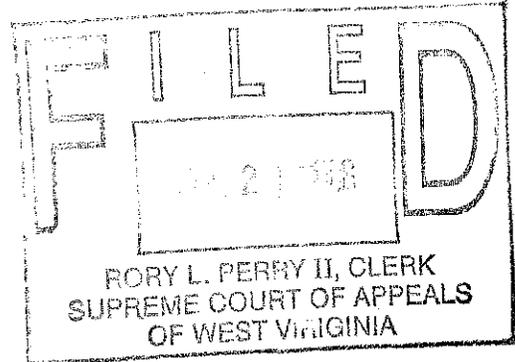


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case Number 33086

IN RE:

RANDY H.
APRIL L. G.
BRITTANY T.
MEGAN H.



BRIEF OF LUCINDA H IN OPPOSITION TO PETITION FOR APPEAL

Submitted by:

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RESPONSIVE STATEMENT OF THE CASE AND PROCEDURE

Appellee, Lucinda H. , points out the following omissions or inaccuracies in the Appellants' statement of the case as contained in the Procedural History and Statement of Facts set forth in Appellants' brief:

The children involved in this case are 16 year old M.H. (Megan), 8 year old B.T. (Brittany), 4 year old A.G. (April), and 1-1/2 year old R.H. (Randy). Appellant, Lucinda H. , is Megan's mother and is the custodian of Brittany, April, and Randy under voluntary arrangements with their parents. Appellant and Mary Ann C. (Randy's mother), along with the four children lived in Moorefield, Hardy County, when an accident occurred which resulted in the filing of an emergency petition for custody.

On July 25, 2005, Brittany, the 8 year old, took April and Randy into the bathroom, locked the door, and gave them clonidine. A call was made to emergency services, April and Randy went by ambulance to Grant Memorial Hospital where they were transferred to University of Virginia Hospital. The next day, July 26, 2005, DHHR took emergency custody of all four children. April and Randy were released from UVA hospital the following day.

DHHR's petition was filed July 28, 2005, and the record shows that the matter was before the Court for hearings on August 2, September 8, September 19, September 23, and November 3, 2005. Neither DHHR nor council for the children produced testimony at any of the hearings to support the original petition. Nor did they produce any witnesses to refute Appellee's evidence that she had remedied the conditions of neglect existing in 1991 that lead to a prior involuntary termination of her parental rights. At the preliminary hearing on August 2, 2005, DHHR moved to dismiss its petition not only because it had failed to produce witnesses in support of its petition, but also because the children's stories when interviewed by the CPS

worker were inconsistent with what was told to the staff at the University of Virginia Hospital . (Transcript, Hearing August 2, 2005, page 8). Judge Cookman returned the children to Appellee at that time.

At the hearing on September 8, 2005, DHHR's counsel stated that the family had complied with everything that DHHR wanted them to do and DHHR again was prepared to dismiss the petition. (Transcript, Hearing September 8, 2005, page 12). Counsel for the children stated that they visited in the household and found it to be a nice home and appropriate for the children. (Transcript, Hearing September 8, 2005, page 13-14). No witness or evidence was produced by DHHR or by Appellants at that hearing in support of the petition. DHHR wanted to determine whether there had been prior involuntary termination proceedings involving other of Appellee's children and its counsel acknowledged that another petition could be filed once it had information as to prior involuntary termination proceedings. (Transcript, Hearing September 8, 2005, page 13). The Court set another hearing date to allow DHHR to get information on prior termination proceedings and specifically ordered that DHHR could produce witnesses from the University of Virginia Hospital telephonically at the continued hearing. (Transcript, Hearing September 8, 2005, page 16; and Order dated September 8, 2005).

At the hearing on September 19, 2005, DHHR reported that it was amending its petition to add allegations of prior involuntary termination proceedings that took place in Hampshire County, West Virginia, in 1991. Due to Judge Cookman's involvement in those prior proceedings, he voluntarily recused himself and The Honorable Andrew N. Frye was appointed.

A hearing was held September 23, 2005, almost 2 months after the original petition was filed. Although ample time and opportunity to present witnesses from UVA or elsewhere had been allowed, neither DHHR nor Appellants produced such witnesses. DHHR renewed its

motion to dismiss the initial grounds because the situation had been remedied (Transcript, Hearing September 23, 2005, page 4) and this motion was granted (Id., page 5). The matter proceeded on the basis of the prior involuntary termination of Appellee's parental rights to other children.

