared, can the FCJ continue the hearing, on its own motion, over the objection of a party who seeks dismissal instead?

Background: Wife filed for divorce alleging both irreconcilable differences and cruel and inhuman treatment. She also filed a financial statement. Husband filed an answer denying irreconcilable differences. He also filed a financial statement. At the final hearing, both parties told the FCJ they were prepared to proceed to final hearing. But the FCJ found it necessary to continue the hearing for two reasons: (1) husband denied irreconcilable differences, so wife would need a witness to her fault ground; and (2) the failure of each of the parties to file an adequate financial statement, as this marriage has acquired property and debts and has substantial assets that will be divided. Husband objected, arguing the case was not proven and should be dismissed. FC rejected argument; dismissing case would only delay matters. At the follow-up hearing, the parties had reached an agreement on equitable distribution and wife had a corroborating witness for fault ground. FC granted the divorce and awarded wife permanent spousal support. Husband appeals, arguing the FC should have dismissed case when wife did not have a witness and should not have continued hearing. CC affirms.

Ruling: CC found FC had good cause, pursuant to Rule 19(c) of the RPPFC, to continue the final hearing. Both parties were unprepared for the initial final hearing because financial statements inadequate to address their financial issues. Rule 19(c) allows the court to continue the hearing on its own motion for good cause; continuance no more than ninety days and must state the specific grounds for the continuance. The FC did not abuse its discretion in continuing hearing.

AFFIRMED

PATERNITY/MATERNITY

5. **Corey D. v. Travis R.**, ____ W. Va. ____, ____ S.E.2d ____; 2021 WL 2217486; June 2, 2021; (No. 20-0020); Upshur County.

Issue: In making a paternity determination, may the FC disregard genetic testing showing a statistical probability of paternity?

Background: Mother and Travis R. were involved in a long-term, on-again/off-again relationship, but never married. During one of their separations in 2011, mother filed for custodial allocation and support for their then three children. She also became pregnant, and in August 2012, D.H. was born. No father was listed on the child's birth certificate. They later reconciled and had a fourth child together, but permanently separated in July 2018. D.H. is the only child subject to this appeal. In 2018, two cases were filed involving D.H. First, Travis R. filed a petition to be adjudicated the psychological parent of the child (rather than his legal father). In addition, BCSE filed a separate paternity action seeking to have Corey D. adjudicated the child's biological father to obtain an order setting child support. (Mother had completed an application for services with BCSE and named Corey D. as the child's biological father). Genetic testing showed a 99.99% probability that Corey D. was the child's biological father.

At the FC hearing, Corey D. testified he knew the child could have been his and that mother asked him to sign a birth certificate when the child was three months old. He never signed the document, but said he wanted to be recognized and act as the child's father. However, the situation and behavior of one of the parties made him afraid to be involved. FC requested all parties do a drug test and Corey D. refused to do so. The GAL report noted failed attempts to reach Corey D. and that he had a couple of misdemeanors. The GAL recommended no contact between child and Corey D. Other than GAL's testimony, no evidence was introduced regarding the child's best interests. Travis R. moved to be adjudicated the child's legal father. The FC considered the testimony of the parties, the GAL report, and the seven year relationship between the child and Travis R. In the spirit of *Michael K.T.*, the family court adjudicated Travis R. the child's father. Both Corey D. and BCSE appealed the decision. The CC refused the appeal and found the FC did not abuse its discretion when it refused to consider the paternity test evidence.

Ruling: WV law allows paternity to be established in three ways: (1) when a child is born during a marriage, the presumption that the husband is the father; (2) if the mother is not married, mother and putative father may sign an affidavit acknowledging paternity; and (3) a paternity action is filed and determined by a court. In this case, undisputed DNA test results show a statistical probability of 99.99% that Corey D. is the child's father. By expressly refusing to give weight to the DNA test results, the FC and CC were in direct contravention of WV Code §48-24-103(a)(3). *Michael K.T.* is readily distinguishable from the facts in the instant case. This case does not involve either a child conceived or born during a marriage, or an alleged father seeking to disprove paternity. The lower courts' reliance on *Michael K.T.* was wholly misguided. The failure to apply the clear directives of WV Code §48-24-

103(a)(3) and declare Corey D. the legal father of the child based upon the genetic evidence was clear error.

Refusing to apply the paternity statutory scheme resulted in allowing a de facto adoption by Travis R. and termination of the parental rights of Corey D. without affording all the affected parties the statutory notices and procedural safeguards required of both adoption and abuse and neglect proceedings. Furthermore, the FC was acting beyond its jurisdiction, as jurisdiction for both adoption and abuse and neglect proceedings lie in CC, not FC.

On remand, the CC should decide, upon relevant evidence presented in a hearing, whether Travis R. is the child's psychological parent and, if so, what effect that determination has in the case. Any custody or visitation decision regarding the child must be guided by a determination of the child's best interests.

New Syllabus Point: In accordance with the provisions of West Virginia Code §48-24-103 (2015), undisputed blood or tissue test results that show a statistical probability of paternity of more than ninety-eight percent are conclusive on the issue of paternity, and the court shall enter an order legally establishing the man as the father of the child. Syl. Pt. 2.

VACATED AND REMANDED WITH DIRECTIONS

6. **Michael N. v. Brandy M.**, 243 W. Va. 415, 844 S.E.2d 450; June 17, 2020; (No. 18-0780); Randolph County.

Issue: When may a person, claiming to be the biological father of a child raise, the issue of paternity if the child was born during a valid marriage between the mother and another man?

Background: Child was conceived and born during a marriage. Putative father filed a petition to seek genetic testing to establish paternity and potentially allocate custodial responsibility. Mother and husband opposed. On various occasions during the marriage, the parties separated, and mother stayed with family in Arkansas. Mother and putative father engaged in an intimate and sexual relationship. She gave birth to a child in WV. On at least two occasions mother and child again traveled to Arkansas and putative father spent time with child. During those periods, putative father performed significant caretaking duties and assumed financial responsibility for child. When back in WV, mother also kept him advised regarding child. Mother gave birth to a second child. This time, without telling putative father. After birth of second child, mother refused further contact with putative father in Arkansas, causing him to file a petition to establish paternity.

FC appointed a GAL and conducted an evidentiary hearing. FC found his relationship with mother credible. Furthermore, he grasps the opportunity to establish a parent/child relationship when the mother was not interfering. He would have continued to share in parenting, if mother had not interfered. FC found *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 474 S.E.2d 554 (1996) inapplicable due to mother's rejection of putative father's attempt to create a parent-child relationship. When FC ordered genetic testing, mother and husband filed writ of prohibition. CC granted writ and prohibited the enforcement of FC genetic testing order, finding putative father lacked standing to initiate paternity action and remanded to FC. On remand, the FC reluctantly entered an

order dismissing the petition for genetic testing. But made findings on why this case embodied special circumstances to justify an exception to *Stone*. Putative father appeals.

Ruling: In the *Stone* case, the Court held a putative biological father to have constitutionally protected liberty interest in a child born to a married woman who is not his wife, if he is able to demonstrate by clear and convincing evidence that he has formed a substantial parent-child relationship with the child at issue. The Court expanded the ruling in this case, stating there are certain circumstances that may exist that do not allow a putative biological father to form this substantial relationship with the child. Particularly where he is actively attempting to do so, and through no fault of his own, but rather through obstructive actions on the part of another (including the child's mother) he is unable to create the relationship generally required to obtain the liberty interest. Following a full hearing, the FC found those circumstances existed. Therefore, he should have been permitted a paternity test.

REVERSED AND REMANDED WITH DIRECTIONS

Armstead Dissent: Court exceeded its authority by essentially rewriting the statute. Putative father was extended a right not contemplated by the statute. Instead of striking down the statute as unconstitutional and requiring the legislature to correct, the Court wrote its own solution.

Hutchison Dissent: The majority has failed to adequately consider the very real harm that the decision to allow a paternity test could inflict on the lives of these children. Given the social policy issues involved, additional exceptions to the statute should be created by the Legislature, and not the Court.

7. **S.U. v. C.J.**, Not Reported in S.E.2d, 2019 WL 5692550; W. Va. November 4, 2019; (No. 18-0566); Mason County.

Issue: Is there a rebuttable presumption that a woman who gives birth to a child is the child's mother?

Background: Parties never married but had a twelve-year relationship that resulted in four children. Mother gave birth to all four children. Their birth certificates list father as their legal father and mother as their legal mother. The children were conceived in nonconventional ways. The parties attempted to have children through sexual intercourse but were unsuccessful. Father was listed as a female on his birth certificate and testified that he was not a binary male or female at birth, although he has always considered himself to be male. Before the parties met, father underwent surgeries to correct unspecified "anomalies" and had his eggs harvested and stored. Father was also granted permission to change the name on his birth certificate to his current name.

The first child was conceived when father, a registered nurse, performed an intrauterine insemination of mother at home. At the time, mother believed father was the sperm donor for this procedure. However, he did not, and apparently could not, provide the sperm. The second child, as well as the later born twins, were conceived when mother went through IVF at the CNY Fertility Clinic in NY. The embryos used in the IVF procedure were from father's harvested eggs and the sperm of an anonymous donor. At the time, mother believed it was from father's sperm and an anonymous egg donor. Mother has no genetic connection to the three youngest children. During her last pregnancy with the twins, the parties' relationship deteriorated. Father served mother with an eviction notice when she was

hospitalized with complications from the pregnancy. Once the twins were born, she never returned to father's home. He was unsuccessful in keeping her name from being placed on their birth certificate. Father contends they entered into a formal custodial agreement that he would provide her with a biological child, which they would share. After that child was born, she would act as a gestational surrogate for father's child, and he would have full rights and custody to any resulting child. Father offered a photocopy of this agreement (supposedly he couldn't find the original). Father said the original agreement had been signed and notarized. He offered no witness to its execution and mother denied that she signed it.

FC hearing involved a GAL as well as an expert who evaluated both parents and the oldest two children. The FC also heard from several medical providers, educators, and other professions familiar with the family. The children were closely bonded to mother, their primary caregiver. Father was abusive, including at times in the presence of the children. FC determined mother was the psychological parent of the children and designated her primary residential parent. Father appealed and CC refused his petition for appeal.

Ruling: Father failed to submit competent evidence to overcome the presumption set forth in WV Code WV Code §16-5-10(e) that the woman who gives birth to the child is presumed to be the child's mother. It was unnecessary for the FC to conduct a psychological-parent analysis when mother is the legal mother of all four children. After the FC found no credible evidence to support father's contention mother was nothing more than a gestational surrogate to the youngest three children, it was a straight-forward case of custodial allocation of the children and their legal parents.

AFFIRMED

CUSTODIAL ALLOCATION/DECISION-MAKING AUTHORITY

8. **Benton B. v. Cassidy T.**, 242 W. Va. 683, 839 S.E.2d 498; March 23, 2020; (No. 18-0569); Jackson County.

Issue: What is required to overcome the presumption of shared decision-making between parents?

Background: Unmarried parents separated when child was two years of age. Father sought allocation of custodial time and decision-making responsibility, as well as child and medical support. On a temporary basis, FC granted equal shared parenting time on a rotating two-week schedule and shared decision-making responsibility. At the final hearing, father sought sole decision-making responsibility pertaining to medical and educational issues.

Father cites three unresolvable issues: (1) whether the child should be home schooled, (2) whether the child should be immunized, and (3) whether the child suffered from certain food allergies. Father wanted the child to receive immunizations, wanted the child to receive a public education, and sought an order permitting "each parent to provide the child food that the parent exercising parenting time

considers appropriate" while precluding mother "from telling the child that he is allergic to any food or substance which is not medically verified." Father presented an expert witness in the field of immunizations and disease control and prevention. She opined that it was better to get vaccinations than not. Paternal grandmother testified that mother reported the child had allergies to certain foods and eating them would cause him to act out. Grandmother gave him many of those foods and never witnessed a problem. Believed mother unreasonable since she had never had the child tested. According to father, mother's list of foods continued to grow. Testing did not support mother's position; unbeknownst to father, she had child tested several more times. Mother did not want to immunize child. First related to a confrontation with her mother, and later because she did some research and feared possible vaccine related reactions and did not want to do further immunizations.

FC ordered joint decision-making; even if father's allegations were true, they do not overcome the presumption set forth in WV Code §48-9-207(b) that the allocation should be shared equally by both parents. Father appeals joint decision-making issue only; CC affirms.

Ruling: WV Code §48-9-207(b) specifically provides that to overcome the presumption for shared decision-making responsibility there must be (1) "a history of domestic abuse," or (2) "a showing that joint allocation . . . is not in the child's best interest." Since the lower court found no history of domestic abuse, the court should have performed a best interest analysis. Though the order stated that joint allocation was in the child's best interests, the final order lacked specific findings regarding the child's best interests. From the evidence one could conclude the parties disagree on significant life decisions involving the child and do not have room to compromise. The record fails to show how the evidence justifies awarding share decision-making. Remand with instructions to appoint GAL and to hold a hearing within thirty days to allocate decision-making responsibility in accordance with the child's best interests.

REVERSED AND REMANDED

9. **Heather M. v. Richard R.**, 242 W. Va. 464, 836 S.E.2d 431; November 20, 2019; (No. 18-1077); Kanawha County.

Issue: (1) When one parent makes a request to place limitations on the other parent's custodial time alleging abuse or neglect of the children, is the FC required to undertake an investigation, or at least take some evidence on the issue? (2) Is the employed non-custodial parent entitled to claim the dependent child tax exemption when the primary custodial parent is unemployed?

Background: The parties had two children; they lived together, but never married. Mother filed petition to allocate custodial responsibility. At one point, she asked father to return to their joint home. She wanted them to attend therapy sessions, because he had a lot of anger issues toward her and the children. When he declined to do so, she proceeded with the custodial allocation case. In her proposed parenting plan, mother sought to limit father's time, stating he had been verbally and physically abusive; he screamed and hit both girls; the oldest fears him and the youngest does sometimes.

At the temporary hearing, the FCJ determined that father was not such a bad guy, because mother had offered to let him return home. Her supervision request was denied, and she was precluded from

presenting further testimony on the issue. Mother retained counsel for the final hearing. Counsel reminded the FC they needed to address the matter of supervision. In addition, one of the children suffered from anxiety issues and the child's pediatrician had been subpoenaed to testify by phone. Before further evidence could be presented, father reminded the court that mother had one time asked him to return to the home. The FCJ stated, "If she asked him to come home, she doesn't get to sit here and say how mean and abusive he is." The FCJ did not allow mother or her counsel to address the issue. Nor would the FCJ allow testimony from the child's pediatrician. The FC granted the parties shared decision-making, made mother primary residential parent, and gave father unsupervised parenting time every Sunday from 9:00 – 5:00.

The second issue involved the child tax exemption requested by mother. The FCJ foreclosed evidence on the tax matter, saying she would probably not allocate to mother due to how much child support father was paying. But, if mother were to obtain employment, she would allocate the exemption so each parent could claim one child. When counsel advised the FC that under WV Code §48-13-801, preference for allocation of the credit is forgiven to the custodial parent, the FCJ responded, "I understand. And I have discretion to do it otherwise. And, based upon that, she's not working. And she's getting a thousand dollars a month in child support." The FC granted the income tax exemptions for both children to father. Mother appealed; CC denied without addressing any of the underlying assignments of error.

Ruling: The FC abused its discretion in refusing mother's repeated attempts to introduce evidence relevant to the allegations of abuse. WV Code §48-9-209 addresses placing limitations on a parent's custodial time. "If either of the parents so requests, or upon a receipt of credible information thereof, the court shall determine whether a parent who would otherwise be allocated responsibility under a parenting plan: (1) Has abused, neglected or abandoned a child, as defined by state law[.]" Based on the plain language of the statute, the FC was required to undertake such an investigation, and that investigation inherently required the taking of at least some evidence. The refusal to take any evidence was an abuse of discretion.

The FC erred in awarding the dependent child tax exemption to father. WV Code §48-13-801 presumes the exemption is awarded to the custodial parent. While the presumption may be rebutted, it was not rebutted at the hearing. The presumption can be rebutted in cases of: (1) extended shared parenting; (2) showing the credit is of no benefit to the custodial parent; or (3) showing that the custodial parent's income and child support would be greater if non-custodial parent was awarded the credits. In this case, the first two do not apply. (With changes in the tax code, the right to claim the dependent child tax exemption directly controls who receives the additional child tax credit. Even though mother not working, claiming the children would permit her to recoup the full refundable amount of the additional child tax credit.) In this case, the parties failed to submit updated financial records that would allow the Court to determine whether the third exception would be applicable.

REVERSED AND REMANDED WITH INSTRUCTIONS

10. **John W. v. Rechelle**, Not Reported in S.E.2d, 2020 WL 201223; W. Va. January 13, 2020; (No. 19-0202); Kanawha County.

Issue: Is a fifty/fifty parenting plan in the best interests of a very young child?

Background: The parties were married for less than one year when they divorced. Wife was pregnant and child was born after the divorce. FC entered an interim parenting schedule. Mother was designated the primary residential parent and father would have parenting time every other Saturday generally synchronized with the child's two half-siblings from father's prior marriage. Mother had relocated to live with her mother and the visits would occur in that general area. A later revised interim order expanded father's time somewhat and provided for some visits to occur in the county where father resides. For the final hearing, the parties each had an expert psychologist regarding whether overnight visits were appropriate. Father's psychologist generally agreed with mother's psychologist, that overnights away from the primary attachment figure during such a young age could potentially be disruptive to the child's emotional and psychological well-being. FC ultimately decided overnights should begin when child was approximately twenty-two months of age and provided for an expanding schedule. Father appealed and CC affirmed.

Ruling: Father wanted equal shared parenting time, but the evidence did not demonstrate that such an arrangement was in the child's best interests at this time. The key focus in determining the appropriate parenting schedule in this case was the child's tender age, stage of development, and mother's primary role as attachment figure. Phasing-in overnights properly considered the best interests of the child.

AFFIRMED AND REMANDED WITH DIRECTIONS

Directions: On remand, Court requested a corrected order be entered. Although the FC's interim order provided the father's weekend parenting schedule with the child be generally synchronized to the parenting schedule he enjoys with the half-siblings, the final order is silent in this regard. According to mother's brief, the omission is harmless error as they have been doing so and interpreted the order to require. Notwithstanding the parties' present willingness, the Court believes it is prudent to require a corrected order to expressly include this provision.

11. **Warren H. v. Kimberly S.**, Not Reported in S.E.2d, 2019 WL 6998680; W. Va. December 20, 2019; (No. 18-0750); Fayette County.

Issue: Father appeals the acceptance/entry of an agreed joint parenting plan.

Background: Brief year marriage ended in an irreconcilable differences divorce. Parties had a four-year-old child together and submitted a joint comprehensive parenting plan. Each appeared at the final hearing with counsel and testified the parenting plan was entered into knowingly and voluntarily and that the parenting plan promotes the best interests of the child. FC adopts their parenting plan. Father then appeals, saying parts of the parenting plan were unfair to him and he did not have adequate legal representation. CC affirmed the FC, finding that the parties reached an agreement and the FC did not abuse its discretion by adopting it.

Ruling: Each party testified that he or she knowingly and voluntarily agreed, and it was in the best interests of the child. Determining credibility is the role of the trier of fact. The FC did not abuse its discretion by adopting the agreement.

AFFIRMED

12. **Jared M. v. Molly M.**, Not Reported in S.E.2d, 2020 WL 7233165; W. Va. December 7, 2020; (No. 19-0764); Monongalia County.

Issue: Order was insufficient to support its conclusion.

Background: Parties never married; had one child together who was born with several serious medical issues. Child is required to take numerous medications throughout the day to maintain her health. When she was less than two years of age, the parties separated, and father filed to establish custody and a parenting plan. Eventually the parties agreed to a 70/30 split, with mother being the primary residential parent. Father worked and provided financially for the child; mother stayed at home with her and handled doctor appointments. Three years later, father filed a petition to modify seeking a 50/50 parenting plan due to a change in circumstances, primarily improvement in daughter's health.

FC denied the motion, not a significant change in circumstances. In doing so, the FC included four specific findings in support of the decision. Mother had incurred attorney's fees of $32,819 and father incurred fees of $32,822. Mother sought an award of fees and FC found father should have known there was no substantial change in circumstances to modify the parenting plan and awarded mother $5,000. On appeal, the CC issued a brief order finding the FC's decision was not clearly wrong and cannot discern an abuse of discretion in the FC ruling. Therefore, it should be affirmed.

Ruling: The CC clearly neglected to provide sufficient findings and conclusions in support of its ultimate decision. Thus, it is insufficient as a matter of law and cannot be upheld. The appropriate remedy is to reverse and remand the case to the CC for an order containing detailed findings of fact and conclusions of law to support its ruling.

REVERSED & REMANDED

13. **Mark V.H. v. Delores J.M.**, Not Reported in S.E.2d, 2019 WL 4257183; W. Va. September 9, 2019; (No. 18-0230); Putnam County.

Issue: Extraordinary restrictions imposed on an exceptionally vexatious litigant.

Background: When parties divorced, mother granted sole custody and decision-making, due to father's documented personality disorder. He was awarded day visits every other Saturday and Sunday. Over time he returned to FC seeking more parenting time. His behaviors had not improved, they had become worse. As a result, in this most recent request to increase his parenting time, the FC instead suspended his parenting time with his son and imposed several conditions before he could again petition to modify the parenting time.

Ruling: Restrictions placed on the father by the FC are incidental to its primary and essential goal: protecting the best interests of the parties' son. The voluminous record in this case clearly shows that father has repeatedly demonstrated that he places his own need for conflict about the needs of his minor son. The record in this case presents a unique and exceptional remedy for an exceptionally vexatious litigant.

AFFIRMED

14., **Brian L. v. Heather E.**, Not Reported in S.E.2d, 2019 WL 4257300; W. Va. September 9, 2019; (No. 18-0752); Cabell County.

Issue: A modification of parenting plan must serve the best interests of the child.

Background: In 2014, FC continued in effect an ex parte order that father was to have no contact with the child while his outstanding action in Texas continues "since he is a flight risk with the child." He was also ordered to pay child support and attorney's fees. SC affirmed. *See Brian L.*, 2015 WL 6955142.

In present case, father petitioned to modify no contact with child order. Stated he had surrendered his Texas residency; Texas case had been dismissed; he had moved to WV where he enrolled his older child in school. Following a hearing, FC dismissed his petition. Although he demonstrated a possible change in circumstances [i.e., moving from Texas to WV, though evidence questionable], he presented no evidence that a modification of the current no contact order is in the child's best interest or promotes the child's best interest. The father has not had contact with his son for several years, even though he had a right to bring his petition to modify at a much earlier date, after the dismissal of his Texas case. Father chose not to do so and this passage of time and reintroduction into the child's life is a significant event that needs to be taken into consideration. Father's appeal was affirmed by the CC.

Ruling: FC did not abuse its discretion. Father failed to present evidence demonstrating that modification would serve the child's best interests. Evidence also supports the FC's finding that father remains a flight risk.

AFFIRMED

CHILD SUPPORT

15. **Amanda B. v. Hakeem M.**, ___ W. Va. ____; 856 S.E.2d 657; 2021 WL 1153153; March 26, 2021; (No. 20-0335); Berkeley County.

Issue: Is a non-disabled child support obligor entitled to an adjustment or credit for "social security benefits sent directly to the child" on behalf of a disabled obligee?

Background: Parties have fifteen-year-old twins. At time of divorce, mother received custody and father was ordered to pay child support. Two years later, FC granted an agreed modification of the custodial arrangement, based upon the children's wishes to live primarily with their father. This prompted a need to change the child support modification. The parties had similar gross monthly income, and each had another dependent child in their household. Father's income included both social security and veteran's disability benefits. There was a social security benefit of $776, which was payable for the benefit of the children, due to father's disability. The FC calculated a child total support obligation of $1,568; father's share was $819, and mother's share was $749. After calculating support, the FC then offset mother's obligation with the $776 social security benefit based upon father's disability. The offset reduced mother's obligation to zero. Father appealed and CC found FC clearly erred in determining that mother owed no child support because of the credit FC gave her for the social security benefit credit arising from father's disability.

Ruling: WV Code §48-13-603(a) clearly provides that an adjustment or credit is given if a proportion of the obligor's social security benefit is paid directly to the custodian of his or her dependents who are the subject of the child support order. Mother is not entitled because she is a non-disabled obligor who is not receiving any social security benefits.

New Syllabus Point: Social security benefits paid directly to the child as a result of the obligor's disability entitle only the disabled obligor to the statutory adjustment or credit set forth in West Virginia Code §48-13-603(a) (2015). Syl. Pt. 4.

AFFIRMED

16. **Hassan G. v. Tamra P.**, 244 W. Va. 337, 853 S.E.2d 577; November 26, 2020; (No. 19-0591); Kanawha County.

Issue: Does egregious contempt of child support obligation bar an obligor from modifying child support obligation when there is a significant change in circumstances?

Background: The parties are the parents of three minor children. When the parties were divorced, wife had income from a day care business that she owned; father represented that he was unemployed and had no income. Following an evidentiary hearing, the FC determined that father worked full-time in a business owned by his parents, had "loans" he was not required to repay from his family, and the family business provided him with food, housing, a vehicle, clothing, a vacation and the use of credit cards. Furthermore, he had voluntarily separated himself from ownership of a car wash business with sales of $12,000 per month. The FC attributed income to father of $19,000 per month, when calculating his child support obligation. Father appealed, unsuccessfully. *See Hassan G. v. Tamra P.*, No. 101328 (W. Va. Apr. 1, 2011) (memorandum decision).

Parties have returned to FC several times. Father has repeatedly asserted, unsuccessfully, that he is not financially able to pay $2,890.46 per month. His failure to pay, or fully pay, his monthly child support has resulted in his incarceration for contempt on multiple occasions; he has had to obtain money from friends and family to purge the contempt. As of May 2018, he owed more than $250,000 in principal and interest on his child support arrearages.

