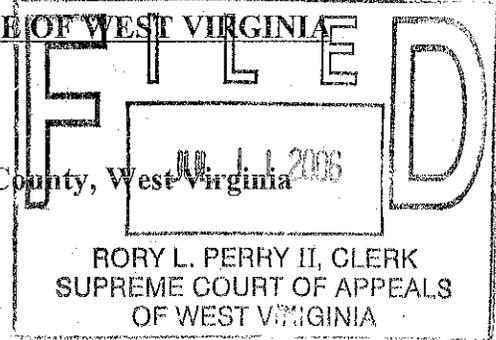


No. 33079

IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA

at Charleston

Appeal from the Circuit Court of Wayne County, West Virginia



IN THE MATTER OF THE ADOPTION
OF JAMISON NICHOLAS CHAFIN BY
CHARLES AND TWILA MCMULLEN

APPEAL NO: 33079

CIVIL ACTION NO: 04-JA-60

BRIEF OF APPELLEES CHARLES AND TWILA MCCMULLEN

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STATEMENT OF THE CASE

On September 9th, 1998, the West Virginia Department of Health and Human Resources (hereinafter DHHR) took Jamison C. into temporary custody as a result of the death of his mother, Crystal C. At the time of Crystal C.'s death, the biological father Clyde C. was a fugitive from justice and had outstanding warrants for domestic violence. The petition for emergency custody indicated that Jamison would be in imminent danger if his father gained custody. Thus, legal and physical custody was granted to DHHR and Jamison was placed with his maternal grandparents.

At the preliminary hearing held on September 18, 1998, Jamison C. was adjudged to be neglected, abused, and abandoned by his father, the Court found the maternal grandparents to be responsible relatives and an appropriate placement. DHHR recommended temporary custody be rescinded and the child be placed with the maternal grandparents.

Jamison's maternal grandparents, Charles and Twila M. subsequently filed a petition to terminate Clyde C.'s parental rights. Clyde C.'s parental rights were terminated by order on September 19, 2000 on the grounds of abandonment, neglect, and domestic violence. Thereafter Charles and Twila M. were granted the right to adopt Jamison, and did in fact adopt Jamison.

Prior to Jamison's adoption he was diagnosed with Depressive Disorder, NOS, and ADHD. DHHR provided medical benefits for Jamison at all relevant times until January 2002. In January 2002, his Medicaid benefits were revoked as a result of his adoption. The income of Charles and Twila M. combined with Jamison's income from Social Security Insurance exceeded the allowable amount for Medicaid eligibility. At that point Jamison

began receiving health insurance through the state run Children's Health Insurance Program (hereinafter "CHIP"). Thereafter in February 2004, Charles and Twila M. received notice that Jamison's coverage through the CHIP's program was to be revoked because they exceeded the allowable income for eligibility.

As Charles and Twila M. were unable to afford to purchase private medical coverage for Jamison they filed a Motion to Amend the Adoption Decree so that they could seek adoption assistance in the form of medical benefits for Jamison. On December 5, 2005 the trial court found that Jamison was a special needs child while in the custody of the DHHR and that he would have been eligible for Title IV-E Adoption Assistance. The Court further found that DHHR's failure to advise the grandparents of available adoption assistance and the fact that DHHR continued to provide medical assistance throughout the process constituted extenuating circumstances. Consequently, the Court ordered the adoption of Jamison be reopened for the purpose of DHHR and the Charles and Twila M. entering into an Adoption Assistance Agreement for medical assistance. It is from this ruling that DHHR now appeals.

QUESTION PRESENTED

Whether the trial court erred in requiring the West Virginia Department of Health and Human Resources to enter into an adoption assistance agreement post adoption when there were extenuating circumstances.

ARGUMENT

The Federal Adoption Assistance and Child Welfare Act of 1980, codified at 42 U.S.C. §§ 670-76, amended Title IV-E of the Social Security Act and provides for adoption

assistance for children with special needs. The Adoption Assistance Program is designed to provide financial and other benefits to a family adopting a child with special needs. Pursuant to W.Va. Code § 49-2-17, an adoption subsidy shall be available for children who are legally free for adoption and who are dependents of the department or a child welfare agency licensed to place children for adoption. In fact, even a child in a private adoption may qualify for adoption assistance. It is the duty of the DHHR to inform potential adoptive parents of the availability of adoption assistance, and if they fail to fulfill their duty the adoption may be reopened for the purpose of completing an adoption assistance agreement.