Appellee presented witnesses whose testimony showed that she remedied the problems which led to the prior involuntary termination of parental rights. What were those problems? A copy of the Order dated February 8, 1991, by which the Hampshire County Circuit Court accepted Appellee's relinquishment to four of her children and terminated her parental rights to two of her children along with the written voluntary relinquishment are appended to this brief. The involuntary termination Order recited three major problems: (a) neglect for not providing the children with stable adequate housing, (b) unsuitability of the home environment, causing lack of proper educational and emotional support, and (c) inadequate personal hygiene. The order said that Appellee had admitted that due to her lack of education and limited financial and social resources, she was unable to provide proper care and emotional support for the children and the court found that her conduct at the time of the petition constituted neglect. That order stated that the two children had special educational, medical and emotional needs that required direct and constant supervision and a stable environment so that reunification of the family was not possible at that time.

It should be noted that Megan, who was born October 12, 1988, was identified by name and was known to be in Appellee's custody at the time of the involuntary termination in 1991. (See the Relinquishment of Parental Rights, copy attached). Obviously DHHR and the court knew of this child and did not remove her notwithstanding the termination of Appellee's parental

rights to two other children. Megan, now 16 years old, has been in Appellee's custody from birth.

The basis of the prior involuntary termination was made clear to the circuit court in the instant case and the court acknowledged that it had reviewed the records produced by DHHR regarding the prior involuntary termination proceeding. (Transcript, Hearing September 23, 2005, pages 38-39). To demonstrate that she had remedied those previous conditions, Appellee presented three witnesses at the hearing held September 23, 2005. The CPS supervisor for DHHR, Teresa Berg, was called by Appellee, and testified that Appellee has taken steps to prevent the children from getting into medicines in the home (Transcript, Hearing September 23, 2005, page 8-9). She also testified that Appellee was receiving services through DHHR and Family Preservation Services and the children are getting counseling through Eastern Psychological Associates (Id., page 7). She stated that Appellee has been cooperative with DHHR. (Id., page 10).

Appellee presented Leslie See, the counselor from Family Preservation Services who was providing parenting and counseling services to Appellee. She described Appellee as cooperative, the home as neat and hygienic, provided with utility service, appropriately furnished, with food in a clean kitchen, and appropriate for young children such as those involved in this case. (Transcript, Hearing, September 23, 2005, page 18-20). She testified that the children were well groomed, well clothed, clean, well fed, happy, affectionate and communicative to Lucinda. (Id., pages 21-23). She testified that Appellee had an understanding suitable for the children, had child-proofed the home, had placed medications in a lockbox, which is locked and the keys put away so that the children in the household could not get to them. (Id., pages 24-25). She testified

that Appellee interacts appropriately with the children and is nurturing and emotionally supportive (Id., page 25).

Appellants suggest that the Family Preservation counselor was not advised by DHHR that sexual abuse protection was to be part of the treatment program. However, the counselor testified that she was to address appropriate relationships and safety issues and that she had read a 21 page report generated by the DHHR worker. (Transcript, Hearing, September 23, 2005, page 29).

Appellee presented testimony of Pastor Lynn Durbin, pastor of the Maysville Bible Brethren Church, Maysville, Grant County, West Virginia, who testified that he had observed the children and Appellee when they attended his church services and that the children were well dressed, well groomed, clean, smiling, and did not exhibit any behavior problems. He described Appellee's interaction to be appropriate and that the children stay close by her. (Transcript, Hearing September 23, 2005, pages 33-35).

Council for the children had reported at a prior hearing that they had visited Appellee's house and found it to be a nice home and appropriate for the children. (Transcript, Hearing September 8, 2005, page 13-14).

At the conclusion of the hearing on September 23, 2005, DHHR's counsel asked that the Court review the matter in 60 days and make sure that the parties have done what they needed to do. (Transcript, Hearing September 23, 2005, page 41). When the matter came on again on November 3, 2005, DHHR's counsel reported that Appellee was doing everything that the Department asked her to do and that DHHR just wanted to continue with services to the family. (Transcript, Hearing November 3, 2005, page 6). The Court dismissed the amended petition at that time.

Counsel for the children complain that there are a number of registered sexual offenders around the children and they imply that this is, in itself, neglect or abuse. The record, however, discloses that only two of the parties are registered sexual offenders and their contact with the children is limited. Kevin Phillips is a registered sexual offender. He called in a 911 report when the children got into the medicine. (Response of Kevin Phillips). He was ordered to have no contact with the children (Order dated August 2, 2006) and subsequently was dismissed from the proceedings (Order dated September 23, 2005). At no point in the record is there any evidence that Kevin Phillips was responsible for child care or was watching the children when Brittany T. gave medicine to the two younger children. The petition does not allege that he was. Mr. Phillips, in paragraph 2 of his Response, and Mrs. H in paragraph 2 of her Answer, deny that Mr. Phillips was ever the custodian of any of the children. Contrary to Appellants' assertion, there was no evidence submitted by DHHR or counsel for the children that Mr. Phillips was watching the children at any time.