Father filed a petition to modify both child support and the parenting plan, again asserting the attributed income was much higher than his actual earnings, the two oldest children now reside with him or his parents, and the mother has had a significant increase in income. FC found father works for his parents and earns more income than he testified to, has been held in contempt multiple times for failing to pay child support, concluded he came to court requesting a modification of child support with unclean hands, and as a result the petition was denied. The FC made no finding on the alleged substantial increase in mother's income and refused to re-calculate support based on two of the three children having moved out of mother's home. On appeal, the CC upheld the FC order.

Ruling: At the time of the original divorce, the FC determined what the father could earn, which was ultimately upheld on appeal. Father has failed to present any evidence to show that he is no longer physically or mentally capable or earning the same amount of income that he could earn in 2010. In fact, his employment situation is very similar. No abuse of discretion to continue to attribute said income. Information contained in the court file indicates that mother has had a significant increase in her income since child support was calculated. While the Court strongly disapproves of father's failure to pay his full support obligation, it was an abuse of discretion to apply the clean hands doctrine to exclude consideration of the mother's current income. Such a significant increase would make it unjust and inequitable to not take her income into account for purposes of calculating child support. The parties had adopted a split custody arrangement, based upon the preference of the two oldest teenagers. West Virginia Code §48-9-402(b)(3) (2020) recognizes the custodial preference of a child who is fourteen or older shall be accommodated if in the child's best interests, and §48-13-503 (2001) provides for an offset on child support when there is split custody. The lower court erred by refusing modify the parenting plan and child support order based on the change in residence of the two oldest children.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

17. **John T. v. Angel T.**, Not Reported in S.E.2d, 2020 WL 3469715; W. Va. June 25, 2020; (No. 19-0765); Hancock County.

Issue: Modifying out of state child support obligation.

Background: Parties divorced in SC, which awarded mother custody of the children and father was ordered to pay $1,163 in child support. Subsequently, mother and children moved to WV. Father, a chemist at a nuclear power facility in SC, was laid off and he moved to PA. Father filed petition to modify child support in WV, where the children lived. After discussing with SC family court, order was registered in WV and hearing held on his petition. Father relocated to find jobs. He was currently unemployed and had job offers rescinded after background checks disclosed his misdemeanor conviction for third-degree criminal domestic violence relating to the incident that precipitated the parties' divorce. The family court found there was a substantial change of circumstances and reduced child support to zero for one year, and then attributed income comparable to mother's office job, to become effective thereafter. Father appeals. Circuit court finds his arguments confusing and unclear. He failed to demonstrate that any of the court's findings and/or rulings were erroneous or outside of the discretion afforded the family court.

Ruling: Concurs with circuit court that arguments are confusing and unclear. In his fifth assignment of error, father contends family court cannot extend child support for a period longer than allowed by originating state's law. SC law ordinarily terminates child support at the end of the school year after the child reaches nineteen years of age. The WV order allowed child support to continue until twenty years of age. Court determined allowing support to potentially continue until twenty years of age does not violate SC law per *McLeod v. Starnes*,723 S.E.2d 198 (S.C. 2012) which allows post-secondary expenses to be paid as an incident to child support in certain cases.

AFFIRMED

18. **In re A.W.**, Not Reported in S.E.2d, 2019 WL 6998315; W. Va. December 20, 2019; (No. 17-1143); Mineral County.

Issue: Does failure to timely notify parent of medical bills bar later attempts to recover expense?

Background: The parties were previously married. Wife had two children, husband was the father of one and stepfather of the other. The parties were involved in an abuse and neglect proceeding. Custodial rights were returned to mother after the children had been temporarily removed from her care. Father's parental rights were terminated. He sexually assaulted his stepdaughter and his daughter resided in the same home. The CC awarded post-termination supervised visitation between father and daughter, which was reversed as there was an insufficient showing of a close emotional bond established between father and daughter. *In re [A.] W.*, 217 W.Va. 707, 712, 619 S.E.2d 220,225 (2005).

Upon termination of parental rights in 2005, case was remanded to FC for a determination of the amount of father's child support obligation. FC set child support and required father to provide medical insurance for child. Five years later the order was modified; support was reduced, mother now maintained insurance, and method for sharing/paying medical bills was included in the order. Approximately three months later, child was adopted by mother's new husband. BCSE was not notified of the adoption and did not learn of it until November 2016. Wage withholding was stopped, and father filed petition to terminate his support. Based upon BCSE proffer, there was an overpayment of $14,777.64. Father tried to initiate wage withholding from mother to recoup overpayment. CC found father had failed to pay half of uncovered medical bills and was given credit in child support formula for health insurance that he was not paying. Mother was given an offsetting credit and father awarded a judgement for $7,962.64. Father appeals.

Ruling: Father argues failure to timely notify him of uncovered medical bills should relieve him of obligation. Nothing in the order indicates father is to be relieved if mother did not comply with the time frames. Father challenges uncovered medical expenses as credible, since mother did not provide relevant bills and invoices. Appellate court cannot weight credibility of witnesses or weigh evidence – exclusive function of the trier of fact.

AFFIRMED

19. **Frederick W. v. Mary F.**, Not Reported in S.E.2d, 2021 WL 195105; W. Va. January 20, 2021; (No. 19-1083); Taylor County.

Issue: When only limited income information provided, can FC extrapolate income for child support purposes?

Background: Husband is an over-the-road truck driver who drives nationwide. Wife stays at home and cares for their teenage daughter who has autism. Divorce was granted in 2015. FCJ at the time denied wife's request for spousal support but granted child support and attorney's fees. Husband given a flexible parenting schedule due to his unpredictable work schedule. Wife appeals and this Court remained because the record was incomplete – no recording of the morning session of their hearing. *Mary W. v. Frederick W.*, No. 16-0145. On remand, a new FCJ conducts hearing and issues a decision. Father appeals and CC denies.

Ruling: Several assignments of error not properly preserved or apparent from the record. Husband contends FC calculated his income incorrectly for child support purposes. Despite repeated warning about requirements and potential consequences, husband was not forthcoming or cooperative about producing income records. He submitted one quarter's worth of earnings and the FC multiplied it by four to determine his wages for an entire year. Given his failure to comply with discovery, cannot find clearly wrong. Husband challenges FC decision to impose strict requirements on his visitation with daughter. FC appropriate to do so when in the best interests of the child. He had a lack of stability and unconventional living and travel conditions at this time, so restrictions necessary to protect her. But FC left open the possibility to modify and expand his parenting time.

AFFIRMED

20. **Robert H. v. Jessica M.**, Not Reported in S.E.2d, 2020 WL 3469370; W. Va. June 25, 2020; (No. 19-0699); Berkeley County.

Issue: In determining child support arrears, does BCSE accounting overcome obligor's undocumented claim of payments made?

Background: The parties have two minor children. Father lives in WV, mother and children live in NY. BCSE files a motion for decretal judgment for past due child support payments against father. According to BCSE accounting, father owes $4,900.36. Father contends he was not credited for $2,274 in payments that he made from August 1, 2018 to January 31, 2019. He provided no accounting or credible evidence that BCSE balances were incorrect. FC grants judgment for $4,900.36. The CC denied father's appeal. While father claimed he made payments of $2,274, his claim was not supported by the record. FC did not commit error to credit BCSE's fully documented accounting over father's claim for an undocumented credit.

Ruling: Concur with the circuit court's findings.

AFFIRMED

21. **Jamison W. v. Jamie W.**, Not Reported in S.E.2d, 2019 WL 5856015; W. Va. November 8, 2019; (No. 18-0803); Kanawha County.

Issue: Retroactive application of child and spousal support order and request court conduct hearing on attorney's fees.

Background: In a post-divorce proceeding, the FC suspended the spousal support payments and significantly reduced the child support obligation. Father requested the modified orders be retroactive to the date of filing. FC found the decision to apply retroactively was within its discretion and orally denied the motion. Following the FCJ's suggestion, both parties mutually agreed to waive all child support. FC acknowledged that child support was a pressure point that instigated persistent litigation and that canceling might increase civility between the parties. FC also denied the parties' requests for attorney's fees. Husband appealed, which was denied by CC.

Ruling: Rule 23 of the WVRPPFC provides that except for good cause shown, orders granting relief in the form of spousal support or child support shall make such relief retroactive to the date of service of the motion for relief. In this case, the FC set forth its reasonings and the CC determined the FC did not err or abuse its discretion. As to attorney's fees, the parties were essentially equal in terms of economic status. Nor did he disclose a schedule of fees incurred such that the FC could have determined whether the fees were reasonable. No abuse of discretion in denying attorney's fees.

AFFIRMED

22. **Donny B. v. BCSE**, Not Reported in S.E.2d, 2019 WL 5289949; W. Va. October 18, 2019; (No. 19-0149); Mercer County.

Issue: Does closing your child support case with BCSE terminate the child support obligation?

Background: In 2006, BCSE filed a petition to establish paternity and child support obligation. Paternity test established he was the father and he was ordered to pay support. Mother and child subsequently moved to Tennessee and she requested BCSE close her case in WV. BCSE closed case in October 2011. Six years later, BCSE receives request from Tennessee child support enforcement for certified copies of the 2006 WV paternity/child support order and a child support arrearage statement. Father moves to vacate order and invalidate accrued arrearages, arguing closure of the case terminated his obligation and arrears. BCSE provided report to FC and parties prior to hearing that his arrearage had not been zeroed out in any court proceeding or otherwise satisfied. FC rejected father's argument, but reduced arrears, finding those accrued prior to 2008 were barred by the ten-year statute of limitations. CC denied father's appeal.

Ruling: FC's authority to modify a child support order is prospective only. It is without authority to modify or cancel an accrued child support arrearage. Father did not provide any evidence to support his argument that the arrears had been previously cancelled. FC did not abuse its discretion in finding that father owed a child support arrearage.

AFFIRMED

23.**In re the Child of Cynthia B. and Stanley O.**, Not Reported in S.E.2d, 2019 WL 4391246; W. Va. September 13, 2019; (No. 18-0410); Kanawha County.

Issue: Served party refused to provide address to BCSE and court.

Background: Parties never married; BCSE attempts to establish paternity. Difficulty getting alleged father served. Numerous attempts to serve him; his mother claimed he did not live at her address and case eventually closed in 2000. Parties both moved out of state. Eleven years later, alleged father contacts child on Facebook to say he is her father but did not "friend" the child and she could not learn his address. Mother and child moved back to WV. For the next three years, BCSE tried to locate alleged father. USPS verified that he received mail at only one address, his mother's. Second paternity complaint filed and attempted service; mother said he does not live there and only stopped by occasionally to get his things. Despite various attempts, BCSE never found another address. In 2016 alleged father contacted BCSE and stated that his mother's address was his correct mailing address and was confused that BCSE was still seeking support for a child now over the age of 18. FC dismissed the action the following month, for lack of activity. BCSE worker contacted alleged father's mother, who again said he stopped by every couple of months to get his mail. That same day, he called the BCSE worker and said he had no physical or mailing address. He did go to the BCSE office to pick up a copy of the dismissed matter. He then accepted service in person at the BCSE office near his mother. He again refused to give his address or provide a copy of his Ohio driver's license. FC reinstated the action. Alleged father filed an answer, again failing to provide an address, and requested DNA testing. Mother and child tested; order for testing sent to his mother's address, not returned and he appeared for the testing.

Genetic test results showed 99.99% probability of paternity. Copy mailed to alleged father at his mother's address. USPS sent notice to BCSE that his mail was being forwarded from his mother's address to a PO box in Wheeling. Hearing set, notice to alleged father not returned. He did not appear for hearing. FC established paternity and set support reimbursement, retroactive to when he acknowledged paternity to child on Facebook. Father filed motion for reconsideration. FC denied. CC dismissed his appeal.

Ruling: On appeal, father concedes paternity and that he owes arrears in child support reimbursement but contends he did not receive notice of the hearing before the FC when his arrearages were assessed. There was overwhelming evidence indicating he actually received the notice of hearing. He continually refused to provide another mailing or residential address to BCSE. Considering his efforts to avoid service, the Court finds his arguments that he failed to receive notice of hearing before the FC untenable.

AFFIRMED

RELOCATION

24. **Stacey J. v. Henry A.**, 243 W. Va. 150, 842 S.E.2d 703; March 26, 2020; (No. 18-0987); Mercer County.

Issue: When neither parent exercises a majority of custodial responsibility or the relocation is not in for a legitimate purpose, the court must consider the best interests of the child, using the statutory factors.

Background: Parties have two children. When they divorced, the FC awarded joint legal custody and split time equally. Mother filed twice to modify the parenting plan. The first was due to father's changed work schedule; it was denied. The second was due to father's changed work schedule and abuse allegations against father and paternal grandfather. Before that case was heard, mother was terminated from her employment and filed notice of relocation with intent to move children to Myrtle Beach, SC. Mother, a certified CT technician, testified that her employment was terminated because she injected the wrong patient with dye. At a subsequent hearing she testified again and admitted that another reason she was fired from her job was because she "inappropriately accessed" the medical records of her current husband's ex-wife and child numerous times. Mother could not find work within her field in WV and she did not wish to pursue employment opportunities that would pay less. She received offers for employment in both Myrtle Beach, SC and Savannah, GA. She accepted the position in Myrtle Beach because her parents lived just two hours away and could assist with the children when needed. GAL testified about the children's close bond to their mother and their clearly expressed desire to live with her. The FC denied mother's motion to relocate the children, designated father as the primary residential parent, and adjusted child support accordingly. CC affirmed and denied mother's appeal.

Ruling: When neither parent has been exercising a majority of custodial responsibility, or where the parent seeking to relocate is not doing so for a legitimate purpose, the court must modify the parenting plan according to the child's best interests. WV Code §48-9-403(d). Multiple factors to consider when making a decision that serves a child's best interests. WV Code §48-9-102. FC order gives no indication these factors were considered. The only factor considered by the FC was that father would be more likely to support a consistent relationship between the children and the other parent. However, that conclusion is not supported by the record. FC's order contains insufficient findings of fact and conclusions of law to support its determination. The FC failed to perform an adequate analysis because it did not consider all the relevant factors. Without a thorough analysis of the relevant factors, the merits of the argument cannot be determined.

REVERSED AND REMANDED WITH DIRECTIONS

Walker Dissent: Although the court did not explicitly state that it was undertaking a best interest analysis, it considered all the relevant best interest factors. The lower court was not wrong to disregard the testimony of the GAL, who took contradictory stances throughout these proceedings. The children were not of an age to nominate their guardian.

25. **Nathan H. v. Ashley R.**, Not Reported in S.E.2d, 2020 WL 3078526; W. Va. June 10, 2020; (No. 19-0122); Kanawha County.

Issue: Does the CC have original jurisdiction to hear a relocation case?

Background: Parties have one child. At the time of their divorce, they had a fifty-fifty custodial split. Later mother relocated, still within WV, and they entered an agreed order modifying their arrangement; mom would now have approximately 65% and dad 35%. Mother filed another notice of relocation, to move from Raleigh County to Greenbrier County. She had accepted employment at the Greenbrier Clinic increasing her salary from $60,000 a year to $120,000 a year. Following a hearing, FC denied her request. Though a legitimate purpose, not in good faith, inferring that mother was trying to get child support increased. (In an ancillary matter, child support had been reduced and afterward mother told father "there was a war.") Despite neither side putting on any real evidence of the effect of relocation on the child, the FC found the relocation was not in the best interests of the child. Sua sponte, the FC lowered child support paid by father by $200 per month to cover his new long-distance travel expenses. Mother appeals.

CC holds two hearings. Determines the FC's findings were clearly erroneous and abused its discretion in not allowing the move. CC also determined it was premature to have reduced child support without any evidence and remanded that issue back to FC. While the issue was still pending, mother remarries, her new husband is a physician and has acquired a position at a hospital in Virginia. Mother files another notice of relocation and a motion for the CC to retain jurisdiction. She indicated there was no change in the parenting plan of her prior relocation that the CC had approved and no impairment to father's custodial time. Father objected because CC does not have original jurisdiction. CC grants relocation over father's objection to exercising jurisdiction. Father appeals.

Ruling: The filing of a notice of relocation – which the mother filed in FC while the case was on appeal to the CC – did not give the CC the right to disregard the jurisdiction of the FC as set forth in WV Code §51-2A-2, as there is no dual or concurrent jurisdiction. Because the CC did not have jurisdiction to hear the second relocation case, we reverse and remand. Father also appeals the first relocation decision reversing the FC and permitting relocation to allow her employment at the Greenbrier Clinic. The CC did not err in determining the FC erred in denying the mother's relocation.

AFFIRMED, IN PART, REVERSED, IN PART, AND REMANDED WITH DIRECTIONS

26. **In re The Child of Steven C. and Melissa D.**, Not Reported in S.E.2d, 2019 WL 4391279; W. Va. September 13, 2019; (No. 18-0289); Lewis County.

Issue: FC evaluates stepfather's efforts to seek employment when determining good faith for relocation request.

Background: Parties divorce; mother designated primary residential parent and father given parenting time and ordered to pay support. Mother has 75% of custodial time. Both parents remarry and continue to reside in the same general area. Mother's husband, sole provider for her family, learns the

convenience store he manages is closing. He diligently looks for other employment in the geographical area. He was offered a similar store management position in Dillon, SC. Mother files notice of relocation. Same company had a position open in Myrtle Beach, SC and it was offered to the stepfather and he accepted. Father files objection to relocation. Mother, stepfather, and child relocate. FC appoints GAL and conducts hearing the following month. FC denied mother's request to relocate. FC determined it was for a legitimate purpose, however harder call on whether it was in good faith. In considering good faith, the family court looked to the dates surrounding stepfather's offer and the mother's filing of notice, deciding mother had made the decision to relocate before the written offer. Could have investigated comparable employment in the area more. FC found not in good faith and granted primary custody to the father, finding it in the child's best interests. Mother filed reconsideration and FC denied adding that failure to provide sixty days' notice lent itself to the conclusion that the move was not in good faith.

Mother appealed and CC reversed. Stepfather had put in more than a score of applications in WV and the surrounding area and received no responses. He searched for four weeks, not two. The statute does not require him to forego the only offer he receives and possible $10,000 raise until he meets a minimum number of weeks searching for a job. Further, the letter clearly states it was to confirm their offer of employment. So, she did not move prior to an offer being made. While the CC rebuked the mother for moving the child to SC before the matter of relocation had been resolved, it ultimately found that she met the criteria for relocation and her request was for a legitimate purpose, to a reasonable location, and made in good faith.

Ruling: FC erred in determining that stepfather's acceptance of employment in SC four weeks after losing his job demonstrates that the mother lacked good faith in requesting to relocate. Mother's request to relocate was for a legitimate purpose and made in good faith, the proposed location was reasonable in light of that purpose.

AFFIRMED

UCCJEA

27. **In re Z.H.**, ___ W. Va. ____; ___ S.E.2d _____; 2021 WL 2390207; June 11, 2021; (No. 20-0377); Mercer Co.

Issue: Determining home state (subject matter) jurisdiction for a newborn child under the UCCJEA. (Though this is an abuse and neglect case, it is similarly relevant to family court determinations of home state jurisdiction for newborn children.)

Background: Baby was born at the Bluefield Medical Center in Mercer County, WV. Mother used narcotics while pregnant and child was born drug exposed and required in-patient medical care. Mother cut off the hospital's infant security bracelet and attempted to remove the baby from the hospital but was stopped by hospital staff. DHHR assumed emergency legal custody. CC found probable cause to believe the child was in imminent danger of being deprived of medical care. DHHR

filed an abuse and neglect action because of mother's drug use during pregnancy and because of medical neglect based upon the attempt to remove the child from the hospital during treatment. The petition asserts the mother and putative father are residents of Tazwell County, VA; nonetheless, the CC has jurisdiction over this matter because WV is the home state of the child at the time of the commencement of this proceeding. The petition also reported mother and putative father were respondents in a prior child abuse and neglect case in Giles County, VA, in which their rights to another child were involuntarily terminated. It was based on drug use and the termination was finalized just two months before this baby was born. DHHR was granted emergency legal custody of the child; mother and putative father returned home to VA and baby remained hospitalized for several more weeks. After release from hospital, child place with foster parents in WV and has remained there throughout this proceeding. Ultimately the CC terminated mother's parental rights and she appealed.

Ruling: Mother did not challenge the CC's jurisdiction while this case was pending. It is being raised for the first time on appeal. Nonetheless, the UCCJEA is a jurisdictional statute, and the requirements of the statute must be met for a court to have the power to adjudicate child custody disputes. The Court emphasized that the issue should have been taken up at the beginning of the CC proceeding. Any decree made by a court lacking jurisdiction is void. Because of the vital importance of this issue to children, all courts must be watchful for jurisdictional issues arising under the UCCJEA, even if not raised by a party. Four ways for a court to have subject matter jurisdiction under the UCCJEA: (1) home state jurisdiction; (2) significant connection jurisdictions; (3) jurisdiction because of declination of jurisdiction; and (4) default jurisdiction.

In considering home state jurisdiction of a child less than six months of age, consider where the child lived from birth to the commencement of the action. Not events prior to birth while in utero or after the action was commenced. Time spent in a hospital incident to a child's birth does not constitute living with a parent or a person acting as a parent for purposes of conferring home state jurisdiction. So, in this case neither WV, nor VA, has home state jurisdiction. Next look to significant connection. Both WV and VA have evidence available concerning the child's care. However, only VA has a significant connection to the child's parents. VA is where his parents reside and where he was injured by mother's prenatal drug use. The next basis for jurisdiction is declination jurisdiction. A state having home state jurisdiction or significant connection jurisdiction could decline jurisdiction if it would be an inconvenient forum to hold the custody proceeding. Because there is no evidence that VA has declined to exercise jurisdiction, or was even contacted to inquire about a declination, WV does not have declination jurisdiction. Finally, default jurisdiction occurs if no state has jurisdiction under home state, significant connection, or declination. WV does not have default jurisdiction, because VA has significant connections.

New Syllabus Points: All courts must be watchful for jurisdictional issues arising under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), West Virginia Code §§48-20-101 to -404 (2001). Even if not raised by a party, if there is any question regarding a lack of subject matter jurisdiction under the UCCJEA then the court should sua sponte address the issue as early in the proceeding as possible. Syl. Pt. 5.

When determining whether a court has home state subject matter jurisdiction over the custody of a child who is less than six months old, West Virginia Code §§ 48-20-102(g) (2001) and 48-20-201(a)(1)

(2001) direct the court to consider where the child lived from the child's birth to the commencement of the proceeding in which custody is at issue. Events prior to birth, and the child's living arrangements after the commencement of the proceeding, are not relevant to the determination of whether the court has home state subject matter jurisdiction. Syl. Pt. 7.

A newborn child's hospital stay incident to birth is insufficient to confer home state subject matter jurisdiction pursuant to West Virginia Code §§ 48-20-102(g) (2001) and 48-20-201(a)(1) (2001). Syl. Pt. 8.

One of the requirements under West Virginia Code § 48-20-201(a)(3) (2001) for a court to obtain subject matter jurisdiction over an initial child custody determination where another state has either home state jurisdiction or significant connection jurisdiction, is that a court of the other state must decline to exercise jurisdiction. This requirement is not satisfied by evidence that some other person or entity in the other state has declined jurisdiction. Syl. Pt. 9.

VACATED AND REMANDED WITH INSTRUCTIONS

Walker Dissent: Disagrees that VA has significant connection jurisdiction over the abuse and neglect proceeding because child himself has no significant connections to VA. Instead, would find the CC properly exercised default jurisdiction.

GRANDPARENT VISITATION

28. **In re Grandparent Visitation of L.M., et al.**, ___ W. Va. ___, ___ S.E.2d ___; 2021 WL 2328148; June 8, 2021; (No. 20-0037); Nicholas County.

Issue: Ordering a therapeutic reunification schedule aimed at establishing visitation with paternal grandparents and children over the objection of a fit parent.

Background: Mother of six children appealed the CC order affirming the FC order which crafted a reunification plan with the goal of allowing grandparent visitation to the paternal grandparents. Terrible factual background. Parents were divorced and mother given custody and father awarded supervised parenting time. His parents were the supervisors. The maternal grandfather delivered the children to a parking lot for visitation exchange. Father and paternal grandfather arrived at the appointed time to exchange the children. During that exchange, and in the presence of all the children, the maternal grandfather drew a pistol and shot father, who died at the scene. Thereafter, the children witnessed the maternal grandfather turn the gun on himself and commit suicide.

One day prior to father's memorial service, paternal grandparents filed petition for grandparent visitation and sought an ex parte order requiring the children to attend father's memorial service. FC denied the ex parte relief, appointed a GAL for the children, and held a hearing wherein all therapists agreed that family unification (kids with paternal grandparents) was in order. The hearing was not

recorded due to technical problems. The FCJ offered to conduct another hearing, but neither party requested a new hearing. FC entered a substantial, highly detailed, and well-reasoned order establishing a reunification therapy plan requiring a reunification therapist to recommend to the FC whether to grant visitation to the paternal grandparents. In the order, the FC applied the thirteen factors enumerated in WV Code §48-10-502 regarding grandparent visitation and found that the mother is a fit parent as defined by applicable law, and gave special weight to her preference that no visitation be occur between paternal grandparents and children. Ultimately, the FC found that it was in the best interests of the children to establish a grandparent visitation schedule.

Mother objected and moved for reconsideration. FC heard testimony on the motion for reconsideration, where mother offered the testimony of the children's three therapists, who collectively opined that they no longer recommended grandparent visitation. The FC delayed the original grandparent visitation order to allow a structure phase-in but did not repeal the actual and eventual visitation order. Mother appeals to the CC and then to the SC.

Ruling: Mother failed to meet her burden to demonstrate error by specific recitations to the record, which the SC acknowledged did not exist. The decision attempts to define and quantify the "special weight" that the fit parent's preference was to be given in grandparent visitation cases. Also, a discussion of *Troxel* (US) and *Cathy L* (WV) visitation cases. The SC did underscore the need for all FCJs to address all the thirteen factors listed in WV Code §48-10-502.