A. Jamison is a child with special needs for purposes of the Adoption Assistance Program.

In order for Jamison to be eligible for the Adoption Assistance Program, he must be a child with special needs. There are three criteria for a special needs determination. *See* US DHHS ACYF (Log No.:CB-PA-01-01 January 23, 2001, p 5). First, a child with special needs is a child who cannot or should not be returned to the home of his or her parents. Second, there must be a special factor or condition such as ethnic background, age, membership in a minority or sibling group or a physical, mental or emotional handicap, because of which the state has concluded that the child cannot be adopted without a subsidy. Third, an effort has been made to place the child with appropriate adoptive parents without providing adoption assistance or where the child has significant emotional ties to a foster parent or relative.

Under the circumstances there was no way that Jamison could be returned to the home. His mother was deceased. His father had a history of domestic violence and was a

fugitive from justice. DHHR should have known that as a result of Jamison's circumstances during the time that the temporary custody order was in effect that Jamison likely had an emotional condition that would have qualified him as a special needs child. That is, the emotional needs based upon the domestic violence he witnessed and the loss of his mother. Lastly, Jamison clearly had significant emotional ties to his maternal grandparents that would have made an alternative placement not be in his best interest. Moreover, Jamison was diagnosed with several medical problems that would have resulted in a finding of "special needs" by the department **prior to his adoption** by his grandparents. Therefore, Jamison is a child with special needs for the purposes of the adoption assistance program.

B. Jamison was eligible for adoption assistance because he was legally free for adoption and a dependent of the DHHR.

Charles and Twila M. pursued termination of Clyde C.'s parental rights so that Jamison could be adopted. While DHHR was not a party to the termination, they were aware that Charles and Twila M. were pursuing such action and in fact participated as witnesses at the termination hearing. Clyde C.'s parental rights were terminated on grounds of abandonment, neglect, and domestic violence by Wayne County Circuit Court order entered in Civil Action No. 00-A-007. Thus, Jamison was legally free for adoption.

DHHR contests the fact that Jamison was in the state's custody or a dependent of DHHR at the time of the adoption as required by the relevant statute. Jamison was taken into DHHR's custody pursuant to a protective services emergency application order of the Wayne County Circuit Court on September 9th, 1998. Jamison became a "ward of the state" when placed in temporary custody of DHHR upon an adjudication of abuse and neglect and upon

a finding that it would be contrary to the best interest of Jamison to permit the biological father to regain custody. *See* W.Va. Code § 49-6-3. At the September 18, 1998, hearing it was DHHR that requested temporary custody be rescinded. Appellees were never advised that a consequence of this designation would be to strip them of potential adoption assistance. Effectively Jamison was, or should be deemed to have been, in the legal custody of DHHR so as to satisfy the requirement for adoption assistance. As the trial court found, Jamison was a ward of the state, legally free for adoption, and therefore was a dependent of the DHHR for purposes of the Adoption Assistance Program.

C. Even if Jamison was not a dependent of DHHR, he still was eligible for adoption assistance.

Even assuming *arguendo* that Jamison was not in the custody or a dependent of DHHR Charles and Twila M. still should have been informed about the adoption assistance program. Private adoptions may still qualify for adoption assistance. *See* U.S. DHHS ACYF (Log No.: ACYF-CB-PA-01-01, January 23, 2001, p. 12). The state asserts that it does not have the ability to review every adoption in the state of West Virginia to determine whether or not a child would qualify for an adoption subsidy. Appellee's concede that it would be too burdensome for DHHR to review every adoption to determine whether a child would qualify for an adoption subsidy. However, DHHR was no stranger to Jamison's adoption. In the case *sub judice*, DHHR knew or should have known that there may be emotional problems based upon the incidents of domestic violence witnessed by Jamison and the death of his mother. These were all facts that were in existence at the time that DHHR had Jamison in temporary

custody. The DHHR had enough knowledge about the instant adoption that they knew or should have known that Jamison was eligible for adoption assistance. DHHR bears the burden of informing potential adoptive parents about benefits that may be available, and here, they failed to fulfill their duty.