Calvin H , father of Megan H., is a registered sexual offender. He filed an Answer asking that he be awarded custody of his daughter, which Appellee opposed in her Response to his Answer. There is no evidence produced by DHHR or counsel for the children that Appellee did anything other than comply with existing visitation requirements by which Mr. H asserted his parental rights to have contact with his child. Teresa Berg, DHHR CPS Supervisor, testified that Calvin H , Megan's father, is allotted visitation. (Transcript, Hearing, September 23, 2005, page 12). She also testified that when Megan made allegations of sexual abuse while visiting with him, her allegations were turned over the police department. (Id., page 12). Appellants in their brief accuse Appellee of not following up with the State Police. The minutes of an MDT meeting on October 19, 2005, which were filed with the court, report that when the

police officer arrived at Appellee's home, they felt he was being disrespectful to Megan and did not assist the officer any further. It is up to the State Police to proceed with investigation and prosecution and to do so in an appropriate, effective manner.

Appellants want to prevent Simon H from returning to Appellee's household. Their reasons is because he had sex with his stepdaughter and may have conceived a baby together with her. (Transcript, Hearing November 3, 2005, page 4). Mr. H was prosecuted and plead guilty to lewd and lascivious behavior. (Id, page 4). There is even some question as to whether paternity of the child, Randy, was ever conclusively determined. (Testimony of Teresa Berg, DHHR CPS Supervisor at Transcript, Hearing September 23, 2005, page 14). DHHR had no objection to Mr. H's return to the home and its counsel stated that to keep him away from children because he had sex with a 26 year old woman doesn't make any sense and he is not a threat to the children. (Transcript, Hearing November 3, 2005, page 5). The CPS Supervisor, Ms. Berg, testified that the Department did not have a plan to address Mr. H's return to the household after his release from jail. (Transcript, Hearing September 23, 2005, page 13). The Family Preservation counselor, Ms. See, testified that she had not been told by the Department or anyone else that it would not be appropriate. (Transcript, Hearing September 23, 2005, page 31).

Appellants refer to 28 referrals on this family over the years, but fail to disclose that almost all of them (about twenty-four or twenty-five) were screened out or no maltreatment was found. The picture Appellants have attached to their brief was the basis of a referral in 2001, which was investigated and resulted in an open case. Ms. H denied that she made the posters and says that they were made by an adult daughter of hers to get her into trouble.

Appellants include in their brief an excerpt from Appellee's psychological evaluation, without identifying the evaluator, the circumstances, and without disclosing that the report was

never offered into evidence at any of the hearings and the evaluator never appeared for examination or cross-examination. Appellants fail to disclose that the evaluation also says: "Her [Appellee's] responses indicate that she has an average knowledge of her role as a parent by establishing appropriate family roles, teaching children to problem solve and make good choices while using alternatives to corporal punishment. She also indicates an appropriate level of empathy for children and understands their developmental needs." Likewise, Appellants footnote oral reports from unnamed sources, hearsay upon hearsay, that the children were coached by someone, unnamed, in connection with sexual abuse evaluations. These are attempts by Appellants to fabricate a reason to continue this case, when there is no basis to do so.

RESPONSE TO ASSIGNMENTS OF ERROR

1. The Circuit Court did not err in dismissing the petition and amended petition. Neither DHHR nor counsel for the children produced testimony in support of the original petition. The overdose of medication was an accident. Testimony was presented showing safeguards in the home to prevent future occurrence, along with cooperation with services and an appropriate home for the children. Appellee produced substantial, credible testimony that she had remedied the prior conditions of neglect that led to the termination of parental rights to two of her children in 1991.

2. The Circuit Court did not summarily dismiss the Petition. It held 5 hearings over a period of approximately 2 months during which DHHR and counsel for the children could have produced proof of their assertions. The Circuit Court did not err in dismissing the petition and amended petition.