AFFIRMED

Wooten Concurring: Takes issue with the two dissenting opinions, stating they do nothing more than denigrate the undeniable care with which the family court handled this most delicate matter and seek to substitute their own "better" judgment in a case they view strictly on a cold record, from arms-length.

Hutchison Dissent: The children's wishes and the recommendations of their therapists have been completely disregarded.

Jenkins Dissent: Contends the majority fails to meaningfully consider whether the lower courts' award of grandparent visitation satisfies the best interests of the six children.

29. **Meagan S. v. Terry S.**, 242 W. Va. 452, 836 S.E.2d 419; November 19, 2019; (No. 18-0764); Cabell County.

Issue: When a fit parent objects to grandparent visitation, what analysis is to be conducted by the family court in rendering a decision?

Background: Parents are divorced and when child is approximately four years of age, his father dies. Paternal grandparents file a petition seeking grandparent visitation, mother (a fit parent) objects, and FC appoints a GAL. Following an investigation, the GAL concluded that mother and grandparents did not agree on basic facts about their relationship, and recommend the grandparents receive limited visitation. The FC entered an order granting their petition. The FC order contains various findings.

However, the FC did not hold an evidentiary hearing, there was no testimony, nor did the parties offer any factual stipulations. The record in this case consists only of the GAL report, which indicated numerous factual disputes exist. Mother appealed to circuit court, requesting an opportunity for oral argument. CC denied her request, stating the record was sufficient to rule on the petition and affirmed the family court decision.

Ruling: The Court cannot properly assess arguments on appeal because the FC's order failed to set forth sufficient findings of fact or conclusions of law explaining its ruling. The FC order did not include any specific analysis addressing the thirteen factors set forth in West Virginia Code §48-10-502, nor did the FC address the special weight that is to be afforded a fit mother's decisions concerning the relationships to be enjoyed by her child. *See In re Grandparent Visitation of A.P.*, 231 W. Va. 38, 743 S.E.2d 346.

REVERSED AND REMANDED WITH DIRECTIONS

GUARDIANSHIP

30. **M.H. v. C.H.**, 242 W. Va. 307, 835 S.E.2d 171; November 20, 2019; (No. 18-0972); Kanawha County.

Issue: Does the FC have jurisdiction to consider a minor guardianship petition when the petition contains various allegations of abuse and neglect?

Background: Mother, a single parent, began a new job that required her to be at work by 7:00 am. She arranged with great-grandmother to drop off child at their house to catch the school bus; after school, great-grandmother would meet the child and babysit until mother got off work. Sometimes child stayed overnight so as not to get up early in the morning. On those evenings, mother would still pick up child for the evening and return to great-grandmother at bedtime.

Approximately three months into this arrangement, child says something at school that led to some sort of investigation by CPS. According to great-grandmother, CPS worker came to her home and advised her that CPS would seek to take the child, if child left great-grandmother's care. Mother was not contacted by CPS. Great-grandmother and mother signed a one sentence, notarized document giving great-grandmother temporary custody until further notice. Two months later, mother contacted CPS and told there had been a case, but it was now dropped. Mother asked great-grandmother to return child, but she was hesitant and ultimately refused. Great-grandmother filed a domestic violence petition on behalf of child, against mother's boyfriend. When that petition was dismissed, great-grandparents filed petition for guardianship and made various allegations of abuse and neglect. Instead of removing the case to CC, the FC held an emergency hearing and designated the great-grandparents as temporary guardians. The FC later held an evidentiary hearing and entered a final order designating the great-grandparents as guardians of the child. Mother appeals and CC affirmed.

Ruling: Mother makes serious constitutional arguments about the balance between the holdings in *Overfield v. Collins*, 199 W. Va. 27, 483 S.E.2d 27 (1996) and *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct.

2054, 147 L. Ed. 49 (2000) and to the standards set forth in W. Va. Code §44-10-3. But the initial concern, before reaching this inquiry, is whether the FC had jurisdiction to consider the minor guardianship petition. Though the FC and the CC both have jurisdiction in guardianship matters, the FC's jurisdiction is subject to the removal provisions in Rule 13 of the Rules of Practice and Procedure for Minor Guardianship Proceedings. The petition contained numerous allegations of abuse and neglect. FC erred by failing to immediately remove the great-grandparents' minor guardianship petition to the CC. The FC was without subject matter jurisdiction to take any other action on the petition.

VACATED AND REMANDED

31.**A.A. v. S.H.**, 242 W. Va. 523, 836 S.E.2d 490; November 22, 2019; (No. 1800804); Mingo County.

Issue: Does the FC have subject matter jurisdiction under Rule 48a(a) and Rule 13 to hear a petition to modify/terminate guardianship when opposed due to concerns of parental neglect and abandonment?

Background: Following an incident of domestic violence, mother and six-month old child go to a domestic violence shelter; husband is arrested. While at the shelter, CPS receives a referral alleging neglect issues against mother and domestic violence in the presence of the child against father. Shelter had no concerns regarding mother's parenting. CPS determined maltreatment had not been substantiated and impending dangers not found. Mother took proper steps to protect child from father's domestic violence. While still at shelter, mother is arrested for identity theft and computer fraud, allegedly using husband's stepmother's checking account information to pay a telephone bill. Child temporarily placed with mother's half-sister.

Paternal grandmother, alleging substantial relationship with child, filed for guardianship in FC. At the time, both parents were incarcerated. Mother released from jail and objected to guardianship as no evidence she was unfit. FC returned child to mother and granted grandmother visitation. Later motion for reconsideration filed. Child was back with grandmother and mother was homeless. FC gave grandmother temporary custody while mother got back on her feet. Though criminal charges had been dropped earlier, they ended up being refiled; mother entered a guilty plea and was incarcerated. FC entered a final order granting guardianship to grandmother and silent on visitation for mother. Following release from jail, mother called grandmother seeking visitation; grandmother told her she would need to go back to court. Fourteen months later, mother filed motion for modification and/or termination of guardianship. Opposed by the grandmother based on mother's abandonment of child and prior allegations of neglect. Evidence from hearing showed mother's abandonment of another child, as well as unstable housing conditions. FC denied mother's request for visitation or any other relief. CC affirmed, there had been no substantial change in circumstances that would warrant a modification of custody.

Ruling: The FC was rightfully concerned with assuring the safety of the child, but its approach to these particular circumstances disregarded the need for permanency for the child and was procedurally insufficient. The allegations of neglect and abandonment made by the grandmother were sufficient to require the family court to transfer the case to circuit court under Rule 48a(a) and Rule 13. Family

court guardianship, granted over the natural parent's objection based on substantiated allegations of abuse and neglect, does not provide a permanent solution for child custody such that it obviates the need for an abuse and neglect petition.

VACATED AND REMANDED WITH DIRECTIONS

32. **David C. v. Tammy S.**, 244 W. Va. 577, 855 S.E.2d 885; March 12, 2021; (No. 19-0786); Kanawha County.

Issue: During a hearing between mother and grandmother on a request to terminate a guardianship, may the FC sua sponte modify the order to prohibit father from having contact with child based upon a GAL's report when father was not given adequate notice or an opportunity to be heard on the allegations and never received a copy of the GAL report?

Background: David and Tammy are the biological parents of a fourteen-year-old child. Since birth, their daughter has resided in the home of her maternal grandmother, Tammy, and her paternal grandfather. At times, mother has resided in the home. Due to mother's drug issues, grandmother has periodically obtained guardianship of the child. The current guardianship was granted in 2018. Father did not have actual notice of the petition; it was served by publication because grandmother said she did not have an address for him. Father has historically paid child support, but he has not been a part of his daughter's life and never had contact with her until two weeks before the final hearing in this matter, when he visited her for the first time.

In 2019, mother files to terminate guardianship, naming only the grandmother. The FC appointed a GAL to investigate. The GAL did find an address for father and she mailed him a letter to give him notice of her investigation and mother's motion to terminate the guardianship. GAL received a phone call from grandmother that father and his wife showed up at her home to visit the child for the first time in her life. Father also called GAL and they discussed his history of alcohol abuse and violence that she discovered in this criminal record. GAL also told father that if he wanted visits with child, he needed to be at the hearing. GAL filed report and sent copy to grandmother and mother, but not father. Her reason – confidentiality. The case involved two of mother's children living with grandmother; father was only related to one child. Grandmother, father, mother, and GAL were all present for the hearing. FC denied the motion to terminate and *sua sponte* modified the guardianship order prohibiting any contact between father and child because of his lack of previous interest, history of violence toward his father, and his history of alcoholism. He could petition the court if he was clean and sober for six months and attending Alcoholics Anonymous classes on a regular basis. Father obtained counsel and filed a motion for reconsideration, which was denied. He appealed to CC and it was denied.

Ruling: Father was not afforded the opportunity to refute the FC's assumption that he was currently unfit to have contact with his child, and thus was deprived of a fair hearing. He had inadequate notice and lack of opportunity to refute the allegations of the GAL made in a report he never received.

REVERSED AND REMANDED WITH DIRECTIONS

33. **Terrence E. v. Christopher R.**, 243 W. Va. 202, 842 S.E.2d 755; April 6, 2020; (No. 18-0832); Cabell County.

Issue: Must a fit parent demonstrate a material change of circumstances to terminate a temporary guardianship?

Background: Initially parents were charged with child abuse and neglect of their child; mother as a result of her substance abuse and father for failing to protect from mother's substance abuse and being delinquent in his child support payments. Conditions corrected and CC returned custody to mother and father, with mother granted physical custody and father visitation. Following month, mother was incarcerated – violated conditions of release and possession with intent to deliver heroin. As a result, maternal grandparents filed a petition to be guardians of child. Father contends not notified of mother's arrest until petition granted on an emergency basis and temporary guardianship hearing scheduled. At the temporary hearing, father objected to appointment of maternal grandparents and requested custody. Mother consented to the guardianship. CC entered a temporary order appointing maternal grandparents guardians. At a subsequent hearing, father again objected and requested custody, but ultimately agreed that child doing well in school and disruptive to mover before end of school year. CC continued the guardianship and father's visitation per the parenting order at the end of the abuse and neglect proceeding. Father did not appeal. At the end of the school year, father petitioned to terminate the guardianship and be granted custody. The CC denied and continued the child's placement with the grandparents, finding there had not been a substantial change of circumstances to warrant modification. Father appeals.

Ruling: In the guardianship statute, the legislature's intent is to favor a child's parent, if he/she is fit, to serve as his/her child's guardian provided the custodial placement comports with the child's best interest. The statutory factors for the appointment of a guardian are enumerated by subsection (f). Absent clear and convincing evidence of any of the factors listed in subsection (f) require the appointment of a guardian, we find the appointment of a guardian is temporary. A temporary guardianship may not exceed six months, unless there is a finding of continued need in the best interests of the child. In this case, the guardianship would have been temporary, so he was not required to satisfy the high threshold of a "material change of circumstances." Father only had to show the justification for a temporary guardianship no longer exists by demonstrating either no "immediate need exists" or no "period of transition into the custody of a parent is needed" to support the continuation of the temporary guardianship. CC applied the wrong burden of proof on father's request to terminate the guardianship.

REVERSED AND REMANDED

34. **Kimberly M. v. D.L.**, Not Reported in S.E.2d, 2021 WL 365286; W. Va. February 2, 2021; (No. 20-0181); Wayne County.

Issue: Mother seeks termination of guardianship after improving her circumstances.

Background: In 2015, grandmother filed a petition in CC seeking guardianship of the child, alleging the child's father was participating in long-term inpatient drug treatment and the mother was in violation

of her probation by traveling with a known felon and engaging in substance abuse. By the time of the hearing, mother was incarcerated. CC appointed grandmother guardian. Four years later, mother filed a petition to revoke, saying she was now able to care for the child. Mother had obtained housing, achieved sobriety, and had been visiting with the child weekly. Mother was planning to seek the child for some time. Her petition was prompted by grandmother's husband (the child's step-grandparent) being charged with possession of child pornography. Grandmother denied her husband ever abused the child; she was working on obtaining a divorce. Grandmother did not object to mother's visits; but objected to rescinding guardianship because mother did not have house of her own; she lived with her boyfriend, his mother, and their new infant child. CC rescinded guardianship and granted grandmother visitation.

Ruling: Grandmother did not dispute mother had corrected the circumstances that led to the guardianship, nor raise issues with her visitation with the child. Her only concern was the mother's housing. The CC had no issues with her housing, found there was a material change in circumstances and that revocation was in the child's best interests.

AFFIRMED

35. **In re Guardianship of N.P.**, Not Reported in S.E.2d, 2021 WL 365283; W. Va. February 2, 2021; (No. 19-1187); Cabell County.

Issue: Fulfilling his legal responsibilities does not per se equate to a change of circumstances required to terminate a long-term guardianship.

Background: Children began living with grandmother in 2010, she was granted legal guardianship in 2011. Since that time, her guardianship has continued uninterrupted. The youngest child has been with his grandmother since he was eight months old and views her as his psychological parent. Father has filed several petitions to revoke or modify guardianship upon assertions he no longer consented and that circumstances had changed or the modification would be appropriate. Father is remarried with another child. He has supervised visits with the children in grandmother's care. Those visits have not gone without issue. The FC has addressed those with the father on several occasions. Child expressed to guardian that his grandmother was his favorite person and the one he most enjoyed spending time with. He would like to see father, but wants his visits supervised. The FC found terminating the guardianship not in the best interests of the children. Father was ordered to pay attorney's fees of $1,500.

Ruling: Father's argument about changed circumstances amount to nothing more than fulfilling his responsibilities, such as paying child support and acting appropriately during supervised visitation – conduct that was expected of father, not evidence of changed circumstances. The court may award attorney's fees reasonably necessary to prosecute or defend an action. When it a party has incurred fees unnecessarily, the court may order the offending party to pay reasonable attorney's fees. WV Code §48-1-305.

AFFIRMED

ADOPTION

36. **In Re Adoption of J.S. and K.S.**, ___ W. Va. ____; 858 S.E.2d 214; 2021 WL 1940823; May 15, 2021; (No. 20-0185); Webster County.

Issue: Does the CC have the statutory authority to limit the fundamental rights of an adoptive parent to make decisions concerning the care, custody, and control of his or her children?

Background: DHHR filed an abuse and neglect petition against the natural parents; their parental and custodial rights were terminated. This Court affirmed the termination of their rights. *In re J.S. and K.C.*, Nos. 17-0331 & 17-0340, 2017 WL 4772938 (W. V. Oct. 24, 2016). Prior to and during the abuse and neglect proceeding, the children were in the custody of their biological aunt and her husband; the permanency plan was for them to adopt both children in the event of termination. The children lived with aunt and husband for most of their lives and had a close bond.

During the permanency planning, evidence arose that uncle was using illicit drugs. (The children's parents' rights were terminated for the same reasons.) DHHR withdrew consent for uncle to adopt. Aunt was unaware of her husband's behavior. She kicked him out of the home and immediately filed for divorce. Aunt amended her petition to adopt as a single parent. CC granted the adoption, but included a paragraph that aunt was enjoined and restrained from permitting any contact of any nature by the children with her ex-husband. A little over a year later, she files to modify the injunction, ex-husband has taken steps to overcome his drug addiction. She submitted evidence that he has stayed clean, had a positive influence on others in recovery, and has changed his life in many positive ways. CC denied modification, finding he had not accepted responsibility for his previous actions and his previous false swearing. Contact would be contrary to the best interests of the children.

Ruling: Once an adoption order is entered, an adoptive parent has the same rights as if the child had been born to him or her. The Due Process Clauses of Article III, Section 10 of the Constitution of West Virginia and the Fourteenth Amendment to the Constitution of the United States protect the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Although parental rights must sometimes yield when they conflict with the best interests of the child, that is not the situation here. In granting the adoption, the CC specifically found the best interests of the children would be promoted by the adoption. There is a presumption that fit parents act in the best interests of their children. There is no evidence that adoptive mother has acted in a way not in their best interests.

New Syllabus Points: Unless otherwise permitted by law, where a circuit court grants a petition for adoption of a child pursuant to the procedures set forth in West Virginia Code §§48-22-701 to -704 (2015), the court may not include any provision in the final order of adoption that would limit, restrict, or otherwise interfere with the adoptive parent's right to make decisions concerning the care, custody, and control of the child. Syl. Pt. 5.

REVERSED AND REMANDED WITH DIRECTIONS

37. **Murrell B. v. Clarence R.**, 242 W. Va. 358, 836 S.E.2d 9; November 18, 2019; (No. 18-0167); Boone County.

Issue: When is there standing to enforce an agreement for post adoption visitation?

Background: The petitioners were granted guardianship of the child in FC. At the time, the respondents were awarded visitation with the child. Though never his guardian, nor a relative, he had lived with them prior to the petitioners becoming his legal guardians. Two years later, the petitioners adopted the now five-year-old child. Both petitioners and respondents attended the adoption hearing. The adoption order found that Clarence and Nancy exercised visitation with the child, they had notice of the hearing, they did not object to the adoption and that the adoption was in the child's best interests. The order did not specify visitation would continue, post-adoption. No one challenged the adoption order. The respondents allowed the visitation to continue following the adoption. Two years later the parties quarreled, and the adoptive parents drastically reduced the visitation. Clarence and Nancy petitioned the CC for visitation, which the CC granted, relying on their pre-adoption relationship with the child and the child's best interests. The adoptive parents appeal.

Ruling: While Clarence and Nancy may have formed a psychological parent relationship with the child prior to the adoption, they cannot rely on that pre-adoption relationship to establish visitation with him post-adoption. When he was adopted, they were divested of any visitation they may have had prior to the adoption. The adoption order did not state that visitation was to continue after the adoption.

New Syllabus Point: An "agreement" for purposes of West Virginia Code §48-22-704(e) (2015) is a mutual manifestation of assent by the adoptive parent(s) and a third party as to visitation or communication with the adopted child that is either stated in full in the final adoption order or explicitly referenced in that order and made an exhibit to it. All parties to the agreement must endorse the final adoption order and any agreement incorporated by reference. Syl. Pt. 5.

REVERSED

SPOUSAL SUPPORT

38. **Campbell v. Campbell**, 243 W. Va. 71, 842 S.E.2d 440; February 24, 2020; (No. 18-0627); Kanawha County.

Issue: Is it a substantial change in circumstances to warrant a modification in spousal support if the spousal support obligation exceeds the obligor's monthly income, which has been reduced as a result of retirement?

Background: Parties were married for ten years. Husband worked for Union Carbide, which later became Dow Chemical Company. A year before the divorce was granted, husband was offered and

accepted an opportunity through Dow to work in Saudi Arabia for a minimum of one year, up to a maximum of three years. During this time, his income increased substantially – from $7,818 per month while working for Dow in US to $18,818 per month while working for Dow in Saudi Arabia. At the time of the divorce, the family court calculated spousal support at $5,900, based upon the inflated monthly earnings. Husband had planned to work until mid-sixties, but retired from Dow at 60 years of age, when his overseas employment contracted ended and the Saudi Arabian company with which he had been working did not offer him continued employment. As a result, his income decreased considerably, to $4,778 per month. Husband files petition to modify.

FC denied modification finding husband failed to prove a substantial change of circumstances occurred. This was based in part on husband's purchase of a home in Thailand following his retirement, where he now resides with his new wife, and his use of savings he had amassed during his employment to fully fund the home's purchase price of $150,000. Husband appeals FC order; CC summarily affirms.

Ruling: An award of spousal support is designed to provide for the care and maintenance of the payee spouse following the termination of the couple's marriage. A corollary component to an award of spousal support must necessarily be the payor spouse's ability to satisfy the payment. Recognizing that people's financial fortunes do not remain constant, the legislature has also provided for subsequent modification should the circumstances warrant. In this case, the husband has retired, and his income is approximately one fourth the amount; his spousal support obligation exceeds his gross retirement amount by $1,121 per month. He has demonstrated s sufficient change in circumstances to modify his spousal support obligation because his current assets are not sufficient to fully satisfy the monthly amount of spousal support he has been ordered to pay.

REVERSED AND REMANDED

39. **Heather H. v. Shane H.**, Not Reported in S.E.2d, 2020 WL 3263933; W. Va. June 17, 2020; (No. 19-0058); Kanawha County.

Issue: Excessive to zero spousal support.

Background: Parties divorced after almost twenty years of marriage. They have two minor children. Husband is an orthodontist. Wife helped build his business. She worked in his office, in various positions, over the years. Husband has an average gross income of $113,545 per month or $1,362,540 per year. Husband initiated divorce. Wife requested $14,648.92 per month in child support, and $5,000 per month in temporary spousal support until her children graduate from high school. FC ordered husband to pay $15,000 per month in permanent spousal support and $12,711.52 per month in child support. FC also found that husband's student loan debt of $133,985 was his separate debt not subject to equitable distribution. FC order did not explain why, even though debt was incurred during the marriage. Husband appeals.

After holding a hearing, the CC found the FC abused its discretion by finding that wife had a financial need for spousal support. Her needs will be met by child support alone, which the parties had agreed would have been $14,648.92. CC reversed and vacated the spousal support award. CC also found the FC abused its discretion when it excluded the student loan debt from the marital estate. Wife appeals.

Ruling: Agree with the CC that awarding permanent alimony of $15,000 per month, not requested, was an abuse of discretion. However, not convinced that denying any spousal support and having her financial needs addressed by child support, was proper. Remand for FC to consider whether a spousal support award is proper based on the factor of WV Code §48-6-301(b), in conjunction with the ruling that permanent spousal support award of $15,000 per month was erroneous. Agree with the CC's ruling that FC erred and abused discretion by determining husband's student loan debt a separate liability of the husband. FC order provided no explanation on its ruling.

AFFIRMED, IN PART, REVERSED, IN PART, AND REMANDED WITH DIRECTIONS

Workman Concurring, in part, and Dissenting, in part: Concurs CC erred in reducing spousal support from $15,000 per month to zero. However, dissents in the majorities' conclusion that the FC's order lacked sufficient basis in the record. Includes a pitch for a formula for spousal support awards to ensure greater uniformity.

40. **Curtis J. v. Laura J.**, Not Reported in S.E.2d, 2021 WL 1553865; W. Va. April 20, 2021 (No. 20-0359); Berkeley County.

Issue: Unable to minimize "available income" to pay spousal support by taking the majority of marital assets (and related debt).

Background: Parties were divorced after twenty-one years of marriage. Wife filed for divorce on irreconcilable differences. The FC approved the parties' oral agreement and stipulation as to the nature and value of their assets and debts, the terms of which were placed upon the record in open court, wherein the parties agreed to the disposition of certain property. They disputed wife's claim for permanent spousal support. Their four children are now adults, but when younger wife did not work outside the home. Wife's employment history has been in retail, working at Wal-Mart, husband works for the FBI. Family court granted divorce, distributed assets and debts per their agreement, and awarded wife permanent spousal support of $1,000 per month, subject to continuing judicial modification. Husband appeals equitable distribution and spousal support. The circuit court affirms.

Ruling: Husband concedes that he failed to raise several issues before the FC regarding equitable distribution. He also failed to include the video recording of the FC hearing. The FC approved the terms of the agreement placed upon the record. We have nothing to review. As to spousal support, husband contends FC erred by ordering him to pay $1,000 per month because the evidence showed his monthly expenses exceeded his net monthly income. It was husband's choice to incur excessive debt. He agreed to be assigned most of the marital debt, because he wanted to also be assigned the most valuable marital assets, the marital home, his accrued annual leave, and the Ameritrade account. It is inequitable for husband to utilize debts he willingly took as a basis for arguing that he cannot afford to pay spousal support.

AFFIRMED

41. **Stephanie M. v. John M.**, Not Reported in S.E.2d, 2020 WL 201217; W. Va. January 13, 2020; (No. 18-1091); Kanawha County.

Issue: Termination of spousal support.

Background: Parties separated after twenty years of marriage and subsequently divorced. Wife was awarded permanent spousal support of $2,500 per month, modifiable by a change in circumstances. Husband petitioned to terminate or reduce alimony. FC denied petition and husband appealed to CC. Following a hearing, CC remanded back to FC for findings on whether husband's recent adoption of the parties' minor grandchild had any effect on his claim of substantial change in circumstances. On remand, the FC terminated the spousal support based upon husband's expenses regarding the grandchildren, the parties' respective abilities to pay and their respective financial needs. Husband has had a significant decrease in income and increase in expenses due to caring for the grandchildren. Wife testified she was forced to retire for health reasons but provided no evidence to support. She also retired ten days before the FC hearing which the FC found to be without cause and to forestall modification of spousal support. Wife's purported expenses were inflated, at the time of her retirement she had more than enough resources to meet her needs and was earning more than the husband. Wife appeals and CC affirms.

Ruling: Wife makes bald assertions but has failed to cite to any portion of the record below that would tend to support her arguments.

AFFIRMED

42. **Doss v. Hill-Doss**, Not Reported in S.E.2d, 2019 WL 5289949; W. Va. September 13, 2019; (NO. 18-0345); Pocahontas County.

Issue: Amount of spousal support award and that it was made retroactive.

Background: During divorce proceeding, FC referred the parties to mediation. They were able to reach an agreement on all issues except spousal support. Mediator sent report to FC and inadvertently attached his personal notes. A few days later, mediator sent a corrective letter without his notes. FC granted divorce, set spousal support at $2,000 per month and commenced retroactively. Husband believed mediator's notes were presumably read by the FC, since one of the proposals in mediation was $2,000 per month. Husband objected to retroactive award, claiming he had paid household bills during separation and would not get Conrad credits for payments. Finally, he felt FC and wife's counsel had ex parte communications. Among reasons, FC knew attorney had afternoon commitments and would not be available for court in afternoon. CC refused appeal finding grounds asserted were without merit.

Ruling: Husband's argument purely speculative and invites Court to presume facts he has not proven. Claims of ex parte communication are a misrepresentation of the record. Spousal support is within the sound discretion of the court. FC discussed approximately thirteen of the necessary factors in determining spousal support. The FC had good cause to use the financial statement submitted by the wife. It was both the lowest and it corresponded with the testimony. Husband waived his right to

claim Conrad credits. The mediator indicated the parties resolved all issues except spousal support. Thus, his waiver was separate and distinct from any spousal support.