D. DHHR's failure to inform Charles and Twila M. of potential adoption assistance available constitutes an extenuating circumstance curing the lack of a signed adoption assistance agreement prior to the final decree of adoption.

The regulations governing the administration of the adoption assistance program are set forth at 45 C.F.R. § 1356.40 and requires states to meet the requirements of this section in order to be eligible for federal financial participation in adoption assistance payments. This section requires that an adoption assistance agreement be signed and in effect at the time of or prior to the final decree of adoption. See 45 C.F.R. § 1356.40(b)(1). There is no dispute that in the case at bar, there was no signed adoption assistance agreement prior to the final decree of adoption.

However, subsection 45 C.F.R. 1356.40(f) requires that state agencies "**must actively seek ways to promote the adoption assistance program.**" This requirement has been interpreted to mean that a state agency has an affirmative duty to inform adoptive parents of the availability of adoption subsidies. At no time did DHHR ever inform Charles and Twila M. of potential adoption assistance available to them. The United States Department of Health and Human Services (hereinafter DHHS) reiterated the duty of the state in a policy announcement issued on January 23, 2001, wherein it stated in relevant part:

The State title IV-B/IV-E agency is required to actively seek ways to promote the adoption assistance program. This means that it is incumbent upon the State agency to notify prospective adoptive parents about the availability of adoption assistance for the adoption of a child with special needs.

DHHS ACYF-CB-PA-01-01 (footnote omitted).

DHHS has also addressed the issue of what is to be done when adoptive parents are not notified of the availability of adoption subsidies prior to an adoption being finalized and later seek such subsidies. The prior agreement requirement can be reviewed if there are extenuating circumstances at the time of the adoption. *Ferdinand v. Dept. for Children and Their Families*, 768 F. Supp. 401 (1991). DHHS PIQ 92-02 was issued on June 25, 1992, and addressed the types of situations that would constitute extenuating circumstances and thus warrant review. According to that policy interpretation, state notification to potential adoptive parents is a critical part of the program and such notification is the responsibility of the state agency responsible for administering the Title IV-E program. Thus, according to DHHS's policy interpretation, failure to provide such notification constitutes an extenuating circumstance warranting a fair hearing.

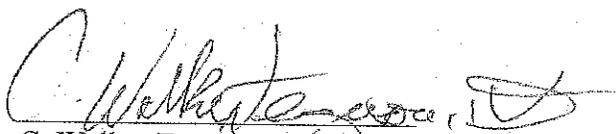
The mere fact that there was not a subsidy agreement signed prior to the entry of the adoption decree in this case does not preclude a determination by the Court that Charles and Twila M. qualify for an adoption subsidy if DHHR failed to provide the requisite information because such a failure constitutes an extenuating circumstance. If a subsidy was not offered or explained the case may be reopened based on the extenuating circumstances rationale. It is undisputed in the instant case, Charles and Twila M. were never provided any information

about the adoption assistance program. Therefore, it was appropriate for the Court to order the adoption reopened for the purpose of completing an adoption assistance agreement.

CONCLUSION

The Adoption Assistance Program is designed to provide financial and other benefits to a family adopting a child with special needs. Jamison is a special needs child who was legally free for adoption and a dependent of DHHR. As such, DHHR should have informed Charles and Twila M. about available adoption assistance. Even accepting DHHR's position that Jamison was not a dependent of DHHR, Jamison still was eligible for adoption assistance because a child in a private adoption may qualify for adoption assistance. As the DHHR had extensive knowledge of the facts and circumstances surrounding Jamison's adoption it was the duty of the DHHR to inform Charles and Twila M. as potential adoptive parents of the availability of adoption assistance. Because DHHR failed to fulfill their duty the adoption must be reopened for the purpose of completing an adoption assistance agreement. Therefore, the trial court did not err and the court's December 5, 2005 order should be affirmed.

Respectfully Submitted,

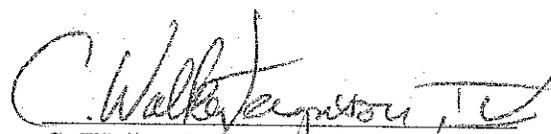


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CERTIFICATE OF SERVICE

I, C. Walker Ferguson, counsel for Appellees, Charles and Twila McMullen, do hereby certify that a true and correct copy of the foregoing has been served upon the following by First Class U.S. Mail, this 10th day of July 2006.

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