No. 35760 – Tevya W. v. Elias Trad V.

FILED
June 21, 2011
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Chief Justice, concurring:

This is a very difficult case. The mother argued on appeal that she relinquished primary custody of this child temporarily to the father at a time when she became subject to depression as the result of accidentally injuring a young woman in a motor vehicle accident, which in turn caused her to become involved in drug use. There were also allegations and evidence, rejected by the finder of fact, of the father's illegal drug use. The father also has a record of convictions for driving under the influence. In addition, it was argued by the mother that the father's work involved frequent absences from the home, and as a result, the real care-taker of the child in his present living situation had been the husband's now ex-wife and now his parents. A child deserves both his parents, and one of the primary functions of courts in this context is to ensure the continued opportunity for relationship between them.

The majority affirms the lower courts on two bases. First, citing the principles of res judicata and collateral estoppel, the majority states that because the Appellant failed to appeal the denial of the July 28, 2006, and March 31, 2008, petitions by the family court,[1]

[1]The Appellant has filed three petitions to alter the child custody arrangement since December 2005, when the family court transferred full custody of the child to the Appellee due to the Appellant's drug usage. In each, she attempted to modify the child custody arrangement on the basis of her continued sobriety. In the July 28, 2006, petition, the (continued...)

this Court is prohibited from altering those determinations in this appeal. I write separately to point out, however, that the majority fails to appreciate that these petitions were not based on identical claims of rehabilitation; rather, each asserts varying degrees of recovery from drug addiction.[2] Because the duration of time that a person achieves sobriety is a significant factor in recovery, I believe that continued sobriety should be considered as an additional change in circumstances. A parent who has remained sober for nearly five years has a far more powerful claim to a change of circumstances than a parent who has been drug-free for merely a month. Such long-lasting transformations reveal a level of stability and personal advancement that is more deserving of consideration by the family court. Thus, because the issues presented are not identical, collateral estoppel should not have barred the Appellant from raising this claim of a change of circumstances.

If one presumes that the Appellant's continued sobriety was found to constitute a change of circumstances, however, that alone does not justify a change of custody. Under

---

[1](...continued)
Appellant asserted that she has been drug-free for nearly a year. In the March 31, 2008, petition, she asserted she has been drug-free for two years. Finally, in the January 12, 2010, petition, she asserted she has been drug-free for four and a half years.

[2]Syl. Pt. 1, *State v. Miller,* 194 W. Va. 3, 459 S.E.2d 114 (1995)("Collateral estoppel will bar a claim if four conditions are met: *(1) The issue previously decided is identical to the one presented in the action in question*; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.")(Emphasis added).

West Virginia Code § 48-9-401 (2009), it must be shown that such a change would materially promote the welfare of the child,[3] the determining factors of which are listed in West Virginia Code § 48-9-102 (2009). The second basis for the majority's decision is that the lower courts did not abuse their discretion in determining that there was insufficient evidence to show that a change of child custody would materially promote the welfare of the child. In reviewing cases such as this, this Court must remember that the family court judge is in a position to see and assess the facts in a manner that we are not. Consequently, I cannot dissent from the Court's affirmation of the lower courts' determinations with respect to this issue.

Therefore, because the lower courts found that the child appears to be thriving educationally and socially under the current arrangement, I concur with the majority that there is no abuse of discretion in the reasoned conclusions of the family court and circuit court that a change of custody would not materially promote his welfare.

Therefore, for the reasons stated above, I concur.

---

[3]*See Cloud v. Cloud* 161 W. Va. 45, 239 S.E.2d 669 (1977); *Holstein v. Holstein*, 152 W. Va. 119, 160 S.E.2d 177 (1968); *Pugh v. Pugh*, 133 W. Va. 501, 56 S.E.2d 901 (1949).