AFFIRM

43. **James J. v. Sarah J.**, Not Reported in S.E.2d, 2019 WL 5092496; W. Va. September 9, 2019; (No. 18-1074); Taylor County.

Issue: Converting rehabilitative spousal support to permanent spousal support.

Background: Parties divorced after twenty-six year marriage. Wife never worked outside of the home. She was awarded rehabilitative spousal support of $225 per month for thirty-six months, with both amount and time frame modifiable upon a showing of changed circumstances. Wife planned to attend post-secondary education and obtain a degree in nursing. Wife files for modification following her diagnosis of breast cancer. She had been laid off from her job and was unable to collect unemployment benefits. Since initial award, she had been enrolled in college classes, but was forced to quite due to work scheduling issues. FC extended award for another twelve months and increased to $300 per month. The following year, wife again petitions to modify. Her diagnosis of breast cancer and consequent medical conditions limited her ability to work and further her education. FC granted modification, converting the award to permanent spousal support and raising the amount to $500 per month. Since divorce, husband's income has increased and wife's has decreased. Even when she is healthy enough to hold a steady job, she is not likely to earn much more than minimum wage. Husband appeals and CC affirms.

Ruling: Modification of an award of rehabilitative spousal support to an award of permanent spousal support is permissible under WV Code §48-8-105(b), if a substantial change of circumstances exist, like the substantial change wife established here. The FC made detailed and specific findings supporting the modification, including an assessment of wife's potential work skills, age, health, education, and ability to meet the terms of the rehabilitative plan.

AFFIRMED

EQUITABLE DISTRIBUTION

44. **Raymond H. v. Cammie H.**, 242 W. Va. 640, 837 S.E.2d 701; November 19, 2019; (No. 18-0875); Mercer County.

Issue: Determining standard to apply for valuation of real property acquired by the wife prior to marriage but included in the marital estate for purposes of equitable distribution by operation of WV Code §43-1-2(a)-(e).

Background: Prior to the marriage, wife acquired two pieces of property, one was a business property she used to operate her daycare business, the other was a residential property which ultimately became their home. Both would have been considered wife's separate property but for the application

of the statute at issue in this case, WV Code §43-1-2(a)-(e). After the marriage, she purchased a third piece of real estate, titled in her name only and she made improvements, to expand her daycare business. The parties agree that property has always been marital. During the marriage and within five years of their eventual divorce, the wife borrowed money to refinance the business property and put in a pool at the residence. Payment was secured with a deed of trust on the business property. Husband was not a party to the transaction, he did not sign the deed of trust, and wife did not notify him within thirty days. At a later date, wife again borrowed money and the circumstances were the same. At the time of divorce, she owed $151,810.38 on the first note and $220,093.00 on the second.

The FC concluded wife had not met her burden of proof regarding notice to husband. Therefore, as a matter of law the transactions were "conveyances" of the properties and accordingly, the "value of the real estate conveyed, as determined at the time of the conveyance, shall be deemed a part of the conveyancer's marital property for purposes of equitable distribution." FC and CC disagreed on determining the value.

Ruling: The statute is ambiguous and a case of first impression for the Court. The ambiguity arises because WV Code §43-1-2(a) specifically includes "the creation of a security interest" in the definition of "a dispositive act intended to create a property interest in land," while the "value of the real estate conveyed" language contained tin the remedy section of the statute, WV Code §43-1-2(d), seems to describe a fee simple conveyance. The emphasis of the statute is on the non-title holding spouse receiving notice when a title holding spouse conveys real estate in order to preserve the benefit of the important role dower had played in marital situations in which there was a possibility of a divorce. Family court's approach has a certain round hoe/square peg feel, since the "conveyance" described in WV Code §43-1-2(a) & (d) does not fall neatly within the analytical framework of our property law cases, we find that taken in its entirety, [it] is grammatically and logically plausible. It is the only construction of the language that is faithful to the Legislature, specifically, that "a spouse cannot avoid the notification requirement by a loan transaction as opposed to a sale.

New Syllabus Point: Under West Virginia Code §43-1-2, where a spouse conveys a security interest in his or her separate real property by deed of trust and fails to give notice of the conveyance to the non-title holding spouse within thirty days of the transaction, then in the event of a subsequent divorce within five years of the conveyance, said separate real property shall be deemed a part of the conveyancer's marital property for purposes of determining equitable distribution or awards of support, and assigned a value equal to its fair market value, net of debt, at the time of the conveyance. Syl. Pt. 3.

REVERSED, IN PART; AFFIRMED IN PART, AND REMANDED

45. **Kovach v. Kovach**, Not Reported in S.E.2d, 2019 WL 5692758; W. Va. November 4, 2019; (No. 19-004); Monongalia County.

Issue: FC unwilling to enforce a "side deal"

Background: Pursuant to the divorce decree, parties agreed that husband would pay wife $4,000 per month for a period of forty-eight months, to be considered equitable distribution. In a later contempt

action, family court grants judgement to wife in the amount of $27,681.56 and sets a payment schedule. Husband contends that he made payments to third-parties on behalf of his wife and should receive credit in his equitable distribution payments. FC considered payments to be gifts and does not credit to the debt he owes wife. The FC reasoned that because husband was not required under the divorce decree to provide such things to wife, he did so of his own volition and without modifying the divorce decree, so those payments were gifts. Conflicting evidence on whether the parties agreed. CC refused husband's appeal.

Ruling: While husband's assignment of error is focused on the FC's use of the term "gift", it is apparent the FC chose simply to enforce the divorce decree previously entered by it. The FC made it abundantly clear that it would not make any decisions regarding alleged side agreements between the parties. In enforcing the decree, the family court also denied certain relief requested by the wife. FC did not abuse its discretion.

AFFIRMED

46. **Richardson v. Richardson**, Not Reported in S.E.2d, 2020 WL 7222720; W. Va. December 7, 2020; (No. 19-0862); Braxton County.

Issue: Deeding home to wife as sole owner – gift or avoiding tax liability?

Background: Twenty years prior to the parties' marriage, husband bought a parcel of land and built a home on it. He lived there with his first wife until her death, and then used her life insurance proceeds to pay off the mortgage. Parties begin dating. Husband proposes marriage several times, but wife reluctant to leave her home. She eventually accepted and he transferred title of his property into both their names. Three years later, husband believes that his auto repair store is facing a huge tax liability. Wife discovers husband has been having an affair with an employee. She confronts them both at the store. Husband asks his attorney who prepared the first deed giving wife a fifty percent share in the marital home, to prepare a second deed giving wife is remaining interest in the home. He claims because of looming IRS debt and she claims because she caught him in affair. Parties divorce and she insists he gifted her the home. FC found it was marital property. The second deed was not an irrevocable gift, but a joint decision by the parties. Wife appeals and CC upholds FC decision. Unjust enrichment to wife. If he gave her deed after being confronted about affair, then at the very least he was under duress.

Ruling: West Virginia case law generally indicates a marked preference for characterizing the property of married persons as marital. Evidence supports the finding made by the lower court.

AFFIRMED

Workman Dissent: She would have set for oral argument in accordance with Rule 19 of the WVRAP.

REVERSED AND REMANDED

47. **Roberts v. Roberts**, Not Reported in S.E.2d, 2021 WL 2023521; W. Va. May 20, 2021; (No. 19-1133); Greenbrier County.

Issue: Equitable distribution – property classification.

Background: Following a thirty-six-year marriage, husband and wife divorce. The principal issue is classification of the marital residence as marital or separate property of the husband. The realty was conveyed to the husband in 2008 from his father during the marriage and the Declaration of Consideration clause at the end of the deed recites that $105,000 was paid to the father and signed by the father. The husband claimed separate property on the basis that no money was really paid by him and no marital monies were paid during coverture for major improvements. Husband stated and father confirmed that the husband and his sister had been given two pieces of property, but she wanted the piece originally given to the husband, and she did pay Father $105,000 for it, and the father just gave the subject real estate to the husband to make it up to him for the supposed difference in value between the properties. Husband said further that the Declaration for Consideration was signed by the father, not husband, and it was irrelevant where the money came from, such as the 3rd party sister, as long as the husband did not pay it. Wife countered that the FC should not have taken evidence on the transaction because the deed spoke for itself within the four corners of the document, and to allow such collateral testimony violated the Parol Evidence Rule.

Upon granting the divorce, FC found that the father had declared under pain of fine and penalty that he had received $105,000, and that the father had deeded another piece of property to husband and wife in 2003 and that instrument had stated there was no consideration, therefore, the husband and his father were well aware of effect of the Declaration of Consideration clause. On the basis of credibility, the FC found the marital residence to be marital. The CC, on appeal, affirmed based on the Parol Evidence Rule.

Ruling: The husband did not overcome the presumption of marital property and that the FC's credibility determinations would not be overturned, and thus, it was unnecessary to reach the Parol Evidence Rule issue raised by the wife.

AFFIRMED

48. **Lee v. Lee**, Not Reported in S.E.2d, 2020 WL 5240402; W. Va. September 3, 2020; (No. 19-0531); Kanawha County.

Issue: Equitable distribution credits.

Background: Pursuant to their divorce, the FC awarded wife the Silverado and husband the Camaro, with each to be financially responsible for his/her vehicle. Husband was also awarded one-half of the principal reduction on the debt secured by the marital home. Wife appealed and CC affirmed, finding that the FC heard the testimony of the parties and made credibility determinations that appear reasonable. Wife appeals not being credited for paying unspecified property taxes on husband's vehicle and his receiving in equity in her separate property home.

Ruling: Appellate record sparse, containing only the FC order and the CC order. The record of the hearing has both parties claiming payment for various bills during the marriage. Wife failed to produce documentation. FC made a credibility determination. At the end of the FC hearing, both parties admitted that the contested payments were all made with marital funds, and . . . it was unlikely that wife made all payments on the vehicles and the house in light of the contrary evidence. As to her separate home, WV Code §48-1-233(2)(A) states marital property includes "the amount of any increase in value in the separate property of either of the parties. . . which results from (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property."

AFFIRMED

49. **Emil N. v. Healy B.-N.**, Not Reported in S.E.2d, 2021 WL 2020296; W. Va. May 20, 2021; (No. 20-0396); Ohio County.

Issue: Equitable distribution of a civil settlement.

Background: Husband was a chiropractor, who as the single plaintiff, had received a civil settlement for $2 million, $80,000 of which was for "lost billings" and $1,920,000 was for a "personal injury claim". As part of the divorce filing, family court ordered husband to make an accounting and to deposit 50% of the settlement proceeds, which he ignored, and then after interim contempt proceedings, husband did make a partial escrow deposit. FC found that after attorney fees for the civil litigation, the wife was entitled to ½ of the net recovery of $399,960. The FC also awarded wife $4,200 in attorney fees related to his disregard of court orders on the accounting and escrow directives; and awarded an additional $50,000 in attorney fees as a sanction for both failing to make ordered disclosures and for the apparent misrepresentation to the FC that documents had not existed until trial. Husband and wife both appealed to the CC, wife claiming that she should have had more of the civil litigation settlement. The CC denied both appeals, noting the FC's exhausting detail within its order.

Ruling: Both Parties appealed. Citing *Hardy*, the husband did not present sufficient evidence to support the civil settlement recitation that $1,920,00 was a recovery for "personal injury", and wife's failure to participate in the civil litigation did not strip her of her distributive share of marital property. Husband did not really deny his wrongdoing in failing to obey the family court's disclosure and escrow orders. Wife's cross-appeal was denied, as well, primarily deferring to the FC's judgment in a complex matter.

AFFIRMED

50. **Keene v. Keene**, Not Reported in S.E.2d, 2021 WL 2580669; W. Va. June 23, 2021; (No. 20-0539); Morgan County.

Issue: Judging credibility function of the trial court.

Background: FC granted the parties a divorce on the grounds of irreconcilable differences and addressed the issues of equitable distribution of marital debts and assets and spousal support. Wife appeal to CC denied. Not all issues preserved for appeal – not raised with the FC. CC determined remaining issue – value of motor home purchased with marital funds – did not constitute an abuse of discretion. Husband offered evidence that he paid $2,000 for the motor home; wife testified it was purchased for $6,500. FC did not find her testimony credible as there was no proof to support her valuation of the motor home.

Ruling: The FC found that it had to judge each party's credibility based on the amount of documentary proof for their respective claims. Judging the parties' credibility in light of the documentary evidence was the FC's exclusive function. Wife cannot show that FC abused its discretion in determining equitable distribution of marital debts and assets.

AFFIRMED

51. **Bruce C. v. Michelle C.**, Not Reported in S.E.2d, 2019 WL 5095654; W. Va. October 11, 2019; (No. 18-0462); Wayne County.

Issue: Factfinding required of FC when dividing marital property.

Background: Parties had a condo in Florida in proximity to husband's family member. When the parties divorced, FC awarded condo to wife, but if she failed to secure financing, it would be sold, and net profit divided equally. Husband appealed and CC remanded for FC to develop the record on expenses and payments related to the condo. On remand, husband was awarded one-half the condo expenses from the date of separation through the date of the final hearing. Again, husband appeals. CC adjusted the award of expenses from the date of separation until the ultimate transfer of legal title to wife. Husband appeals arguing FC was required to make findings supporting its disregard of the parties' suggestions concerning the condominium.

Ruling: Equitable distribution is a three step process: (1) classify the property as marital or nonmarital; (2) value the marital assets; and (3) divide the marital estate between the parties in accordance with the principles contained in WV Code §48-7-103. These clear directives, first offered in *Whiting v. Whiting*, 183 W. Va. 451, 396 S.E.2d 413 (1990), are those that the FC must focus their factfinding. No indication the FC order fell short of satisfying this standard.

AFFIRMED

DOMESTIC VIOLENCE

52. **Benjamin J. v. Kristina J.**, Not Reported in S.E.2d, 2020 WL 2910809; W. Va. June 3, 2020; (No. 18-1114); Jefferson County.

Issue: Domestic violence appeal had become moot.

Background: Parties were married but separated. Husband lived in Massachusetts. Wife lived with her minor child (his stepchild) in West Virginia. Husband had filed for divorce in Massachusetts but was having difficulty getting wife served. He called the house and daughter answered the phone. He told her that she should open the door for a "playmate" he was sending to wife's address. Shortly thereafter an adult male whom wife did not know arrived outside and walked around her house several times. Wife files for a DVPO. The FC finds husband placed wife in reasonable apprehension of physical harm and granted the one-year protective order she had requested. Despite notice, husband does not appear for the hearing. Two weeks later, husband advises FC that he was incarcerated in Massachusetts at the time of the hearing. FC considers that a motion for reconsideration and sets a hearing on the motion. Husband fails to appear for hearing on his motion, FC dismisses. Two months later, husband sends another letter to FC saying he had been re-incarcerated on the date set for his reconsideration motion. FC denies without resetting. Motion not filed within a reasonable time and there was a need to achieve finality for the parties' case. CC denied appeal.

Ruling: Appeal filed with this Court in December 2018, brief and appendix filed on March 28, 2019. DVPO expired by its own terms on June 13, 2019. Husband argues the FC erred in denying his renewed motion for reconsideration and that the DVPO against him should be vacated. Even if the husband is correct that the DVPO was entered erroneously, there is no need to vacate the DVPO due to its expiration.

DISMISSED AS MOOT

53.**J.C. v. J.M.**, Not Reported in S.E.2d, 2021 WL 2023578; W. Va. May 20, 2021; (No. 19-1168); Richie County.

Issue: Domestic violence petition burden of proof.

Background: Niece files petition against aunt seeking a protective order. Hot mess family dispute when niece shows up unexpectedly on aunt's property to see whether a piece of equipment belonging to a family trust had been sold. Niece asked to leave and does not. Things escalate with uncle being very belligerent and hitting niece's car. Law enforcement called and witnessed some of the events. Uncle ends up being arrested at the scene and charged with domestic assault and destruction of property. Niece files for a DVPO, which FC grants after full hearing. Aunt appeals, CC affirms.

Ruling: CC erred in affirming FC. Niece never testified that she feared for her own safety on the day in question. Instead she testified that she was fearful that family members would be injured or run over by aunt's vehicle. She repeatedly stated she just wanted aunt to leave her alone.

REVERSED AND REMANDED WITH INSTRUCTIONS

Instructions: The DVPO and any reference to that order be purged from the file maintained by any law enforcement agency and the files kept by the lower courts be sealed and not opened except upon order of the circuit court when such is in the interests of justice.

54. **Anthony L. v. Shelbi P.**, Not Reported in S.E.2d, 2020 WL 201202; W. Va. January 13, 2020; (No. 18-0959); Harrison County.

Issue: No means No – domestic violence appeal.

Background: Girlfriend files domestic violence petition alleging former boyfriend sexually assaulted her four days earlier. Following a hearing, family court denied the petition and terminated the magistrate court emergency order. Girlfriend appeals and CC remands because FC did not make necessary findings to support its order. On remand, FC heard argument but did not consider additional evidence. Again, FC denied the petition and girlfriend appeals. CC reversed the denial and granted the DVPO. Boyfriend appeals.

Ruling: In this state, "no means no." The FC abused its discretion in failing to so realize. The family court found that she told him "no" and "please stop" multiple times and make no findings that contradict her lack of consent. She met her burden of proof. The CC entered a cogent and well-reasoned order thoroughly addressing each argument the boyfriend has made here.

AFFIRMED

55. **J.F. v. F.C.**, Not Reported in S.E.2d, 2020 WL 878581; W. Va. February 24, 2020; (No. 18-0756); Tucker County.

Issue: Extending a domestic violence protective order permanently.

Background: Wife files petition seeking protection from her husband or ex-husband. He contested the allegations of domestic violence but agreed to the entry of a protective order. The FC granted the order, effective for one year. Nearing the end of the year, wife files a petition to modify the order. The FC found that he has continued to engage in acts of harassment, threats through third parties, and driving past her house. The protective order was extended for his lifetime. Husband appeals claiming FC did not find aggravating factors as set forth in WV Code §48-27-505 when it entered its initial year-long protective order, and therefore could not at that time enter an order for longer than 180 days. Thus, the protective order had expired before the petition to modify/extend was filed. FC lacked jurisdiction to modify.

Ruling: The CC's order on appeal clearly reflects that the CC reviewed the audio recording made by the FC prior to the entry of the domestic violence protective order and found that the FC did make such findings of aggravated circumstances on the record. Husband has produced no evidence to contradict the CC's findings.

AFFIRMED

APPELLATE PRACTICE

56. **Ethan B. v. Tracy W.**, Not Reported in S.E.2d, 2020 WL 6393565; W. Va. November 2, 2020; (No. 19-0830); Lewis County.

Issue: Late filing of appeal not extended by mail.

Background: When the parties were divorced, the FC adopted a parenting agreement that made mother the primary residential parent and father was allocated parenting time on a phased-in schedule. Five years later the parenting plan was modified to give father an additional evening during the week and two weeks summer vacation. After about five more years go by, father files to modify parenting agreement, because mother is not abiding by it. The FC modified the parenting plan in a manner to diminish the conflict between the parties and ease the transition issues for the children. The FC set very specific details.

Father requested the CC grant him an extension of time to file an appeal. Rule 32 of the FCRPP allows a ten-day extension. CC granted and said he would be given a ten-day extension and has until June 17, 2019 to file his appeal. Appeal was not filed until June 21, 2019 and CC denied appeal as untimely. Father appeals stating it was put in the mail on June 17th (within the time period) and Rule 6(e) of the Rules of Civil Procedure allows for an additional three days to file documents when notice of a "required act" is delivered by mail rather than e-filing or some other more expedited form of document delivery.

Ruling: Rule 6(e) is not applicable; it does not extend time to file appeal. Mailing only extends a party's time to act when the time to act is measured from "a prescribed period after the service of notice or other paper upon the party. Mailing does not equate to filing under the family court rules – an appeal is "filed" when it is filed with the clerk. Father filed no proper pleading with the CC explaining why his appeal of the FC order was untimely.

AFFIRMED

57. **Mulugera v. Misailidis**, Not Reported in S.E.2d, 2020 WL 200988; W. Va. January 13, 2020; (No. 18-0840); Berkeley County.

Issue: Was dismissal of appeal an appropriate sanction?

Background: Parties divorced, and wife granted permanent spousal support. Prior appeal found the amount of award "patently unfair" and remanded to FC for a hearing on spousal support. On remand, FC increased monthly spousal support award. Petitioner again appeals. Almost four months later, CC issues an order directing wife to file a copy of the hearing DVD to the circuit clerk's mail receptacle within twenty-one days. (Due August 3, 2018.). Two weeks after request, but seven days before due, wife's counsel requests a copy from family court office. When CC did not have DVD by Friday due date, dismissed appeal on Monday. On Wednesday DVD hand-delivered by counsel with motion asking to reconsider dismissal. CC denied and wife appeals.

Ruling: The drastic sanction of dismissing appeal is not proportionate to her counsel's conduct. No evidence to show that counsel's conduct was willful, in bad faith, displayed a pattern of wrongdoing throughout the case, was an extreme circumstance or that other sanctions have failed to bring about compliance. CC abused its discretion by imposing the drastic sanction of dismissing wife's appeal because the sanction does not comply with any inconvenience caused by counsel's delay in requesting the DVD.

REVERSED AND REMANDED

58. **Kevin D. v. Beth G.**, Not Reported in S.E.2d, 2020 WL 2735530; W. Va. May 26, 2020; (No. 19-0775); Kanawha County.

Issue: Judges are not pigs, hunting for truffles.

Background: Parties were previously divorced. At the time they had several contested issues regarding property and debts. The family court decision was ultimately affirmed in a memorandum decision in 2017. *Kevin D. v. Beth Ann R.*, No. 16-0530, 2017 WL 944058 (W. Va. Mar. 10, 2017). They return to family court on contempt issues – husband failed to make certain payments. The FC found no reasonable way to resolve issues other than to make certain payments from what would have been husband's share of wife's 401(k). The CC denied husband's appeal.

Ruling: "A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. . .. Judges are not like pigs, hunting for truffles buried in briefs." *State v. Kaufman*, 227 W. Va. 537, 555 n. 39, 711 S.E.2s 607, 625 n. 39 (2011) (quoting *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). Husband's brief wholly fails to comply with WV Rules of Appellate Procedure 10(c)(4), which requires the following: "Support by appropriate and specific references to the appendix or designated record, the statement of the case must contain a concise account of the procedural history of the case and a statement of the facts of the case that are relevant to the assignments of error." His arguments as to assignments of error are inadequate and fail to comply with Rule 10(c)(7), we decline to address them on appeal.

AFFIRMED

59. **Vladimirov v. Vladimirov**, Not Reported in S.E.2d, 2020 WL 201174; W. Va. January 13, 2020; (No.18-0689); Kanawha County.

Issue: Equitable distribution issues.

Background: Parties divorce and FC determines equitable distribution. Wife objects to valuation assigned to some gold coins, the award of the marital home and debt to husband, and not getting *Conrad* credits for period she lived in home exclusively and paid expenses from their joint account. Wife appeals and CC denies.

Ruling: In her appeal, wife does not cite to the record and makes a vague argument not supported by factual or legal authority. Such argument is insufficient to show the family court abused its discretion. Court again cites "… Judges are not like pigs, hunting for truffles buried in briefs." Another reminder to read Rule 10(c)(4) & (7) of the Rules of Appellate Procedure and the Court's Administrative Order issued December 10, 2012, *Re: Filings That Do Not Comply with the Rules of Appellate Procedure*.

AFFIRMED

60. **Stacy J. v. Christapher H.**, Not Reported in S.E.2d, 2021 WL 357776; W. Va. February 2, 2021; (No. 20-0074); Putnam County.

Issue: Equitable distribution appeal but failed to file a transcript or recording of the FC hearing; inadequate record to review.

Background: Parties had one biological child and wife adopted four children, who were never adopted by husband. Divorce was granted on grounds of child abuse. Wife appealed three equitable distribution issues. (1) FC resolved disagreement on who would take certain items by flipping a coin for first pick and then alternating thereafter. (2) FC found wife knowingly, freely, and voluntarily waived her right to one-half of worker's compensation benefits husband received after separation. (3) FC found husband was entitled to on-half the funds in the children's college savings accounts. CC refused appeal.

Ruling: Wife did not submit a recording or transcript of the family court hearing. Though she contends family court should have divided assets equitably based on their value, she conceded the court had ordered the parties to submit an appraisal and they had not. The worker's compensation payments were confusing and the parties disagreed on what she did and did not waive. Limited information was provided on the education accounts.

AFFIRMED

61. **Elizabeth P. v. Gid M.**, Not Reported in S.E.2d, 2019 WL 5289927; W. Va. October 18, 2019; (No. 18-1048); Wayne County.

Issue: Late pro se appeal with no explanation not considered.

Background: Sparse record. Parties have an eleven year old child together. Mother lives in OH; father and child now live in WV. Child previously lived in OH with mother but missed so much school she was in danger of being held back in fifth grade. Following a hearing, FC designated father primary residential parent and mother had parenting time every Friday and Saturday. Mother appealed and CC denied on the grounds that it was untimely filed; outside the thirty-day time frame. Mother appeals to SC.

Ruling: Mother failed to address the CC ruling that her appeal was untimely. On review of the limited record, we find no impediment that impacted mother's ability to file a timely appeal to the CC. In

addition, she filed no motion for reconsideration, which would have suspended the time in which she had to appeal and no motion for an extension of time to appeal as permitted by Rule 32 of the FCRPP.

AFFIRM

Workman Dissent: The majority's decision focuses on the unrepresented mother's failure to adhere to time deadlines and the Rules of Appellate Procedure. The Court should focus at least as much attention on compliance with the rule of law by the lower courts. Neither FC nor CC set forth any legal context whatsoever for their decisions. Was this an appeal of an initial custody order or a modification of custody or some other kind of appeal? The standard of review for an initial allocation of child custody decision is vastly different from the standard of review for a modification of child custody. The case should have been remanded to require the lower courts to enter orders which comport with the law.

ALPHABETICAL INDEX

David McMahon

Mr. McMahon is a graduate of West Virginia Wesleyan College and completed law school at George Washington University in D.C. He worked continually at one or another legal aid programs for 34 years doing domestic relations and other work from 1975 to 2008. Since 1981 he has also lobbied the West Virginia Legislature on behalf of low income citizens and on behalf of surface owners faced with oil and gas drilling on or near their property. Although no longer affiliated with any legal organization, he continues in semi-retirement to lobby on those issues. He also has a part-time practice he started in 2008 representing surface owners and small mineral interest owners. Among other achievements he has been chair of the Administrative Law Committee of the West Virginia State Bar and was a consumer representative to the National Conference of Commissioners on Uniform State laws during the revision of Uniform Commercial Code Article 9 governing security interests and repossessions.

Revised Summary of Changes to Child Custody Code Made by H.B. 2363 in effect July 10, 2021

Revised Version 2021-07-10

Prepared by David McMahon, J.D.
Please report errors to wvdavid@mountain.net | 304-415-4288

Table of Contents

NOTE: The full citations to the amended Code sections would read "W.Va. Code §48-?-???" each time. All the changes are made in Chapter 48 of the Code and in either Article 1 or Article 9. So, for simplicity, the citations will be abbreviated to the article and section. For a version of HB 2363 that shows changes from current law, please contact the author of this summary. The "enrolled" final version of the bill that does *not* show changes from current law is available on the Legislative website under "Bill Status."

New definitions.

Definitions of the term "Shared legal custody" (1-239a) and its corollary "Sole legal custody" (1-239b) and of the term "Shared physical custody" (1-241a) and its corollary "Sole physical custody" (1-241b) are added to the Code by the bill, but they are not used in the bill or pre-existing Code. Some parties may argue that "shared legal custody" means a presumption of 50/50 custody. Since the W.Va. Legislature explicitly did not define the term that way it is expected that this attempt will not be successful with judges.

Venue for custodial allocation actions independent of divorce.

That is the name of the new section. But the new section 9-105 appears only to refer the reader to the Uniform Child Custody Jurisdiction Act relating to interstate issues where that Act is relevant and to the Code section providing the substantive answer to venue for divorce. The House of Delegates insisted in last minute negotiations in removing an additional new subsection for venue for inTRAstate custody disputes outside of divorce -- a new subsection that the Senate believed the family court judges wanted.

Orders have to include specific findings of fact.

Legislators heard time and again from all sides of the policy debate that parties believed that orders did not set out enough specific findings, and that made it difficult to appeal. Some parties I believe wanted the findings requirement because they think it will make the judge more likely to follow their view of the law or evidence. The findings issue was a big deal to the Legislature and the findings requirement is throughout the bill including some sections only put into the bill to be amended to put that requirement in. See new findings requirements in 48-1-239(d); 9-203(b)(6) and (d); 9-204(a) and (c); 9-206(e); 9-207(b); and 9-403(c).

Hearings not based entirely on proffers requirement new?

New subsection (e) to 9-206 specifically says that in the absence of an agreement the final hearing "shall not be conducted exclusively by the presentation of evidence by proffer." Is that new in the Code? Yes. Is that otherwise new? No. It is already stated in Rule 20 of the Rules of Practice and Procedure for Family Courts.

One of the constant themes heard at the Legislature was that people didn't feel they got to put on their cases. It may be that sometimes the cases they wanted to put on were not relevant. Sometimes parties just want to be heard to be heard or to vent or be mean to the other side. But pressure on the Legislature for "Full adversarial judicial hearing" to be defined in Code and used throughout the Code comes from this perception by many parties that they do not get to present their case in court.

Maybe a little less reliance on caretaking in final custodial responsibility allocation orders?

In 9-206(c) there is a new proviso that, ""[I]f either parent or both has demonstrated reasonable participation in parenting functions as defined in §48-1-235.2 of this code, the court cannot rely solely on caretaking functions, and shall consider the parents' participation in parenting functions."

What is interesting is that subsection (c) where the proviso is located only applies if the court is unable to allocate custodial responsibility under subsection (a) because 1) an allocation under (a) could be harmful to the child, or 2) because there is no history of past performance of caretaking functions, (although "caretaking" and the presumption of caretaking function reliance was removed from the (a) some years ago), as in the case of a newborn, or 3) the history does not establish a pattern of caretaking sufficiently dispositive of the issues. If subsection (c) does apply, then that subsection says the court shall allocate custodial responsibility based on the child's best interest and also cross-references two other sections, 9-409 (the"limiting factors" section) and section 9-403(d) (which is in the relocation section). (The problem with that second cross reference is that the language of subsection (d) got switched back and forth as the bill got switched back and forth three times in the last 3 days of the session (including once at 2 a.m. on Thursday morning and including twice on the last day). So it may be that it was intended for there to be a reference not to new (d) but to old (d). It seems likely that the Supreme Court would uphold a decision based on old (d) factors.)

So what is the meaning of the new proviso set out above? Probably not technically much of a change in the law. But some contribution to the overall interpretation of the article that caretaking is not a presumption, but a factor, and parenting functions must be given at least some consideration.

Caretaking still an important factor left in the Code.

1.235.2 "Parenting functions defined" says in the preamble to its subdivisions that, "Parenting functions include caretaking functions . . ."

9-204 "Criteria for temporary parenting plan" includes subdivision (a)(2) that says "which parenting arrangements will cause the least disruption to the child's emotional stability while the action is pending." In the same section, subdivision (a)(1) even though it is amended to add "and/or parenting" still leaves "caretaking" in.

9-205 "Permanent parenting plan" in subdivision (a)(3) requires "A description of the allocation of caretaking and other parenting responsibilities performed by each person . . ."

9-206 subsection (c) states two reasons that its provisions are used if the objectives in subsection (a) cannot be used. They are, "because there is no history of past performance of caretaking functions, as in the case of a newborn," or "because the history does not establish a pattern of caretaking sufficiently dispositive of the issues of the case . . . " Even the new proviso in (c) indirectly acknowledges the importance of caretaking when it says "the court cannot rely solely on caretaking functions" if "either parent or both has demonstrated reasonable participation in parenting functions . . ."

Time spent with third parties not taken into account.

In 9-206(a) custodial time is allocated to achieve any of the several objectives set out in numbered subdivisions. New subdivision (10) added a new objective to take into account. The new

objective is that time allocated to a parent does not result in time spent with a family member of that parent or with a third party.

Less reliance on caretaking in temporary orders possibly?

The "Criteria for temporary parenting plan," section, 9-204 has the following underlined language added to subdivision (a)(1): "Which parent has taken greater responsibility during the last 12 months for performing caretaking and/or parenting functions relating to the daily needs of the child." Perhaps this gives an argument that parenting functions should be weighed more than in the past. However, caretaking still has the weight as noted above in the other provisions of the Code and in addition, subdivision (a)(2) of that temporary parenting plan section still says the court shall give "particular consideration" to "Which parenting arrangements will cause the least disruption to the child's emotional stability while the action is pending." The temporary order section in its subsection (b) also seems to throw in a reference to the factors for the permanent parenting plan which is probably 9-206.

So for temporary orders the allocation may be a little more open for consideration of which parent performed what level of parenting functions, but recent caretaking remains important, particularly because of the reference in subdivision (a)(2) to emotional stability.

Changes to investigations.

The original bill, in addition to the changes in investigations that made it into the final bill, required advance notice with reasonable particularity of the nature and objective of the investigation; it forbade any action pursuant to an investigative report, no matter how serious, until after a full-blown hearing; it only allowed the child to be referred to professionals, or allowed professionals' records to be reviewed, if both parents agreed or the child was removed from custody of that parent. Those provisions did not pass.

What got in changes to 9-301 as enacted requires notice to parties of the order of an investigation and the identity of the investigator. Also it makes the investigator subject to being called and cross examined and subject to discovery -- even including pre-hearing deposition. It also provides for an automatic continuance if a party is not given a copy of the report 10 days in advance (which may be invading the right of the courts to set their own procedures). Perhaps most problematic is it requires all records and documents reviewed or relied upon by the investigator be available to the parties. It is unclear what happens if a confidential source gives information that leads to discovery of damning evidence that is not confidential, and the non-confidential evidence is used in a hearing, but the confidential source records are not made available.

Note however, Rule 47(d) of the Rules of Practice and Procedure in Family Court, Appendix B entitled "Guidelines for Guardian ad Litem in Family Court, may conflict and allow greater confidentiality, and the Rule states that "[T]he Guidelines for Guardians Ad Litem in Family Court set forth in Appendix B of these rules shall govern investigations by guardians ad litem. If the Guidelines for Guardians Ad Litem in Family Court conflict with other rules or statutes, the Guidelines shall apply."

Changes to custodial responsibility related to siblings and half-siblings.

Current law 9-206(3), makes, as one objective of the allocation of custodial responsibility, keeping siblings together but only when "necessary to their welfare".

The bill adds a provision that would broaden that although it is in 9-102 "Objectives; best interests of the child." The provision states that facilitating "(8) Meaningful contact between a child and his or her siblings, including half-siblings" serves the child's best interests.

Does "meaningful contact" only mean that siblings and half-siblings should be allowed to SnapChat each other? Or is the best interest of a child facilitated by co-ordinating physical time spent together with the common parent or parents? Certainly the latter is something that at least one legislator who was a sponsor of the bill wanted. It is certainly a new objective that is in the Code. There are of course a lot of moving parts involved in making half-sibling time together with a common parent happen. Rarely will a court have both custody orders before it. Do the children get along? Does the common parent want to spend "alone time" with one or more of the children separately? The schedules of all the individuals involved that cannot be affected by the court are themselves a whole subset of moving parts. Etc.

Electronic access to the child.

New subdivision (11) in 9-206 has the objective to "allow reasonable access to the child by telephone, or other electronic contact, which should be defined in the parenting plan." Probably not new in practice, but something for a parent to hang their hat on.

Changes to relocation provisions.

Section 9-403 was completely rewritten. Before the enactment of this legislation a relocating parent had to provide a notice to the other parent and the burden was placed on the other parent to go to court to go forward to dispute or accommodate the move. The Legislature heard that had created problems. The section was rewritten to put the burden of going to court on the relocating parent, but the language, after being amended into HB 2363 bill from another bill and then going back and forth might create new problems in carrying out its mission.

Fortunately subsection (e) allows an agreed parenting plan to be filed and adopted by the court if in the child's best interest. This language requires a finding which could be read to require some kind of an inquiry by the court. But this change is one place where there is no language requiring written findings. And the court may have enough experience with the family to just sign a form order even if inquiry is deemed necessary.

However, if there is no agreement, things get complicated. Hopefully the Supreme Court can have rules and forms to help guide people, plus lawyers and judges, through a new process that is practical and effective. The statute is not always practical and could use some assistance.

The meaning of subsection (f) is not clear. It states "Except in extraordinary circumstances articulated in the court's order, a relocation may not be considered until an initial permanent parenting plan is established." What does it means to be "considered" and by whom, and what is the difference between an "initial permanent" plan and a permanent plan that is not initial -- seems like a conflict in terms. Or is it saying relocation of a temporary parenting plan cannot be considered?

The timing in the Code creates problems also. The relocating parent has to file a petition 90 days prior to the relocation, but only have the summons served 60 days in advance, but still "provide such notice 90 days in advance". The hearing has to be held 30 days in advance of proposed relocation unless there are findings why not. Some relocations to take advantage of a job offer etc. would seem impractical to fit in the time limitations, so hopefully those can be considered extraordinary.

Subsection (d) sets out the standards for allowing the relocation and shifting burdens to prove those standards and what modifications the court may make.

In the end the amended section says the court shall "if practical" maintain the same division of time; it requires the court to "attempt to minimize impairments to a parent-child relationship caused by a parent's relocation through alterative arrangements;" and it requires the court to consider costs the relocation imposes on the respective parties, and allocate those perhaps even by disregarding the child support formula.

Consideration of "neglect or abandonment" overcoming presumption of equal allocation of decision making.

The complaint was that one parent would ghost a child and the other parent for years, and then suddenly show up (perhaps angry at being made to pay child support for the first time) and demand equal decision making on education, healthcare, activities etc. So these terms "neglect and abandonment" were added to 9-207(b) as grounds to vary from equal decision making.

Emergency health care decision making.

The new proviso in 1-220 appears to not be different than existing 9-207(c).

Is there a change in parental rights interference?

One of the current limiting factors in 9-209)(a)(4) is if a parent "has interfered persistently with the other parent's *access* to the child". The new language is whether a parent "overtly, or covertly, persistently violated, interfered with, impaired, or impeded the rights of a parent or a child with respect to the exercise of shared *authority, residence, visitation, or other contact* with the child." The new language is a little broader than the old "access". In the end the question may be whether a broken relationship between a child and a parent is caused by the other parent, by the child, or by the parent who is making the complaint.

Notice if the child is a victim of an alleged crime.

New subdivision (c)(2) to section 601 "Access to a child's records" gives each parent the right to be notified by the other if the minor child is the victim of an alleged crime, including notice of the identify of the investigating agency if known, unless the parent to be notified is the alleged perpetrator.

No retroactivity.

Despite an amendment the last night of the session by the House, I believe any fair reading of the provisions of new subsection (c) of 9-603 does not, standing alone, provide that the enactment of the bill is a change of circumstances or other grounds allowing modification of previous custody orders.

What HB 2363 as amended, passed, "engrossed" and signed into law does NOT do?

The introduced version of HB 2363, and even the version of the bill that passed the House, did a number of things that many people may have heard about and been concerned about, but that did not make it into the final bill. Those are listed below.

It does not take out the current Code section making parental fairness secondary to the best interest of the child. 9-102(b)

It does not tie judges' hands with a 50/50 presumption that would have to be applied to every family unless the court "document[s] all the evidence of record upon which the court relies" that the presumptive division would "endanger the child's physical, mental or emotional health."

It does not require for temporary orders, as the version that passed the House did, that the court "shall expressly cite all the evidence of record upon which the court relies for its determination" that 50/50 custody is not ordered; although the version that first passed the House and was sent to the Senate did take out the requirement in the original introduced version for "a full adversarial judicial hearing" for temporary orders.

It does not impose a presumption that would scare women (mostly) into staying in abusive relationships rather than risk having their child alone with the abuser half the time.

It does not give a bargaining chip to a parent who really does not want half the time with the child, but who can use the presumption of 50/50 custody to frighten the other parent into negotiating bad terms of equitable distribution, spousal support, and even child support etc.

It does not require a sibling's time with a parent to be ordered to be equivalent to the highest, up to 50%, amount of time any sibling or half-siblings has with that parent.

It does not make all the changes to investigations originally proposed as indicated above.

It does not put false statements about the recommendations of social science into Code.

It does not allow 18 years of existing child custody orders to be reopened without changed circumstances.

NOTE: This language was obtained directly from the House Clerk's office and I am assured this is the language that passed just before midnight April 10, 2021 The Clerk's office will take several days to put it in final "enrolled" form (including any possible technical corrections in things like section numbering, obvious grammatical problems, etc.) and send it to the Governor to sign. This version will be more useful at first because it shows changes from current law with ~~strike-through (deleted)~~ and underline (added).language. The enrolled version will not show changes and will look just like what will appear in the books/on line. Also note when discussing with others, that this is a MsWord file that different computers will open differently, so the pagination and line numbering (where it exists) may not be the same and there may be page break irregularities. It is suggested to refer to section and subsection numbers etc. when discussing with others. Dave McMahon | wvdavid@mountain.net

HB2363 SUB1 HFA FOSTER 4-10 #1 AMENDED

Spano 3382

Delegate Foster moved to amend the bill, as amended by the Senate, on page one, after the enacting clause, by striking out the remainder of the bill, and inserting in lieu thereof, the following:

CHAPTER 48. DOMESTIC RELATIONS.

ARTICLE 1. GENERAL PROVISIONS, DEFINITIONS.

§48-1-220. Decision-making responsibility defined.

"Decision-making responsibility" refers to authority for making significant life decisions on behalf of a child, including, but not limited to, the child's education, spiritual guidance and health care: *Provided*, That with regard to healthcare, both parents in any shared parenting plan, regardless of the relative ratio of parenting time allocated between the parents, shall have the authority to make emergency or other non-elective healthcare decisions concerning their child necessary for the child's health or welfare during such parent's parenting time.

§48-1-239. Shared parenting defined.

(a) "Shared parenting" means either basic shared parenting or extended shared parenting.

(b) "Basic shared parenting" means an arrangement under which one parent keeps a child or children overnight for less than 35 percent of the year and under which both parents contribute to the expenses of the child or children in addition to the payment of child support.

(c) "Extended shared parenting" means an arrangement under which each parent keeps a child or children overnight for more than 35 percent of the year and under which both parents contribute to the expenses of the child or children in addition to the payment of child support.

(d) In any case where, in the absence of an agreement between the parents, a court orders shared parenting; the order shall be in writing and include specific findings of fact supporting the Court's determination

§48-1-239a. Shared legal custody defined.

"Shared legal custody" means a continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care, and emotional, moral, and religious development consistent with the provisions of §48-9-207 of this code.

48-1-239b. Sole legal custody defined.

"Sole legal custody" means that one parent has the right and responsibility to make major decisions regarding the child's welfare including matters of education, non-emergency medical care, and emotional, moral, and religious development.

§48-1-241a. Shared physical custody defined.

"Shared physical custody" means a child has periods of residing with, and being under the supervision of, each parent consistent with the provisions of §48-9-206 of this code: *Provided,* That physical custody shall be shared by the parents in such a way as to assure a child has frequent and continuing contact with both parents. Such frequent and continuing contact with both parents is rebuttably presumed to be in the best interests of the child unless the evidence shows otherwise.

§48-1-241b. Sole physical custody defined.

"Sole physical custody" means a child resides with and is under the supervision of one parent, subject to reasonable visitation by the other parent, unless the court determines that the visitation would not be in the best interests of the child.

ARTICLE 9. ALLOCATION OF CUSTODIAL RESPONSIBILITY AND DECISION-MAKING RESPONSIBILITY OF CHILDREN.

§48-9-102. Objectives; best interests of the child.

(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 and parenting 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; and

(8) Meaningful contact between a child and his or her siblings, including half-siblings.

(b) A secondary objective of article is to achieve fairness between the parents.

§48-9-105. Venue for custodial allocation actions independent of divorce.

(a) Venue for the initial determination of custodial allocation or child custody determination within a divorce action shall be governed by §48-5-106 or §48-20-101 *et seq*. of this code, or both.

(b) Venue for the initial determination of custodial allocation or child custody determination as between parties who reside in separate states shall be governed by §48-20-101 *et seq*. of this code.

(c) Venue for modification of custodial allocation or modification of child custody determination which was previously determined in a tribunal of a state other than West Virginia shall be governed by §48-20-101 *et seq*. of this code.

§48-9-203. Proposed temporary parenting plan; temporary order; amendment; vacation of order.

(a) A parent seeking a temporary order relating to parenting shall file and serve a proposed temporary parenting plan by motion. The other parent, if contesting the proposed temporary parenting plan, shall file and serve a responsive proposed parenting plan. Either parent may move to have a proposed temporary parenting plan entered as part of a temporary order. The parents may enter an agreed temporary parenting plan at any time as part of a temporary order. The proposed temporary parenting plan may be supported by relevant evidence and shall be verified and shall state at a minimum the following:

(1) The name, address and length of residence with the person or persons with whom the child has lived for the preceding twelve months;

(2) The performance by each parent during the last 12 months of the parenting functions relating to the daily needs of the child;

(3) The parents' work and child-care schedules for the preceding twelve months;

(4) The parents' current work and child-care schedules; and

(5) Any of the circumstances set forth in ~~section 9-209~~ §48-9-209 of this code that are likely to pose a serious risk to the child and that warrant limitation on the award to a parent of temporary residence or time with the child pending entry of a permanent parenting plan.

(b) At the hearing, the court shall enter a temporary parenting order incorporating a

temporary parenting plan which includes:

(1) A schedule for the child's time with each parent when appropriate;

(2) Designation of a temporary residence for the child;

(3) Allocation of decision-making authority, if any. Absent allocation of decision-making authority consistent with ~~section two hundred seven of this article~~ §48-9-207 of this code, neither party shall make any decision for the child other than those relating to day-to-day or emergency care of the child, which shall be made by the party who is present with the child;

(4) Provisions for temporary support for the child; ~~and~~

(5) Restraining orders, if applicable; and

(6) Specific findings of fact upon which the court bases its determinations.

(c) A parent may make a motion for an order to show cause and the court may enter a temporary order, including a temporary parenting plan, upon a showing of necessity.

(d) A parent may move for amendment of a temporary parenting plan, and the court may order amendment to the temporary parenting plan, if the amendment conforms to the limitations of ~~section 9-209~~ §48-9-209 of this code and is in the best interest of the child. The court's order modifying the plan shall be in writing and contain specific findings of fact upon which the court bases its determinations.

§48-9-204. Criteria for temporary parenting plan.

(a) After considering the proposed temporary parenting plan filed pursuant to ~~section 9-203~~ §48-9-203 of this code and other relevant evidence presented, the court shall make a temporary parenting plan that is in the best interest of the child, which shall be in writing and contain specific findings of fact upon which the court bases its determinations. In making this determination, the court shall give particular consideration to:

(1) Which parent has taken greater responsibility during the last 12 months for performing caretaking and/or parenting functions relating to the daily needs of the child; and

(2) Which parenting arrangements will cause the least disruption to the child's emotional stability while the action is pending.

(b) The court shall also consider the factors used to determine residential provisions in the permanent parenting plan.

(c) Upon credible evidence of one or more of the circumstances set forth in ~~subsection 9-209(a)~~ §48-9-209(a) of this code, the court shall issue a temporary order limiting or denying access to the child as required by that section, in order to protect the child or the other party, pending adjudication of the underlying facts. The temporary order shall be in writing and include specific findings of fact supporting the court's determination.

(d) Expedited procedures shall be instituted to facilitate the prompt issuance of a parenting plan.

§48-9-206. Allocation of custodial responsibility.

(a) Unless otherwise resolved by agreement of the parents under §48-9-201 of this code or unless harmful to the child, the court shall allocate custodial responsibility so that, except to the extent required under §48-9-209 of this code, the custodial time the child spends with each parent may be expected to achieve any of the following objectives:

(1) To permit the child to have a meaningful relationship with each parent who has performed a reasonable share of parenting functions;

(2) To accommodate, if the court determines it is in the best interests of the child, the firm and reasonable preferences of a child who is 14 years of age or older; and to accommodate, if the court determines it is in the best interests of the child, the firm and reasonable preferences of a child under 14 years of age, but sufficiently matured that he or she can intelligently express a voluntary preference for one parent;

(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 §48-9-403(d) of this code 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;

(8) To consider the stage of a child's development; ~~and~~

(9) To consider which parent will encourage and accept a positive relationship between the child and the other parent, including which parent is more likely to keep the other parent involved in the child's life and activities;

(10) To take into account the preference that time allocated to the parent resulting in the child being under the care and custody of that parent is preferred to time allocated to the parent resulting in the child being under the care or custody of a family member of that parent or a third party; and

(11) To allow reasonable access to the child by telephone or other electronic contact, which shall be defined in the parenting plan.

(b) The court may consider the allocation of custodial responsibility arising from temporary agreements made by the parties after separation if the court finds, by a preponderance of the evidence, that such agreements were consensual. The court shall afford those temporary consensual agreements the weight the court believes the agreements are entitled to receive, based upon the evidence. The court may not consider the temporary allocation of custodial responsibility imposed by a court order on the parties.

(c) If the court is unable to allocate custodial responsibility under §48-9-206(a) of this code because the allocation under §48-9-206(a) of this code would be harmful to the child, or because there is no history of past performance of caretaking functions, as in the case of a newborn, or because the history does not establish a pattern of caretaking sufficiently dispositive of the issues of the case, the court shall allocate custodial responsibility based on the child's best interest, taking into account the factors in considerations that are set forth in this section and in §48-9-209 and §48-9-403(d) of this code and preserving to the extent possible this section's priority on the share of past caretaking functions each parent performed~~:~~ *Provided*, That if either parent or both has demonstrated reasonable participation in parenting functions as defined in §48-1-235.2 of this code, the court cannot rely solely on caretaking functions, and shall consider the parents' participation in parenting functions.

(d) In determining how to schedule the custodial time allocated to each parent, the court shall take account of the economic, physical, and other practical circumstances such as those listed in §48-9-206(a)(6) of this code.

(e) In the absence of an agreement of the parents, the court's determination of allocation of custodial responsibility under this section shall be made pursuant to a hearing, which shall not be conducted exclusively by the presentation of evidence by proffer. The court's order determining allocation of custodial responsibility shall be in writing, and include specific findings of fact supporting the determination.

§48-9-207. Allocation of significant decision-making responsibility.

(a) Unless otherwise resolved by agreement of the parents under ~~section 9-201~~ §48-9-201 of this code, the court shall allocate responsibility for making significant life decisions on behalf of the child, including the child's education and health care, to one parent or to two parents jointly, in accordance with the child's best interest, in light of:

(1) The allocation of custodial responsibility under ~~section 9-206 of this article~~ §48-9-206 of this code;

(2) The level of each parent's participation in past decision-making on behalf of the child;

(3) The wishes of the parents;

(4) The level of ability and cooperation the parents have demonstrated in decision-making on behalf of the child;

(5) Prior agreements of the parties; and

(6) The existence of any limiting factors, as set forth in section 9-209 of this article.

(b) If each of the child's legal parents has been exercising a reasonable share of parenting functions for the child, the court shall presume that an allocation of decision-making responsibility to both parents jointly is in the child's best interests. The presumption is overcome if there is a history of domestic abuse, neglect, or abandonment, or by a showing that joint allocation of decision-making responsibility is not in the child's best interest: *Provided*, That the court's determination shall be in writing and include specific findings of fact supporting any determination that joint allocation of decision-making responsibility is not in the child's best interest.

(c) Unless otherwise provided or agreed by the parents, each parent who is exercising custodial responsibility shall be given sole responsibility for day-to-day decisions for the child, while the child is in that parent's care and control, including emergency decisions affecting the health and safety of the child.

PART 2 – PARENTING PLANS

§48-9-209. Parenting plan; limiting factors.

(a) If either of the parents so requests, or upon receipt of credible information thereof, the court shall determine whether a parent who would otherwise be allocated responsibility under a parenting plan:

(1) Has abused, neglected or abandoned a child, as defined by state law;

(2) Has sexually assaulted or sexually abused a child as those terms are defined in ~~articles eight-b and eight-d, chapter sixty-one~~ §61-8B-1 *et seq.* and §61-8D-1 *et seq.* of this code;

(3) Has committed domestic violence, as defined in ~~section 27-202~~ §48-27-202 of this code;

(4) Has ~~interfered persistently with the other parent's access to the child,~~ overtly or covertly, persistently violated, interfered with, impaired, or impeded the rights of a parent or a child with respect to the exercise of shared authority, residence, visitation, or other contact with the child, except in the case of actions taken for the purpose of protecting the safety of the child or the interfering parent or another family member, pending adjudication of the facts underlying that belief; or

(5) Has made one or more fraudulent reports of domestic violence or child abuse: *Provided*, That a person's withdrawal of or failure to pursue a report of domestic violence or child support shall not alone be sufficient to consider that report fraudulent.

(b) If a parent is found to have engaged in any activity specified by subsection (a) of this section, the court shall impose limits that are reasonably calculated to protect the child or child's parent from harm. The limitations that the court shall consider include, but are not limited to:

(1) An adjustment of the custodial responsibility of the parents, including but not limited to:

(A) Increased parenting time with the child to make up for any parenting time the other

parent lost as a result of the proscribed activity;

(B) An additional allocation of parenting time in order to repair any adverse effect upon the relationship between the child and the other parent resulting from the proscribed activity; or

(C) The allocation of exclusive custodial responsibility to one of them;

(2) Supervision of the custodial time between a parent and the child;

(3) Exchange of the child between parents through an intermediary, or in a protected setting;

(4) Restraints on the parent from communication with or proximity to the other parent or the child;

(5) A requirement that the parent abstain from possession or consumption of alcohol or nonprescribed drugs while exercising custodial responsibility and in the twenty-four hour period immediately preceding such exercise;

(6) Denial of overnight custodial responsibility;

(7) Restrictions on the presence of specific persons while the parent is with the child;

(8) A requirement that the parent post a bond to secure return of the child following a period in which the parent is exercising custodial responsibility or to secure other performance required by the court;

(9) A requirement that the parent complete a program of intervention for perpetrators of domestic violence, for drug or alcohol abuse, or a program designed to correct another factor; or

(10) Any other constraints or conditions that the court deems necessary to provide for the safety of the child, a child's parent or any person whose safety immediately affects the child's welfare.

(c) If a parent is found to have engaged in any activity specified in subsection (a) of this section, the court may not allocate custodial responsibility or decision-making responsibility to that parent without making special written findings that the child and other parent can be

adequately protected from harm by such limits as it may impose under subsection (b) of this section. The parent found to have engaged in the behavior specified in subsection (a) of this section has the burden of proving that an allocation of custodial responsibility or decision-making responsibility to that parent will not endanger the child or the other parent.

(d) If the court determines, based on the investigation described in part three of this article or other evidence presented to it, that an accusation of child abuse or neglect, or domestic violence made during a child custody proceeding is false and the parent making the accusation knew it to be false at the time the accusation was made, the court may order reimbursement to be paid by the person making the accusations of costs resulting from defending against the accusations. Such reimbursement may not exceed the actual reasonable costs incurred by the accused party as a result of defending against the accusation and reasonable attorney's fees incurred.

(e) (1) A parent who believes he or she is the subject of activities by the other parent described in subdivision (5) of subsection (a), may move the court pursuant to subdivision (4), subsection (b), section one hundred and one, article five, chapter forty-nine of this code for the Department of Health and Human Resources to disclose whether the other parent was the source of the allegation and, if so, whether the department found the report to be:

(A) Substantiated;

(B) Unsubstantiated;

(C) Inconclusive; or

(D) Still under investigation.

(2) If the court grants a motion pursuant to this subsection, disclosure by the Department of Health and Human Resources shall be in camera. The court may disclose to the parties information received from the department only if it has reason to believe a parent knowingly made a false report.

PART 3. FACT FINDING.

§48-9-301. Court-ordered investigation.

(a) In its discretion, the court may order a written investigation and report to assist it in determining any issue relevant to proceedings under this article: *Provided*, That the court must serve notice to all parties of the court's order. The investigation and report may be made by the guardian ad litem, the staff of the court, or other professional social service organization experienced in counseling children and families: *Provided*, That the court shall identify to all parties the identity of the assigned investigator, and the investigator shall be a compulsory witness and subject to full examination and cross-examination by both parties. The court shall specify the scope and objective of the investigation or evaluation and the authority of the investigator.

(b) In preparing the report concerning a child, the investigator may consult any person who may have information about the child and the potential parenting or custodian arrangements: *Provided*, That the person(s) consulted by the investigator shall be identified to the parties and shall be subject to complete discovery including but not limited to pre-hearing deposition. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if the child has reached the age of twelve, unless the court finds that the child lacks mental capacity to consent. If the requirements of subsection (c) of this section are fulfilled, the investigator's report may be received in evidence at the hearing.

(c) The investigator shall deliver the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing unless a shorter time is ordered by the court for good cause shown: *Provided*, That in no event shall the hearing take place until

after the report has been provided to the parties and the completion of any discovery requested thereupon. The court may grant a continuance, upon motion by a party showing good cause that discovery cannot be adequately completed within 10 days. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data and reports, records or documents reviewed or relied upon by the investigator, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (b) of this section, and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call as a hearing witness the investigator and any person whom the investigator has consulted for cross-examination. A party may not waive the right of cross-examination prior to the hearing.

(d) Services and tests ordered under this section shall be ordered only if at no cost to the individuals involved, or at a cost that is reasonable in light of the available financial resources.

PART 4. MODIFICATION OF PARENTING PLAN.

§48-9-403. Relocation of a parent.

~~(a) The relocation of a parent constitutes a substantial change in the circumstances under subsection 9-401(a) of the child only when it significantly impairs either parent's ability to exercise responsibilities that the parent has been exercising.~~

~~(b) Unless otherwise ordered by the court, a parent who has responsibility under a parenting plan who changes, or intends to change, residences for more than ninety days must give a minimum of sixty days' advance notice, or the most notice practicable under the circumstances, to any other parent with responsibility under the same parenting plan. Notice shall include:~~

~~(1) The relocation date;~~

~~(2) The address of the intended new residence;~~

~~(3) The specific reasons for the proposed relocation;~~

~~(4) A proposal for how custodial responsibility shall be modified, in light of the intended move; and~~

~~(5) Information for the other parent as to how he or she may respond to the proposed relocation or modification of custodial responsibility.~~

~~Failure to comply with the notice requirements of this section without good cause may be a factor in the determination of whether the relocation is in good faith under subsection (d) of this section and is a basis for an award of reasonable expenses and reasonable attorney's fees to another parent that are attributable to such failure.~~

~~The Supreme Court of Appeals shall make available through the offices of the circuit clerks and the secretary-clerks of the family courts a form notice that complies with the provisions of this subsection. The Supreme Court of Appeals shall promulgate procedural rules that provide for an expedited hearing process to resolve issues arising from a relocation or proposed relocation.~~

~~(c) When changed circumstances are shown under subsection (a) of this section, the court shall, if practical, revise the parenting plan so as to both accommodate the relocation and maintain the same proportion of custodial responsibility being exercised by each of the parents. In making such revision, the court may consider the additional costs that a relocation imposes upon the respective parties for transportation and communication, and may equitably allocate such costs between the parties.~~

~~(d) When the relocation constituting changed circumstances under subsection (a) of this section renders it impractical to maintain the same proportion of custodial responsibility as that being exercised by each parent, the court shall modify the parenting plan in accordance with the child's best interests and in accordance with the following principles:~~

~~(1) A parent who has been exercising a significant majority of the custodial responsibility for the child should be allowed to relocate with the child so long as that parent shows that the relocation is in good faith for a legitimate purpose and to a location that is reasonable in light of the purpose. The percentage of custodial responsibility that constitutes a significant majority of custodial responsibility is seventy percent or more. A relocation is for a legitimate purpose if it is to be close to significant family or other support networks, for significant health reasons, to protect the safety of the child or another member of the child's household from significant risk of harm, to pursue a significant employment or educational opportunity or to be with one's spouse who is established, or who is pursuing a significant employment or educational opportunity, in another location. The relocating parent has the burden of proving of the legitimacy of any other purpose. A move with 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 to the child.~~

~~(2) If a relocation of the parent is in good faith for legitimate purpose and to a location that is reasonable in light of the purpose and if neither 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 effects of the relocation on the child.~~

~~(3) If a parent does not establish that the purpose for that parent's relocation is in good faith for a legitimate purpose into a location that is reasonable in light of the purpose, the court may modify the parenting plan in accordance with the child's best interests and the effects of the relocation on the child. Among the modifications the court may consider is a reallocation of primary custodial responsibility, effective if and when the relocation occurs, but such a reallocation shall not be ordered if the relocating parent demonstrates that the child's best interests would be served by the relocation.~~

~~(4) The court shall attempt to minimize impairment to a parent-child relationship caused by a parent's relocation through alternative arrangements for the exercise of custodial responsibility appropriate to the parents' resources and circumstances and the developmental level of the child.~~

~~(e) In determining the proportion of caretaking functions each parent previously performed for the child under the parenting plan before relocation, the court may not consider a division of functions arising from any arrangements made after a relocation but before a modification hearing on the issues related to relocation.~~

~~(f) In determining the effect of the relocation or proposed relocation on a child, any interviewing or questioning of the child shall be conducted in accordance with the provisions of rule 17 of the rules of practice and procedure for family law as promulgated by the Supreme Court of Appeals.~~

(a) The relocation of a parent constitutes a substantial change in the circumstances of the child under §48-9-401(a) of this code when it impairs either parent's ability to exercise responsibilities that the parent has been exercising, or when it impairs the schedule of custodial allocation that has been ordered by the court for a parent or any other person.

(b) A parent who has responsibility under a parenting plan who changes, or intends to

change, residences must file a verified petition with the court for modification of the parenting plan, and cause a copy of the same to be served upon the other parent and upon all other persons who, pursuant to the court's order in effect at the time of the petition, have been allocated custodial time with the child. The petition shall be filed at least 90 days prior to any relocation, and the summons must be served at least 60 days in advance of any relocation, unless the relocating parent establishes that it was impracticable under the circumstances to provide such notice 90 days in advance. The verified petition shall include:

(1) The proposed relocation date;

(2) The address of the intended new residence;

(3) The specific reasons for the proposed relocation;

(4) A proposal for how custodial responsibility shall be modified, in light of the intended move; and

(5) A request for a hearing.

Failure to comply with the requirements of this section may be a factor in the determination of whether the relocation is in good faith under subsection (d) of this section, and may also be a basis for reallocation of the primary residence and custodial responsibility for the child and for an award of reasonable expenses and reasonable attorney's fees to another parent or another person exercising custodial responsibility for the child pursuant to an order of the court that are attributable to such failure.

(c) A hearing on the petition shall be held by the court at least 30 days in advance of the proposed date of relocation. A parent proposing to relocate may move for an expedited hearing upon the petition in circumstances under which the parent needs an answer expeditiously. If the hearing is held fewer than 30 days in advance of the proposed date of relocation, the court's order shall include findings of fact as to why the hearing was not held at least 30 days prior to the petition's proposed date of relocation. After a hearing upon a petition filed under this section, the court shall, if practical, revise the parenting plan so as to both accommodate the relocation

and maintain the same proportion of custodial responsibility being exercised by each of the parents and all such other persons exercising custodial responsibility for the child pursuant to the order of the court. In making such revision, the court may consider the additional costs that a relocation imposes upon the respective parties for transportation and communication, and may equitably allocate such costs between the parties and may consider §48-13-702 of this code authorizing the court to disregard the child support formula relating to long distance visitation costs.

(d) (1) At the hearing held pursuant to this section, the relocating parent has the burden of proving that: (A) The reasons for the proposed relocation are legitimate and made in good faith; (B) that allowing relocation of the relocating parent with the child is in the best interests of the child as defined in §48-9-102 of this code; and (C) that there is no reasonable alternative, other than the proposed relocation, available to the relocating parent that would be in the child's best interests and less disruptive to the child.

(2) A relocation is for a legitimate purpose if it is to be close to immediate family members, for substantial health reasons, to protect the safety of the child or another member of the child's household from significant risk of harm, to pursue a significant employment or educational opportunity, or to be with one's spouse or significant other with whom the relocating parent has cohabitated for at least a year, who is established, or who is pursuing a significant employment or educational opportunity, in another location.

(3) The relocating parent has the burden of proving the proposed relocation is for one of these legitimate purposes. The relocating parent has the burden of proving the legitimacy of any other purpose. A move with a legitimate purpose is unreasonable unless the relocating parent proves that the purpose is not substantially achievable without moving, and that moving to a location that is substantially less disruptive of the other parent's relationship to the child is not feasible.

(4) When the relocation is for a legitimate purpose, in good faith, and renders it

impractical to maintain the same proportion of custodial responsibility as that being exercised by each parent and all other persons exercising custodial responsibility for the child pursuant to an order of the court, the court shall modify the parenting plan in accordance with the child's best interests.

(5) If the relocating parent does not establish that the purpose for that parent's relocation is made in good faith for a legitimate purpose to a location that is reasonable in light of the purpose, the court may modify the parenting plan in accordance with the child's best interests and the effects of the relocation on the child. Among the modifications the court may consider is a reallocation of primary custodial responsibility, to become effective if and when the parent's relocation occurs.

(6) The court shall attempt to minimize impairment to a parent-child relationship caused by a parent's relocation through alternative arrangements for the exercise of custodial responsibility appropriate to the parents' resources and circumstances and the developmental level of the child.

(e) If the parties file with the court a modified parenting plan signed by all the parties the court may enter an order modifying custodial responsibility in accordance with the parenting plan if the court determines that the parenting plan is in the best interest of the child to do so.

(f) Except in extraordinary circumstance articulated in the court's order, a relocation may not be considered until an initial permanent parenting plan is established.

(g) In determining the effect of the relocation or proposed relocation on a child, any interviewing or questioning of the child shall be conducted in accordance with the provisions of Rule 17 of the Rules of Practice and Procedure for Family Court as promulgated by the Supreme Court of Appeals.

PART 6. MISCELLANEOUS PROVISIONS.

§48-9-601. Access to a child's records.

(a)(1) Each parent has full and equal access to a child's educational records absent a court

order to the contrary. Neither parent may veto the access requested by the other parent. Educational records are academic, attendance and disciplinary records of public and private schools in all grades pre-kindergarten through 12 and any form of alternative school. Educational records are any and all school records concerning the child that would otherwise be properly released to the primary custodial parent, including, but not limited to, report cards and progress reports, attendance records, disciplinary reports, results of the child's performance on standardized tests and statewide tests and information on the performance of the school that the child attends on standardized statewide tests; curriculum materials of the class or classes in which the child is enrolled; names of the appropriate school personnel to contact if problems arise with the child; information concerning the academic performance standards, proficiencies, or skills the child is expected to accomplish; school rules, attendance policies, dress codes and procedures for visiting the school; and information about any psychological testing the school does involving the child.

(2) In addition to the right to receive school records, the nonresidential parent has the right to participate as a member of a parent advisory committee or any other organization comprised of parents of children at the school that the child attends.

(3) The nonresidential parent or noncustodial parent has the right to question anything in the child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school.

(4) Each parent has a right to arrange appointments for parent-teacher conferences absent a court order to the contrary. Neither parent can be compelled against their will to exercise this right by attending conferences jointly with the other parent.

(b)(1) Each parent has full and equal access to a child's medical records and vital records absent a court order to the contrary. Neither parent may veto the access requested by the other parent. If necessary, either parent is required to authorize medical providers to release

to the other parent copies of any and all information concerning medical care provided to the child which would otherwise be properly released to either parent.

(2) If the child is in the actual physical custody of one parent, that parent is required to promptly inform the other parent of any illness of the child which requires medical attention.

(3) Each parent is required to consult with the other parent prior to any elective surgery being performed on the child, and in the event emergency medical procedures are undertaken for the child which require the parental consent of either parent, if time permits, the other parent shall be consulted, or if time does not permit such consultation, the other parent shall be promptly informed of the emergency medical procedures: *Provided,* That nothing contained herein alters or amends the law of this state as it otherwise pertains to physicians or health care facilities obtaining parental consent prior to providing medical care or performing medical procedures.

(c)(1) Each parent has full and equal access to a child's juvenile court records, process and pleadings, absent a court order to the contrary. Neither parent may veto any access requested by the other parent. Juvenile court records are limited to those records which are normally available to a parent of a child who is a subject of the juvenile justice system.

(2) Each parent has the right to be notified by the other party if the minor child is the victim of an alleged crime, including the name of the investigating law-enforcement officer or agency, if known. There is no duty to notify if the party to be notified is the alleged perpetrator.

§48-9-603. Effect of enactment; operative dates.

(a) The enactment of this article, formerly enacted as article eleven of this chapter during the second extraordinary session of the 1999 Legislature, is prospective in operation unless otherwise expressly indicated.

(b) The provisions of ~~section 9-202~~ §48-9-202 of this code, insofar as they provide for parent education and mediation, became operative on January 1, 2000. Until that date, parent education and mediation with regard to custody issues were discretionary unless made

mandatory under a particular program or pilot project by rule or direction of the Supreme Court of Appeals or a circuit court.

(c) The provisions of this article that authorize the court, in the absence of an agreement of the parents, to order an allocation of custodial responsibility and an allocation of significant decision-making responsibility became operative on January 1, 2000, at which time the primary caretaker doctrine was replaced with a system that allocates custodial and decision-making responsibility to the parents in accordance with this article. Any order entered prior to January 1, 2000, based on the primary caretaker doctrine remains in full force and effect until modified by a court of competent jurisdiction.

(d) The amendments to this chapter made during the 2021 session of the Legislature shall become applicable upon the effective date of those amendments. Any order entered prior to the effective date of those amendments remains in full force and effect until modified by a court of competent jurisdiction.

Adopted

Rejected

Susana Duarte is an attorney and the Legal Services Manager with Legal Aid of West Virginia. She supports local offices across the state ensuring high quality legal services across the program. She started with the program in 2005 as a staff attorney, and later became the Supervising Attorney in the Charleston office. She has practiced in the areas of domestic relations and landlord tenant law, particularly focusing on subsidized housing law. Susana graduated with a Bachelor of Arts from Concord College (now University) in 2002 and received her Juris Doctor in 2005 from the University of California at Berkeley.

Katheryn Marcum is an attorney with Legal Aid of West Virginia in the Elkins office, and is Legal Aid's statewide Housing Law Taskforce Chairperson. She graduated from West Virginia Wesleyan College in 2011 and holds an MA from the University College Dublin, 2012, where she was a George J. Mitchell Scholar. She received her Juris Doctor in 2017 from West Virginia University College of Law. She has been with the program since 2017 and has practiced in the area of domestic relations and landlord tenant law. Katheryn specializes in federally subsidized housing law and serves various housing security programs in the Elkins area.

Abandoned Personal Property
After Court-Ordered Vacate Date

Summary of the "safe harbor" provision in the Wrongful Occupation statute, WV Code §55-3A-3(h) and 3(i).

Note: "Safe harbor" means if you follow the rules you are safe; if you fail to follow the rules you can be held liable.

Alternative 1 - Written Tenant Consent

IF The tenant "informs the landlord in writing that the personal property is abandoned or if the property is garbage"

THEN LL may dispose of the personal property at any time without liability.

Alternative 2 - Store the personal property for up to 30 days

IF: 1. Remove and/or store the personal property for up to 30 days after the court ordered vacate date and time;

2. AND EITHER

A. tenant has not paid reasonable costs of storage and removal and has not taken possession of the personal property; OR

B. The costs of storage equal the value of the personal property

THEN After 30 days storage LL may dispose of the personal property without liability.

HOWEVER

IF 1. Personal property is worth more than $300; AND

2. Either the tenant "or any person holding a security interest in the abandoned property" requests an additional 30 days, AND

3. That person pays the **reasonable costs** of storage and removal,

THEN Landlord **"shall"** store the property for up to 30 additional days.

Note: "reasonable costs of storage and removal" does not necessarily mean monthly rent.

Abandoned Personal Property:
Abandonment during Term, No Eviction Order

Summary of the "safe harbor" provision in the "Desertion of Leased Premises," WV Code 37-6-6.

Step One: Right to Regain Possession of Premises

IF Tenant in arrears abandons the leased property, AND

Post notice in conspicuous place on property, requiring tenant to pay rent within 1 month, AND

Tenant does not pay the rent in that time

THEN Landlord entitled to possession of rental premises, may enter thereon, and may recover rent owed up to that point.

Step Two: Disposal of Personal Property If Following Requirements Are Met

IF

1. Written notice stating:
   - A. That the leased property is considered abandoned, and
   - B. That any personal property must be removed "from the place of safekeeping" no later than:
     - a. 30 days after date notice mailed, OR
     - b. 60 days if tenant has notified that on active duty in armed forces;
2. Give the notice to tenant by ALL of following methods that apply:
   - A. Post in a conspicuous place on the premises,
   - B. Send by First Class mail, Return Receipt Requested, marked "Please Forward," with Certificate of Mailing, to:
     - a. The leased property address; and
     - b. Any P.O. Box held by tenant and known to Landlord; and
     - c. Any forwarding address if provided by tenant or known to LL
3. The personal property is not removed by the deadline

THEN the tenant forfeits his or her ownership rights to the personal property.

HOWEVER Same provision for extra 30 days if tenant or holder of security interest requests time and pays "reasonable costs of storage and removal."

Facing eviction? Struggling to pay rent? There are programs that may be able to help.

To help stop COVID-19, the CDC has issued an order to stop evictions for non-payment of rent, now extended until JULY 31, 2021.
To qualify, you must meet ALL these requirements:

- You are being evicted for past-due rent.
- You have applied for all available government help for rent or housing.
- You earned less than $99,000 (or less than $198,000 for couples) in 2020/2021.
- You can't pay rent or a full payment due to substantial loss of income, loss of hours/ wages, layoffs, or extra medical expenses.
- You are using your best efforts to make timely partial payments.
- If evicted, you would become homeless or move to a crowded living situation.

To get this protection, all adults listed on the lease must complete a CDC form and give it to your landlord. You can find the form and instructions at **www.cdc.gov**.

Struggling to pay rent or utilities due to COVID-19? You may qualify for financial help from the **Mountaineer Rental Assistance Program (MRAP).**
To be eligible, you must:

- Rent and live in West Virginia.
- Show lost income, economic hardship, or qualify for unemployment related to COVID-19.
- Meet income requirements.
- Have a member of your household who has experienced homelessness or housing instability since March 13, 2020.

MRAP can help with past-due rent and utilities dating back to April 1, 2020, up to three future rental payments, and a one-time internet payment.

For more information, to apply, or to find out if you qualify, visit **www.wvhdf.com.**
Call 211 if you have questions.

For help with evictions, visit
www.legalaidwv.org or call **866-255-4370**.

LEGAL AID OF WEST VIRGINIA

INTRODUCTION TO LANDLORD/TENANT LAW IN WEST VIRGINIA

1. **General Overview**
    a. Only discussing residential rental landlord/tenant relationships
    b. Not covering:
        i. Commercial realty; or
        ii. Land purchase contracts; or
        iii. Non-tenant squatters addressed via ejectment or unlawful detainer.
    c. "Rent-to-Own" (RTO) arrangements are difficult to categorize. There are lots of factual variation with these.
        i. Was there a down payment? More than a normal Security Deposit amount?
        ii. Can be further complicated by "work-in-lieu-of-money" elements.
        iii. What about "you pay the rest of the loan payments on the trailer and it's yours?"
        iv. Often the actual terms may override the non-technical words "rent to town."
    d. In general, the less formal the RTO arrangements are written, the more they tend to look like lease agreements. They have to be scrutinized carefully.
2. **What's in the Agreement?**
    a. Most of the provisions of WV Landlord/Tenant law can be varied by agreement of the parties.
    b. There are only a few protections beyond the possibility of change by explicit terms in the agreement.
        i. Warranty of Habitability;
        ii. Prohibition against retaliation for the exercise of rights related to tenancy;
        iii. Statutory Security Deposit requirements (§37-6a-1 *et.seq.*);
        iv. State and Federal Fair Housing laws (including disabilities protections); and
        v. Illegal Discrimination (on the basis of race, gender, religion, national origin, age, etc.).
    c. You cannot definitively advise your client until and unless you know what is in the agreement (written or verbal).
    d. Anything not covered or varied by the agreement will be governed by the "default" structure of WV law.

3. Landlord Obligations

a. Contract law

i. Follow the lease!

ii. Honor any promises made at inception of tenancy that are part of the deal, such as promises to re-paint, "we'll get this fixed," etc.

b. Warranty of Habitability

i. Defined by:

1. WV Code § 37-6-30; and
2. *Teller v. McCoy*, 162 W. Va. 367, 253 S.E.2d 114 (1978).

ii. Elements of a claim:

1. Material defects;
2. Knowledge by landlord;
3. Implied for all conditions existing at the inception of tenancy;
4. Tenant must notify for any conditions arising after inception of tenancy;
5. Reasonable opportunity to repair; and
6. Failure or refusal to repair within a reasonable amount of time.

iii. Keep in mind:

1. No obligation for defects caused by tenant neglect or abuse; and
2. No obligation to repair if tenant in arrears <u>before the defect arose</u>.
    a. Note: tenant withholding after defect arose does not suspend the obligation to repair.

iv. Possible Tenant Remedies for a Breach of Warranty of Habitability Claim:

1. Immediate rescission – move out without further liability under the lease;
2. Sue for affirmative damages – reduction in fair rental value; annoyance and inconvenience fees. *See Adams v. Gaylock*, 180 W. Va. 576, 378 S.E.2d 297 (1989); or
3. Withhold rent and assert habitability violation as a defense to any ensuing eviction action (likely with a counterclaim against the landlord for damages).

v. Remedies that are **<u>not</u>** available in a Breach of Warranty of Habitability claim:

1. Repair and deduct (unless the landlord consents); and
2. Specific performance;
    a. Courts usually cannot order the landlord to make particular repairs;
    b. Courts may only set a reduced fair rental value for the tenant to pay for the premises in a defective condition until the landlord makes the repairs;
    c. However, courts will order emergency repairs to be made if the living conditions are life-threatening, such as no heat in bitter winter weather.

vi. Protective orders requiring rent payment during pendency of the case may be required.

vii. Applicability of Warranty of Habitability to RTO:
1. If the property is a rental, Warranty of Habitability applies, despite any "as is" language or other disclaimers; and
2. If it is a land sale contract, Warranty of Habitability does not apply.

viii. Best practices:
1. Neutral party verification ideal – building inspector, health department inspector, utility company, etc.;
2. Take photos and videos;
3. Provide receipts; and
4. Document everything in writing.

c. ADA and WV Fair Housing law
i. Obligation to reasonably accommodate limitations of the disability;
ii. Reasonable accommodation may not impose an undue burden; and
iii. Waivers of ADA compliance for existing structures, until substantial changes or renovations are made.

4. Tenant Remedies for Landlord Breach – besides warranty of habitability

a. Standard contract analysis
i. Rescission – terminate the lease for material breach and depart with no further liability;

ii. Affirmative suit for compensatory damages while maintaining possession; and
iii. Specific performance – if traditional equitable criteria are met, essentially regarding unique nature of the contracted obligation.

b. If there is a violation of Fair Housing, ADA, or other supervening statutes, see the remedies in those fields of law.

5. Tenant Obligations

a. Basic contract law;
   i. Follow the lease; and
   ii. Honor any promises made at the inception of tenancy as part of the agreement.
b. Pay rent;
c. No damage to premises beyond normal wear and tear;
d. Quiet enjoyment for self and for others; and
e. Follow lease provisions regarding visitors, guests, and additional residents.

6. Landlord Remedies for Tenant Breach

a. Ejectment
   i. WV Code § 55-4-1 *et. seq.*
b. Unlawful Detainer
   i. WV Code § 55-3-1 *et. seq.* for Circuit Court
   ii. WV Code § 50-2-1 and § 50-4-5 for Magistrate Court
c. Wrongful Occupation Action
   i. WV Code § 55-3A-1 *et. seq.*
   ii. The hearing is set at the time the petition is filed – to be held within 10 days of filing.
   iii. Grounds:
      1. Non-payment of rent;
      2. Damage deliberately or negligently done to the property; and
      3. Breached a warranty of leasehold covenant.
   iv. A jury trial is available.
   v. If the petition is filed in Magistrate Court, removal to Circuit Court is an option so long as the $2,500 amount-in-controversy requirement is met. WV Code § 50-4-8.

1. The value of future months of occupancy and the amounts of any counterclaim are considered as part of the amount-in-controversy requirement.
2. *See State ex. rel. Strickland v. Daniels*, 173 W. Va. 576, 318 S.E.2d 627 (1984).

vi. The rules of civil procedure apply, including discovery.
1. Timelines may be shortened for good cause upon the court's motion.
2. *Criss v. Salvation Army Residences*, 319 S.E.2d 403 (1984).

vii. The right to appeal from a Magistrate Court ruling, per WV Code § 50-5-12:
1. Is absolute within 20 days of judgment;
2. May be filed late upon good cause, so long as the order approving the late appeal is filed within 90 days of the judgment; and
3. "No bond shall be required" of a person who files qualifying Fee Waiver Affidavit. WV Code § 59-2-1; *see also Bay v. Marshall*, 227 W. Va. 679, 714 S.E.2d 331 (2011).
4. There is no further discovery available in the appeal process. Civ. Pro. Rule 81.

viii. Possession of premises during pendency of appeal
1. "Further proceedings to enforce the judgment" are stayed by filing of the appeal. This is automatic, meaning that it is not a stay granted only upon motion. WV Code § 50-5-12(a) and Magistrate Civil Rule 18A.
2. Wrongful Occupation statute WV Code § 55-3A-3(g):
    a. "During the pendency of any such appeal, the tenant is not entitled to remain in possession of the property if the period of the tenancy has otherwise expired."
    b. "In the event an appeal is taken and the tenant prevails upon appeal, the relief ordered by the appellate court shall be for monetary damages only and shall not restore the tenant to possession if the term of the lease has expired, absent an issue of title, retaliatory eviction, or breach of warranty."
    c. Legal Aid's analysis to reconcile these two sentences:

i. If the tenancy has "otherwise expired," then:
    1. Tenant cannot remain in possession during the appeal; and
    2. Tenant cannot be restored to possession after winning an appeal, absent an issue of title, retaliation, or warranty.
ii. The expiration of the lease is a question of fact which must be determined by the Court.
iii. If the tenancy has not "otherwise expired," then:
    1. Tenant may maintain possession during appeal; and/or
    2. Tenant may be restored to possession upon winning an appeal.
iv. Justice Ketchum's concurring opinion in *Bay v. Marshall*, 227 W. Va. 679, 714 S.E.2d 331 (2011).
    1. "In view of … the plain language of W. Va. Code § 55-3A-3(g), a tenant found to be in wrongful occupation … whose tenancy has expired, may not remain in possession of the property during the pendency of his appeal."
    2. The possession issue was moot by the time of the Supreme Court decision, so the majority did not address it.

ix. Recovery of possession:
    1. Landlord may **not** breach the peace.
    2. Utilize fast, simple magistrate court Wrongful Occupation process.

7. Termination of Periodic Tenancy by Notice (without breach of agreement)

a. Periodic tenancy – there is no fixed end date (i.e. month-to-month or year-to-year).
b. If the agreement has a provision permitting early termination, then follow WV Code § 37-6-5:
    i. Must be in writing;

ii. Must be delivered one full period before the end of any period;
    1. If year-to-year lease, then three months; or
    2. Vacate by the end of the next rental month.
iii. Rental period defined by the date rent is due, which is not necessarily the 1st of the month;
iv. Because these evictions are not based on any alleged breach of agreement, judges may require highly technical compliance with the "one full rental period" requirement.

8. Tenant Abandonment with Personal Property Left on Premises [see handout]

a. At the behest of furniture/appliance dealers with purchase money security interests and of Rent-to-Own furniture companies, the legislature enacted provisions requiring landlords to safeguard personal property left on the premises.
b. If landlord does not follow these Safe Harbor rules, they are exposed to liability.
c. After the court-ordered eviction date, there are two options, per WV Code § 55-3A-3(h) and § 55-3A-3(i):
    i. If the tenant informs the landlord in writing that personal property is abandoned or garbage, then the landlord may dispose of it without liability; or
    ii. There is a safeguard for 30 days, and the landlord may dispose of the personal property after 30 days if:
        1. The tenant has not paid reasonable storage cost and/or reclaimed items; or
        2. The costs of storage equal the value of the personal property being stored.
    iii. <u>However</u>, the landlord must store for an <u>additional</u> 30 days if:
        1. Personal property is worth more than $300, and
        2. Either the tenant or person holding security interest requests an additional 30 days, and
        3. That person pays the "reasonable costs" of storage and removal.
d. Abandonment during the term of tenancy without a Court eviction order, per WV Code § 37-6-6:
    i. <u>STEP ONE</u>: right to regain possession of premises

1. Post notice in conspicuous place on the premises, requiring tenant to pay rent within one month, and
2. Tenant does not pay during that time; then
3. Landlord is entitled to enter and recover possession of premises and may sue to recover rent owed

ii. STEP TWO: retention/disposal of abandoned personal property (only after written notice and expiration of time period):

1. Content of written notice:
    a. Premises are considered abandoned; and
    b. Any personal property must be removed within 30 days after mailing.
        i. 60 days if tenant has been notified and is on Active Duty;
2. Delivery of written notice:
    a. Post in conspicuous place on premises, and
    b. Mail first class, return receipt requested, marked "please forward," with certificate of mailing to:
        i. Leased property address; and
        ii. Any P.O. Box held by tenant and known to landlord or Housing Authority; and
        iii. Any forwarding address known to landlord or Housing Authority or provided by tenant.
3. Dispose if personal property is not reclaimed by the deadline.
4. However, store an additional 30 days if the personal property is worth more than $300 and tenant or the person holding security interest pays reasonable costs of storage and removal.

9. Retaliation

a. Prohibited:
    i. *Imperial Colliery v. Fout*, 179 W. Va. 776, 373 S.E.2d 489 (1988).
    ii. *Adams v. Gaylock*, 180 W. Va. 576, 378 S.E.2d 297 (1989).
b. This protection only applies to retaliation for rights related to the tenancy.
c. This must be asserted affirmatively, not just as a defense to eviction.

i. *Murphy v. Smallridge*, 196 W. Va. 35, 469 S.E.2d 167 (1996).

ii. *Imperial Colliery v. Fout*, 179 W. Va. 776, 373 S.E.2d 489 (1988).

10. Security Deposits

a. Federally subsidized housing

i. Federal rules prevail over state law or over any contrary provision in the lease.

ii. Landlords with tenants who are federally subsidized have 30 days to either refund the deposit or itemize the charges.

b. WV Code § 37-6A-1 *et.seq.* – applies to rentals initiated after June 10, 2011.

i. Time period – within 60 days of termination of tenancy or 45 days of occupancy by a new tenant, whichever is shorter. WV Code § 37-6A-1(7).

ii. Obligation – refund the deposit, minus any deductions for damages or other charges along with an itemization of damages and charges. WV Code § 37-6A-2(a).

iii. The property owner at the time of the termination of tenancy is obligated, regardless of when the ownership interest was acquired or whether the security deposit was transferred from the prior owner. WV Code § 37-6A-2(e).

iv. The landlord must maintain records of all deductions for one year after termination, and the landlord must permit the tenant to inspect records within 72 hours of the tenant's request to do so. WV Code § 37-6A-3.

v. Penalty for violation – amount of unreturned security deposit + annoyance and inconvenience equal to one-and-a-half times the wrongfully withheld amount (unless the tenant owes rent at termination). WV Code § 37-6A-5.

vi. Waiver of statutory Security Deposit rights are prohibited. WV Code § 37-6A-4.

11. Federal Rules for Landlords Renting to Section 8 Voucher Tenants

a. Tenant-Based Section 8 Voucher Assistance.

i. Housing Authority pays to the private landlord a portion of the tenant's rent, and the tenant pays the remaining portion. The amounts are determined by the tenant's household income.

ii. The premises must pass an inspection by Housing Authority.

iii. The total rent charged by the landlord must be at or below a federally defined cap for the household size in that community.

b. The tenant may not offer, and the landlord may not require, "side payments" not identified and approved in the lease and the HAP contract.
    i. Distinguish from Public Housing, Project-Based Section 8, other HUD-subsidies, Low Income Housing Tax Credit (LIHTC), Rural Development, etc.

c. Federal requirements override state law
    i. Federally required "Lease Addendum" with detailed rules
    ii. Federally required "Housing Assistance Payment" (HAP) contract between landlord and the Housing Authority providing assistance with detailed rules.

d. Major differences affecting Section 8 Voucher landlords:
    i. The initial term must be a one-year lease, but it may be converted to a month-to-month lease after that.
    ii. During the first year, eviction may be for Good Cause only:
        1. Material violation of lease, or
        2. Repeated minor violations.
    iii. The tenant is entitled to a notice of eviction, of specificity sufficient to permit preparation of a defense.
    iv. The landlord must also give advance notice to Housing Authority of eviction [failure to do so is a defense to eviction].
    v. Self-help eviction is prohibited.

12. "Factory-Built Home Rental Communities" (i.e. trailer parks). WV Code § 37-15-1.

a. Defined as:
    i. A parcel of land with "two or more factory-built homes" on a continual, non-recreational basis. WV Code § 37-15-2(c).
    ii. But not "premises occupied solely by a landowner and members of his family." WV Code § 37-15-2(c).

b. Requirements:
    i. Must have a written lease prior to commencement of tenancy. WV Code § 37-15-3(a).
    ii. The lease "**shall** contain":

1. Terms of tenancy and rent;
2. Rules and regulations of community (attached copy sufficient);
3. The "language of the provisions of this article" [WV Code § 37-15-3(b)(3)]; and
4. Description of physical improvements, maintenance, services and fees provided by or assumed by either landlord or tenant.

c. Minimum rental periods
   i. Single Wide homes – no termination of tenancy except for Good Cause for the first 12 months of tenancy.
   ii. Double Wide homes – no termination of tenancy except for Good Cause for the first 5 years of tenancy.

d. Protections
   i. The landlord may not demand or collect [WV Code § 37-15-5(a)]:
      1. Any fee not listed in the agreement
      2. Any "entrance fee"
      3. Any fee for improvement to interior of home unless tenant expressly employs landlord to make the improvements
   ii. Any invitee of tenant has free access to tenant's home, unless a court order says otherwise. WV Code § 37-15-5(b).
   iii. Tenant cannot be restricted in choice of vendors of mobile home or other goods or services, except that landlord may prescribe "reasonable requirements" governing size, style, or quality of homes or structures. WV Code § 37-15-5(c).

e. Termination of tenancy in Factory-Built Home Community
   i. Written notice at least 3 months prior to termination date. WV Code § 37-15-6(c).
   ii. Notice must include "specific facts to permit determination of the date, place, witnesses, and circumstances concerning" the reason for termination. WV Code § 37-6-6(e).
   iii. No restriction on tenant sale of home if termination is not for Good Cause
      1. "Unless the landlord is changing the use of the site" (i.e. it will no longer be a mobile home park), the landlord may not prevent the sale of

the home in place to another purchaser "who meets the standards and restrictions in effect for other new tenants." WV Code § 37-15-6(f).

iv. Longer notice when more than 25 Tenants are affected in an 18-month period. WV Code § 37-15-6a.
    1. In that event, a **six-month advance** notice is required, unless the landlord obtains "written agreement to voluntarily vacate the premises by every tenant" prior to the end of the 18-month period.

v. "Wrongful Occupation of Factory-Built Home Site" WV Code § 55-33B-1 et. seq.
    1. Applies regardless of whether home is just a single site or in a "factory-built home community." WV Code § 55-3B-1(b).
    2. Distinguish "order the tenant to vacate the premises" from "order the tenant to remove the factory-built home." WV Code § 55-3B-6(e).

vi. Court may not order "tenant to vacate" in less than 30 days unless:
    1. Failure to pay rent;
    2. Damage to property of landlord or other tenants; or
    3. Materially threatened or harmed the quiet enjoyment of other tenants or neighbors

vii. Court may not order "tenant to remove the home" in less than 90 days unless:
    1. Failure to pay rent; or
    2. Presence of home poses imminent threat to health or safety of others

f. Remedies for failure to remove the mobile home [WV Code § 55-3B-6(g)].
    a. Landlord may "dispose of the home" if tenant informs in writing that it is abandoned;
    b. Landlord may "remove and store" for 30 days after court ordered removal date, then may "sell" (not "dispose") after 30 days if tenant hasn't paid reasonable costs of storage and taken possession of the home, or if costs of storage equal or exceed value of home;

c. Landlord may leave the home in place, then "sell" (not "dispose") after 30 days if tenant has not paid reasonable costs of storage and taken possession of home;
d. Proceeds of sale of home by landlord must be distributed pursuant to UCC Article 9, except landlord has priority to recover unpaid rent and may require purchaser to post in escrow the cost of moving the home. WV Code § 55-3B-6(i).

2. Disposition of Personal Property Left in the Home. WV Code § 55-3B-6(i).
3. Generally, similar to provisions discussed previously about personal property abandoned in ordinary rental premises. See WV Code § 37-6-6 and/or 55-3A-3(g).

Mountaineer RENTAL Assistance Program

wvrentalassistance.com

Real Help for West Virginia Renters is Here!

The Mountaineer Rental Assistance Program is now open and accepting applications.

If you are a renter who is struggling to pay rent or utilities because of financial hardship due to the Coronavirus, you may be eligible for assistance.

Eligibility

Not all renters are eligible for assistance. In general, the program is designed to assist West Virginia residential renters with annual income of no more than 80 percent of area median income (AMI); one or more household members has qualified for unemployment benefits, experienced a reduction in household income, incurred significant costs, or experienced other financial hardship due directly or indirectly to the coronavirus outbreak; and one or more household members are at risk of homelessness or housing instability such as a past due utility or rent notice or an eviction notice.

Eligible Expenses may include:

- Past due and current rent beginning April 1, 2020 and up to three months forward rent
- Past due and current water, sewer, gas, electric and home energy costs such as propane
- A one-time $300 stipend for internet expenses so you can use the internet for distance learning, telework, telemedicine and/or to obtain government services

Please go to the website for more information:

wvrentalassistance.com

INTRODUCTION TO LANDLORD/ TENANT LAW IN WV

Susana Duarte, Esq. and Katheryn Marcum, Esq.
Legal Aid of West Virginia, Inc.

AGENDA

Today's Focus is:
LANDLORD/TENANT LAW in West Virginia

We will NOT cover:

- Commercial Realty
- Land Purchase
- Non-tenants (i.e, squatters or relatives who do not pay rent)
- Rent to Own (RTO) agreements
- Subsidized Housing

LET'S MAKE AN AGREEMENT

A **LEASE** is the **contract** between the landlord and the tenant.

- A lease creates **legal terms** between the landlord and the tenant.
- A lease cannot
  - waive the **Warranty of Habitability** (W. Va. Code §37-6-30) or
  - waive statutory **Security Deposit requirements** (W. Va. Code §37-6a-1 et. seq.)

Other Legal Protections:

- A Landlord may not retaliate against a tenant for exercise of rights related to the tenancy.
- State and federal Fair Housing laws apply, including disabilities protections and illegal discrimination (race, gender, religion, national origin, age, etc.).

LANDLORD OBLIGATIONS

- Follow the lease!
- Do what is promised, for example "I'll re-paint" or "We'll get this fixed"
- Provide reasonable notice of entry into the unit, absent emergency.
- Satisfy the **Warranty of Habitability**

WARRANTY OF HABITABILITY

- W. Va. Code §37-6-30
- Teller v. McCoy, 162 W. Va. 367, 253 S.E.2d 114 (1978).
- A Material Defect
  - Known to the Landlord
  - Implied for conditions existing at inception of tenancy;
  - Or upon notification by the tenant;
  - Where the landlord has been given a reasonable opportunity to repair;
  - But, the landlord has failed or refused to make a repair in reasonable time.

BUT, WHAT IF?!

What if the tenant causes the damage by neglect or abuse?

- The landlord does not have an obligation to repair.

What if the tenant owes rent at the time the defect arises?

- The landlord does not have an obligation to repair.
- **Unless** tenant is withholding rent for failure of the landlord to make repairs. Then, the landlord's obligation is not suspended.

TENANT RECOURSE

When the Landlord has not made vital repairs, tenants may:

- **Move out** without being liable for remainder of lease term; or
- **Withhold rent** after communication to the landlord has failed to result in timely repairs.
- Whether or not the tenant remains in possession, the tenant may **seek affirmative damages**:
  - Reduction in fair rental value;
  - Annoyance and inconvenience.
    - See Adams v. Gaylock, 180 W. Va. 576, 378 S.E.2d 297 (1989).

What if this ends up in court due to a landlord suit for eviction?

- The tenant may assert **habitability as a defense** to an action brought by the landlord; or
- The tenant may file a **counterclaim for damages** against landlord.

WHAT IS NOT A SOLUTION?

West Virginia law does **NOT** permit:

- **Repair and Deduct** – unless consented to by landlord; or
- **Specific Performance** –the Court cannot ordinarily order the landlord to make particular repairs.
  - Instead, the Court may set a **reduced fair market rental value** based on the conditions of the unit
    - To be paid by tenant for the premises in defective condition, until repairs are made;
    - With payments made to the landlord or into court ordered escrow during pendency of case.

PROVING A HABITABILITY CASE

- Neutral party verification (building inspectors, health department inspectors, utility company records, fire department inspections, etc.);
- Witness/neighbors who have witnessed conditions;
- Photos/videos; and
- **Document communications in writing**.
- Keep copies! Receipts, Texts, Phone logs, Notices, Lease, etc.

ADA AND FAIR HOUSING

- ✓ Landlords have an obligation to **reasonably accommodate** limitations of the disability
- ✓ But reasonable accommodation may not impose **undue burden**.
- ✓ Waivers of ADA compliance for existing structures, until substantial changes or renovations are made.
- ✓ **Service animals are protected** under the ADA, West Virginia Fair Housing Act, and the WV Human Rights Commission.

TENANT OBLIGATIONS

- ✓ **Follow the lease.**
- ✓ Honor any promises made at inception of tenancy.
- ✓ Pay rent.
- ✓ No damage to premises beyond reasonable wear & tear.
- ✓ Quiet Enjoyment – for self and others.
- ✓ Follow lease provisions or occupancy rules regarding visitors, guests, additional residents.

MOUNTAINEER REPAYMENT ASSISTANCE PROGRAM (MRAP)

Evictions are often caused by money problems. Something happens, and rent becomes impossible.

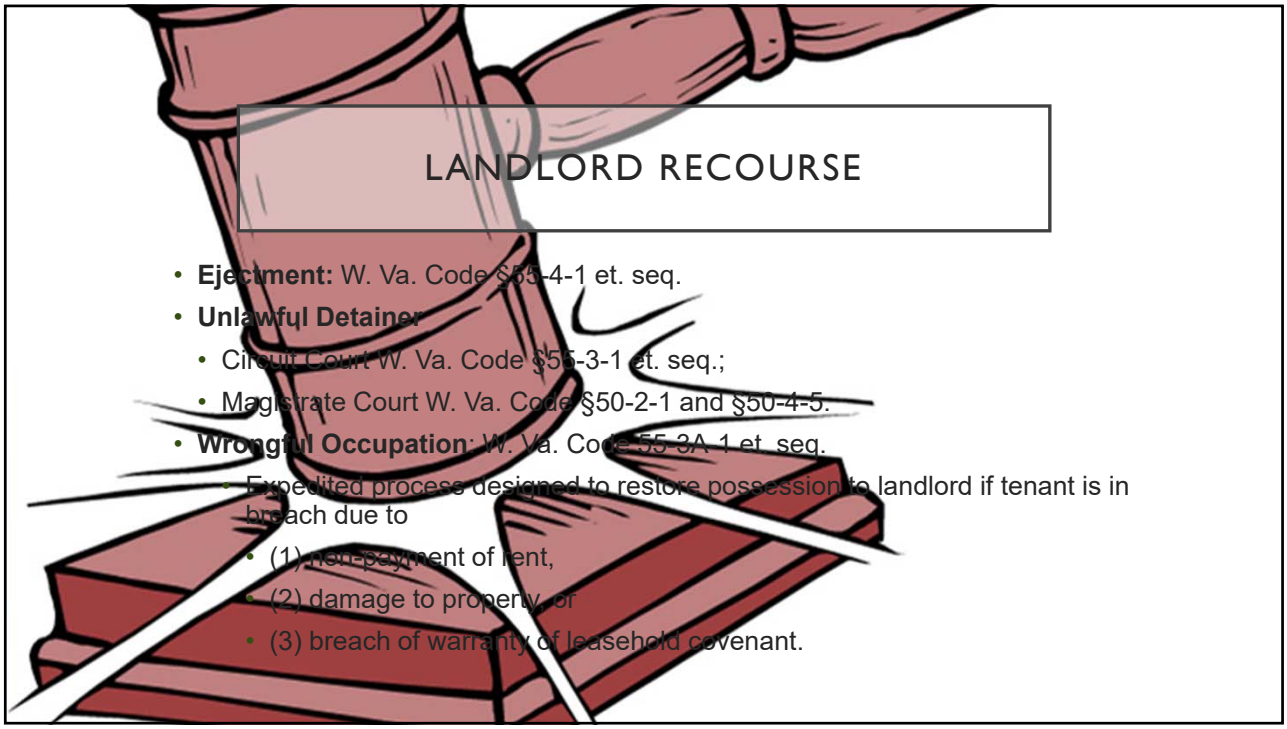
Right now, there is a money solution.

MRAP – WIN, WIN, WIN

- Tenants stay housed, and get caught up.
- Landlords get paid.
- Courts avoid unnecessary eviction actions.
- More info at https://www.wvhdf.com/programs/mountaineer-rental-assistance-program

If you are interested in volunteering – there is a significant need – we would **love** to have your help!

MRAP has funds available to help address unpaid **rent and utilities due to the pandemic – this could be a huge boost for landlords and tenants in West Virginia!**



LANDLORD RECOURSE

- **Ejectment:** W. Va. Code §55-4-1 et. seq.
- **Unlawful Detainer**
  - Circuit Court W. Va. Code §55-3-1 et. seq.;
  - Magistrate Court W. Va. Code §50-2-1 and §50-4-5.
- **Wrongful Occupation:** W. Va. Code 55-3A-1 et. seq.
  - Expedited process designed to restore possession to landlord if tenant is in breach due to
    - (1) non-payment of rent,
    - (2) damage to property, or
    - (3) breach of warranty of leasehold covenant.

WRONGFUL OCCUPATION

- Magistrate hearing set at time of filing of petition, held within **10 days**.
- Jury trial available.
- May remove to Circuit Court if **$2,500** amount in controversy met. W. Va. Code §50-4-8.
  - Value of future months of occupancy and amounts of any counterclaim considered as part of amount in controversy. Strickland v. Daniels, 173 W.Va. 576, 318 S.E.2d 627 (1984)
- Rules of Civil Procedure (Magistrate Court Rules allow for limited discovery) apply; although timelines may be shortened upon motion for good cause. Criss v. Salvation Army Residences, 319 S.E.2d 403 (W. Va. 1984).

AVAILABLE RELIEF IN A WRONGFUL OCCUPATION CASE

The Magistrate makes the determination:

The tenant prevails:

- Case is dismissed, tenant remains in possession

  Pay & Dismiss – if the *only* ground for eviction is non-payment of rent, W. Va. Code §37-6-23 allows the tenant to pay "all rents and arrears owed including interest and costs" and the matter **shall be dismissed.

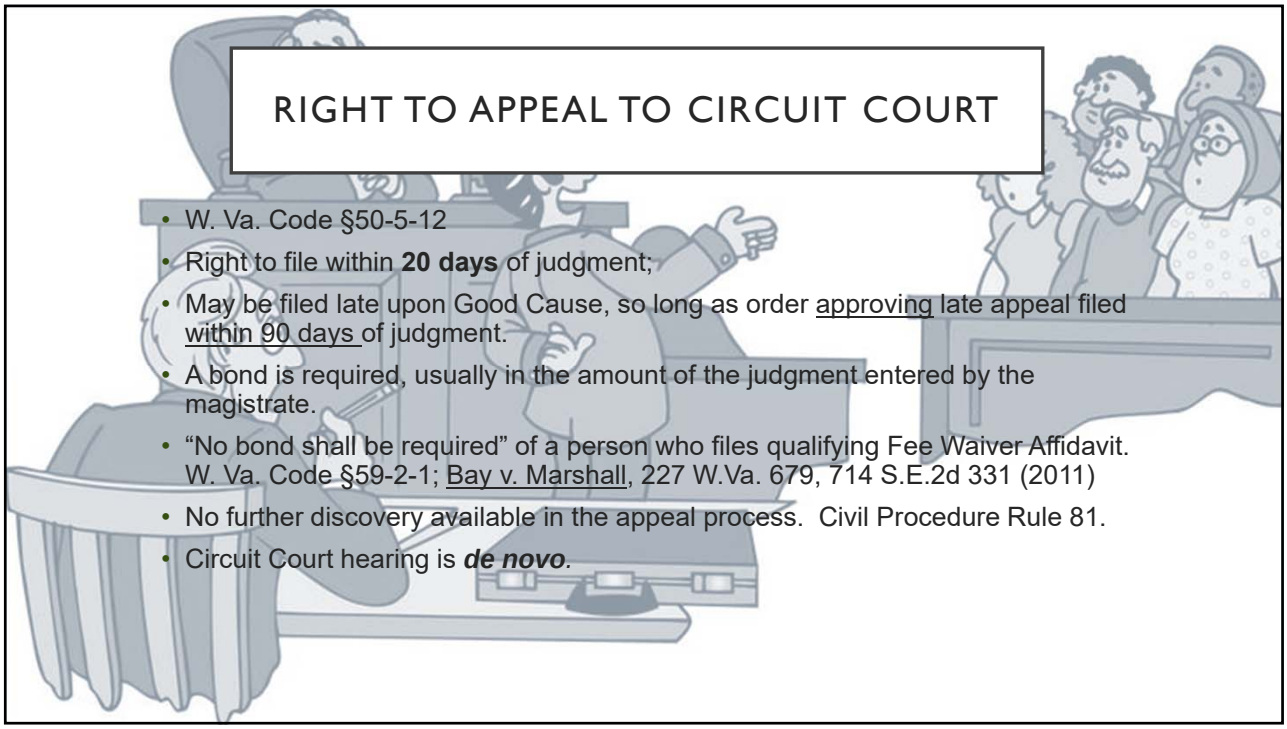
The landlord prevails:

- Possession is awarded to property owner with an effective vacate date
- Judgment can be ordered if money is owed at the time of the hearing

**If the tenant holds over beyond the vacate date, the landlord can enforce the order of possession with law enforcement assistance.

DO LANDLORDS HAVE TO GO COURT?

- The legal remedy available to landlords to recover possession of their property is the expedited Wrongful Occupation action.
- Law enforcement will **NOT** assist with removal of a tenant absent a court order directing them to do so.
- In West Virginia the law is ambiguous about whether it is legal to "lockout" a tenant in breach of the lease. However, the landlord subjects themselves to **significant liability** if they initiate a lockout and fail to utilize the Wrongful Occupation statute. Whether or not a tenant is at "fault" is a fact issue best determined in a Court of law.



RIGHT TO APPEAL TO CIRCUIT COURT

- W. Va. Code §50-5-12
- Right to file within **20 days** of judgment;
- May be filed late upon Good Cause, so long as order approving late appeal filed within 90 days of judgment.
- A bond is required, usually in the amount of the judgment entered by the magistrate.
- "No bond shall be required" of a person who files qualifying Fee Waiver Affidavit. W. Va. Code §59-2-1; Bay v. Marshall, 227 W.Va. 679, 714 S.E.2d 331 (2011)
- No further discovery available in the appeal process. Civil Procedure Rule 81.
- Circuit Court hearing is ***de novo***.

POSSESSION DURING THE APPEAL

In an appeal from any Magistrate Court civil case, W. Va. Code § 50-5-12(a) and Magistrate Civil Rule 18A state "further proceedings to enforce the judgment" **are stayed** by filing of appeal. This is **automatic**, not a stay granted only upon motion.

Wrongful Occupation statute includes two critical sentences:

- "During the pendency of any such appeal, the tenant is not entitled to remain in possession of the property if the period of the tenancy ***has otherwise expired***." W. Va. Code § 55-3A-3(g).
- "In the event an appeal is taken and the tenant prevails upon appeal, the relief ordered by the appellate court shall be for monetary damages only and shall not restore the tenant to possession if the term of the lease has expired, absent an issue of title, retaliatory eviction, or breach of warranty." W. Va. Code §55-3A-3(g).

If the tenancy has "otherwise expired" then:

- Tenant cannot remain in possession during appeal **AND**
- Tenant cannot be restored to possession after winning an appeal, absent issue of Title, Retaliation, or Warranty; but

If the tenancy has not "otherwise expired" then:

- Tenant may maintain possession during appeal; **and/or**
- Tenant may be restored to possession upon winning an appeal.

TERMINATION OF PERIODIC TENANCY **WITHOUT** BREACH OF LEASE

Periodic tenancy – a tenancy with no fixed ending date, e.g. month-to-month or year-to-year.

- If lease has a provision permitting early termination without breach, follow the lease requirements.
- If no provision in the lease regarding termination, then follow W. Va. Code §37-6-5.
  - Must be "**in writing**";
  - Must be delivered "**one full period** before the end of any period"
    - [If year-to-year lease, then three months]
  - Rental period defined by **date rent is due**,
  - Because these evictions are not based on any alleged breach of agreement, judges may require **highly technical compliance** with the "one full rental period" requirement.

WHAT DO WE DO WITH ALL THIS STUFF?

Landlord has a legal obligation to protect belongings abandoned by the tenant if:

The tenant vacates the unit after a court ordered eviction, but abandons property,

AND ALSO IF

The tenant vacates the unit without notice to landlord or without a Court order but abandons property.

ABANDONMENT OF PROPERTY WITH A COURT-ORDERED EVICTION

After a court-ordered eviction date (W. Va. Code § § 55-3A-3(h) and 55-3A-3(i)), Landlord has two options:

1. If tenant informs LL in writing that personal property is abandoned or garbage, then Landlord may dispose of it without liability; **OR**
2. Landlord must safeguard for at least **30 days**. May dispose after 30 days if:
   - ❖ Tenant has not paid reasonable storage cost and/or reclaimed items; **OR**
   - ❖ Costs of storage equals the value of the personalty being stored

HOWEVER, the landlord must store for an **additional 30 days** if:

- ❖ Personalty is worth more than $300; **AND**
- ❖ Either tenant or person holding security interest requests additional 30 days; **AND**
- ❖ That person pays the "reasonable costs" of storage and removal.

*Additional Abandonment Handout in materials

TENANT ABANDONMENT OF PROPERTY

Step One: Right to Regain Possession of Premises

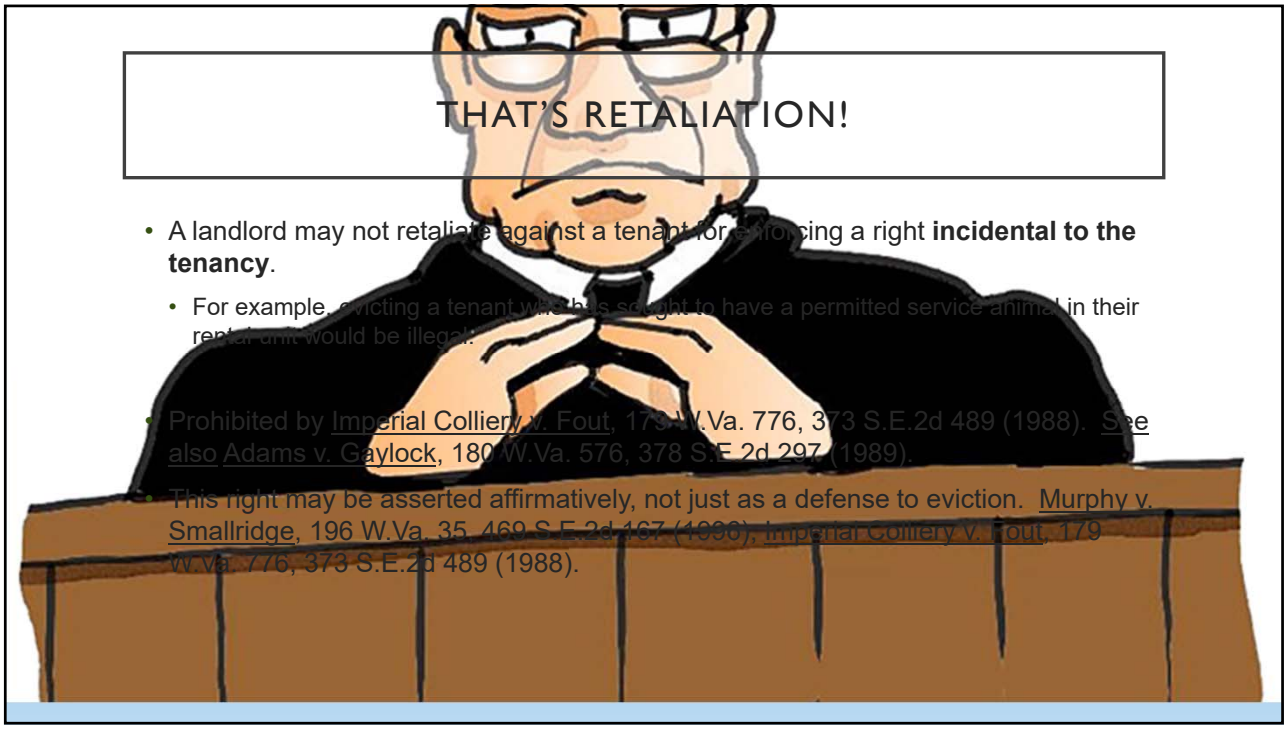
- Post notice in conspicuous place on the premises, requiring tenant to pay rent within one month; **AND**
- Tenant does not pay during that time; **ONLY THEN**
- May landlord change the locks or be entitled to enter and recover possession of premises; **AND**
- May sue to recover rent owed.

Step Two: Retention/Disposal of Abandoned Personalty

- (Only after written notice and expiration of time period)
- Content of Written Notice:
  - Premises are considered abandoned; **AND**
  - Any personalty must be removed within 30 days after mailing (60 days if tenant has notified on Active Duty).
  - See W.Va. Code **§37-6-6**

TENANT ABANDONMENT OF PROPERTY

- **Delivery of Written Notice:**
  - Post in conspicuous place on premises, **AND**
  - Mail First Class, Return Receipt Requested, marked "Please Forward," with Certificate of Mailing, to:
    - Leased property address; **AND**
      - Any P.O. Box held by tenant and known to landlord or Housing Authority; **AND**
    - Any forwarding address known to Landlord or Housing Authority or provided by tenant.
- Disposal if personalty not reclaimed by deadline then permitted.
- HOWEVER, store an additional 30 days if personalty worth more than **$300** and tenant or person holding security interest pays reasonable costs of storage and removal.



THAT'S RETALIATION!

- A landlord may not retaliate against a tenant for enforcing a right **incidental to the tenancy**.
  - For example, evicting a tenant who sought to have a permitted service animal in their rental unit would be illegal.
- Prohibited by Imperial Colliery v. Fout, 179 W.Va. 776, 373 S.E.2d 489 (1988). See also Adams v. Gaylock, 180 W.Va. 576, 378 S.E.2d 297 (1989).
- This right may be asserted affirmatively, not just as a defense to eviction. Murphy v. Smallridge, 196 W.Va. 35, 469 S.E.2d 167 (1996); Imperial Colliery v. Fout, 179 W.Va. 776, 373 S.E.2d 489 (1988).

SECURITY DEPOSITS

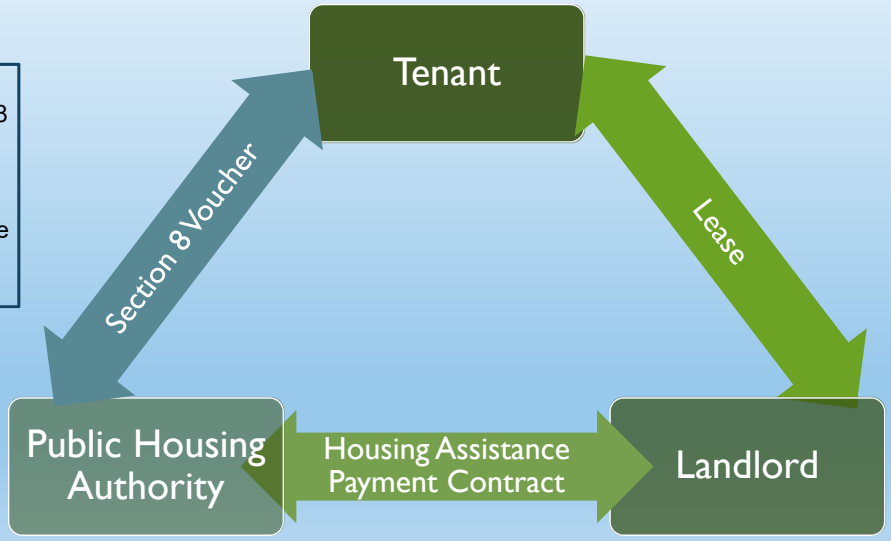
- **Check the lease first**. Waiver of statutory Security Deposit rights is **prohibited**.
- **Then, check the Code**. W. Va. Code §37-6A-1 et. seq., applies to rentals initiated after June 10, 2011.
  - **Practice tip:** federally subsidized tenancies may have slightly different security deposit requirements! These should be laid out in lease agreements or other contracts.

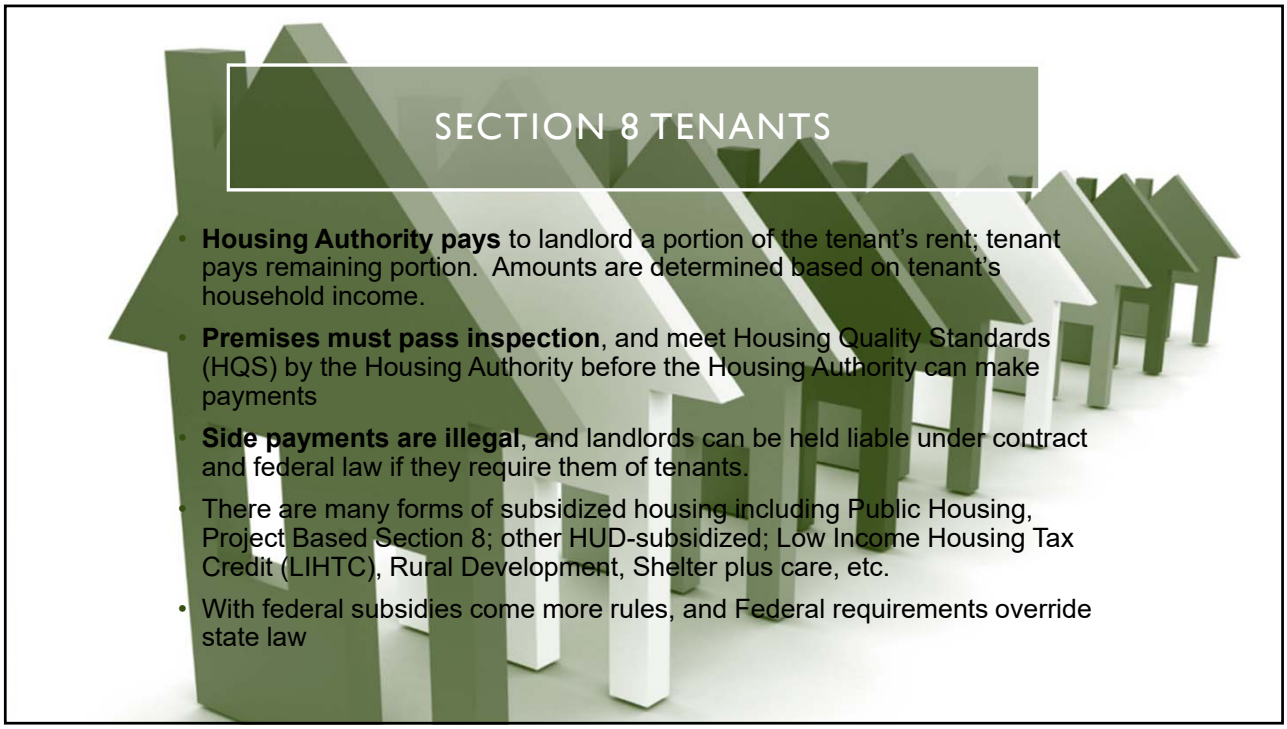
W. VA. CODE §37-6A-1

- **Time period:** Within 60 days of termination of tenancy, or 45 days of occupancy by a new tenant, whichever is shorter. W. Va. Code §37-6A-1(7).
- **Landlord obligation:** Refund the deposit, minus any deductions for damages beyond reasonable wear and tear, or other charges *provided in lease*. Provide an itemization of damages and charges. W. Va. §37-6A-2(a).
  - Property owner at time of termination of tenancy is obligated, regardless of when the ownership interest was acquired or whether security deposit was transferred from prior owner. W. Va. Code §37-6A-2(e).
  - Landlord to maintain records of all deductions for one year after termination; and must permit tenant to inspect records within 72 hours of request to do so. W. Va. Code §37-6A-3.
- **Penalty for violation:** Amount of unreturned security deposit PLUS Annoyance and Inconvenience equal to one-and-a-half-times the wrongfully withheld amount (unless tenant owes rent at termination). W. Va. Code §37-6A-5.

HOUSING CHOICE VOUCHER/SECTION 8 TENANT? WHY IT MATTERS.

A Housing Choice Voucher, commonly called a Section 8 Voucher, or HUD, is federal assistance paid by HUD through a local public housing authority to a private landlord on behalf of a tenant.



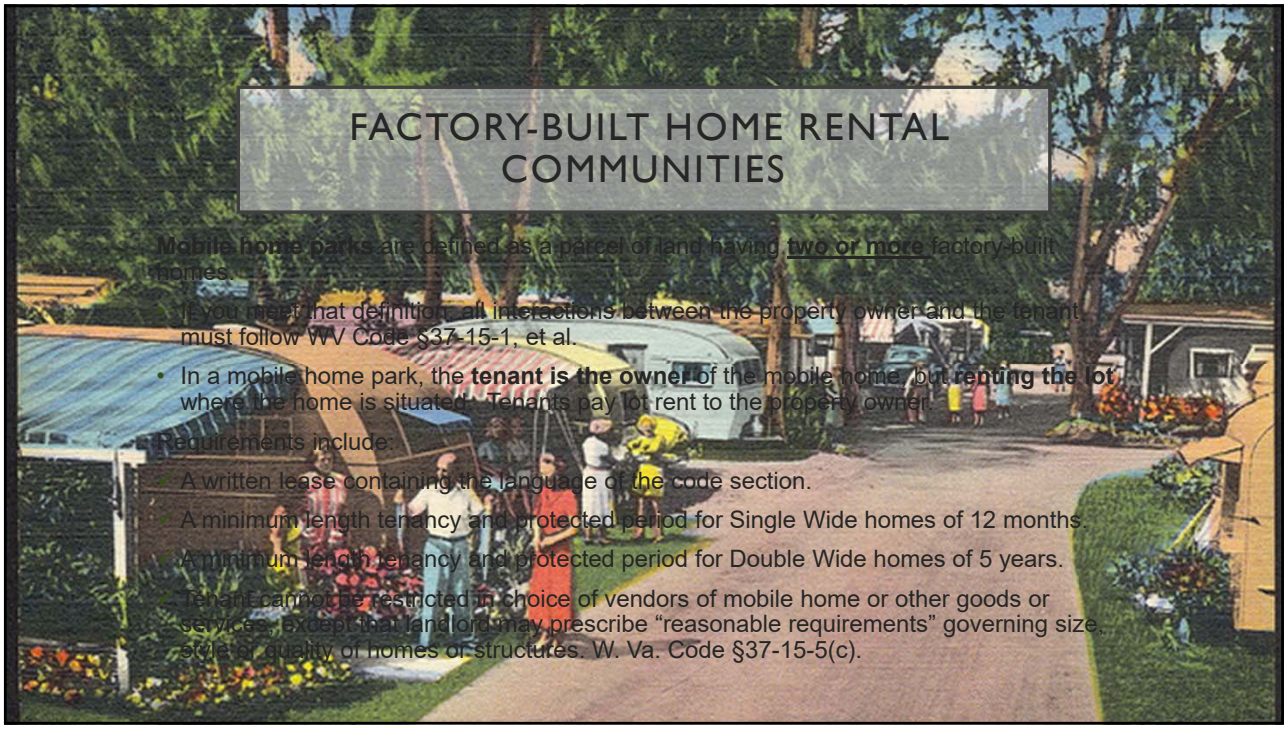


SECTION 8 TENANTS

- **Housing Authority pays** to landlord a portion of the tenant's rent; tenant pays remaining portion. Amounts are determined based on tenant's household income.
- **Premises must pass inspection**, and meet Housing Quality Standards (HQS) by the Housing Authority before the Housing Authority can make payments
- **Side payments are illegal**, and landlords can be held liable under contract and federal law if they require them of tenants.
- There are many forms of subsidized housing including Public Housing, Project Based Section 8; other HUD-subsidized; Low Income Housing Tax Credit (LIHTC), Rural Development, Shelter plus care, etc.
- With federal subsidies come more rules, and Federal requirements override state law

MORE ABOUT SECTION 8 VOUCHERS

- Initial term must be a **one-year lease**
- During first year, eviction permitted **only** for:
  - (1) Serious or repeated violation of the lease;
  - (2) Violation of Federal, State, or local law that imposes obligations on the tenant in connection with the occupancy or use of the unit and the premises;
  - (3) Criminal activity or alcohol; or
  - (4) Other good cause.
- The tenant is entitled to notice of eviction, of allegations with sufficient particularity to permit preparation of a defense.
- The landlord must provide a copy of that notice to the Housing Authority.
- The owner may evict only through Court action, self-help is prohibited.



FACTORY-BUILT HOME RENTAL COMMUNITIES

Mobile home parks are defined as a parcel of land having **two or more** factory-built homes.

- If you meet that definition, all interactions between the property owner and the tenant must follow WV Code §37-15-1, et al.
- In a mobile home park, the **tenant is the owner** of the mobile home, but **renting the lot** where the home is situated. Tenants pay lot rent to the property owner.

Requirements include:

- ✓ A written lease containing the language of the code section.
- ✓ A minimum length tenancy and protected period for Single Wide homes of 12 months.
- ✓ A minimum length tenancy and protected period for Double Wide homes of 5 years.
- ✓ Tenant cannot be restricted in choice of vendors of mobile home or other goods or services, except that landlord may prescribe "reasonable requirements" governing size, style or quality of homes or structures. W. Va. Code §37-15-5(c).

EVICTIONS AND FACTORY-BUILT RENTAL COMMUNITIES

- Written notice **3 months** prior to termination date. W. Va. Code §37-15-6(c).
- Notice must include "specific facts to permit determination of the date, place, witnesses and circumstances concerning the reason for termination." W. Va. Code §37-6-6(e).
- No restriction on tenant sale of home if termination is not for Good Cause:
  - "Unless the landlord is changing the use of the site landlord may not prevent the sale of the home in place to another purchaser "who meets the standards and restrictions in effect for other new tenants." W. Va. Code §37-15-6(f).
- Longer notice required when more than 25 tenants affected in an 18 month period. W. Va. Code §37-15-6a.

"Wrongful Occupation of Factory-Built Home Site." W. Va. Code §55-3B-1 et. seq.

- ➢ Applies regardless of whether home is just a single site, or in a "factory-built home community." W. Va. Code §55-3B-1(b)
- ➢ Relief distinguishes *Ordering the tenant to vacate the premises* from *Ordering the tenant to remove the factory-built home.* W. Va. Code §55-3B-6(e).

EVICTIONS, CONTINUED

Remedies for failure to remove the mobile home. W. Va. Code §55-3B-6(g)

- Landlord may "dispose of the home" if tenant informs in writing that it is abandoned;
- Landlord may "remove and store" for **30 days** after court-ordered removal date; then may "sell" (not "dispose") after 30 days if tenant hasn't paid reasonable costs of storage and taken possession of the home, or if costs of storage equal or exceed value of home;
- Landlord may leave the home in place, then "sell" (not "dispose") after 30 days if tenant has not paid reasonable costs of storage and taken possession of home;
- Proceeds of sale of home by landlord must be distributed pursuant to **UCC Article 9**, except landlord has priority to recover unpaid rent and may require purchaser to post in escrow the cost of moving the home. W. Va. Code §55-3B-6(i).
- If Personalty Left In the Home - generally similar to provisions discussed previously about Personalty abandoned in ordinary rental premises. See W. Va. Code §§37-6-6 and/or 55-3A-3(g).

THANK YOU!

If you have follow-up questions, please feel free to contact us:

Susana Duarte sduarte@lawv.net

Katheryn Marcum kmarcum@law.net