AUTHORITIES RELIED UPON

<u>Brown v. Gobble</u> , 196 W.Va. 559, 474 S.E.2d 489 (1996).....	12
<u>In Re Christina L. and Kenneth J. L.</u> , 194 W.Va. 446, 460 S.E. 2d 692 (1995)	14
<u>In re Emily & Amos B.</u> , 208 W.Va. 325, 540 S.E.2d 542 (2000).....	12
<u>In re George Glen B., Jr.</u> , 205 W.Va. 435, 518 S.E.2d 863 (1999).....	13
<u>In re Rebecca K. C.</u> , 213 W.Va. 230, 579 S.E.2d 718 (2003)	14
<u>In re Tiffany Marie S.</u> , 196 W. Va. 223, 470 S. E.2d 177 (1996)	12
<u>State ex rel. Diva P. v. Kaufman</u> , 200 W.Va. 555, 490 S.E.2d 642 (1997).....	12

STANDARD OF REVIEW

In appeals from abuse and neglect proceedings, the West Virginia Supreme Court of Appeals has consistently applied a standard of review that subjects conclusions of law to de novo review and findings of fact to the clearly erroneous standard. In re Tiffany Marie S., 196 W. Va. 223, 470 S. E.2d 177 (1996). This standard of review requires deference to the findings of a circuit court. A finding is clearly erroneous only when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. State ex rel. Diva P. v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997).

The deference required under the clearly erroneous standard was stated by Justice Cleckley in Brown v. Gobble, 196 W.Va. 559, 474 S.E.2d 489 (1996) as follows:

“We note at the outset that the standard of review for judging a sufficiency of evidence claim is not appellant friendly. Following a bench trial, the circuit court’s findings, based on oral or documentary evidence, shall not be overturned unless clearly erroneous, and due regard shall be given to the opportunity of the circuit judge to evaluate the credibility of the witnesses. W.Va. R. Civ. P. 52(a). Under this standard, if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse it, even though convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently.”

In particular, the lower court is better equipped to make substantive determinations regarding termination of parental rights. In re Emily & Amos B., 208 W.Va. 325, 540 S.E.2d 542 (2000).

The burden on an appellant attempting to show clear error is especially strong when the findings are primarily based on oral testimony and the circuit court has viewed the demeanor and judged the credibility of the witnesses. Brown v. Gobble, supra. The reviewing court cannot overturn a finding simply because it would have decided the case differently, but must affirm if the evidence is plausible in light of the record viewed in its entirety. Syllabus Point 1, In re Tiffany Marie S., supra.

ARGUMENT

Appellants are correct in saying that where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems leading to such prior involuntary termination must, at a minimum, be reviewed by a court on a petition pursuant to the child neglect or abuse provisions of the West Virginia Code. That ruling came from the case of In the Matter of George Glen B., Jr., 205 W.Va. 435, 518 S.E.2d 863 (1999), where it was held to be error for the circuit court to dismiss the abuse and neglect petition without first allowing the development of evidence regarding the prior terminations at issue and whether the parents had taken steps to remedy the circumstances underlying the prior involuntary termination.

In the instant case, the circuit court did precisely that and did allow development of evidence regarding the prior termination of parental rights and did review the steps taken by Appellee to remedy the circumstances of the prior termination. The prior order that involuntarily terminated Appellee's rights to two of her children clearly identified the issues at that time as neglect for not providing stable adequate housing, lack of proper educational and emotional support, and inadequate personal hygiene. Appellee presented witnesses to show that she had remedied the prior circumstances. Those witnesses testified that Appellee's home is clean, child-proofed, and appropriate, the children are clean, well-fed, well-groomed, happy, and that Appellee's interaction with the children is affectionate, nurturing, and appropriate. Neither DHHR nor Appellant produced testimony to refute the testimony of those witnesses or to challenge their credibility or objectivity. DHHR and its counsel said that Appellee was doing everything DHHR has asked her to do. Appellants personally visited the home and found it to be a nice home and appropriate for the children.

After having heard the witnesses on September 23, 2005, the court went the extra measure and continued the case until November 3, 2005, to allow DHHR to be sure that Appellee was doing what she needed to do. Upon returning on November 3, 2005, the court was told by the prosecuting attorney that Appellee was doing everything that the Department asked her to do. On the basis of the record and having heard the testimony and evidence presented, the circuit court could and did conclude that the original conditions of neglect that existed in the 1991 terminations do not exist today, and as a result, the Court properly dismissed the amended petition. There was no presentation of evidence in support of the original petition. Even if there been an adjudication of abuse or neglect, the fact is that during the pending case, Appellee did everything that DHHR asked her to do and the case should have been dismissed anyway.

A prior termination merely lowers the threshold of evidence necessary for termination of parental rights but does not mandate the circuit court to terminate parental rights. In re Rebecca K. C., 213 W.Va. 230, 579 S.E.2d 718 (2003). Nor should it mandate that every case must proceed after evidence is presented to show that the conditions giving rise to the prior termination have been remedied. The Department still has the burden of proving abuse or neglect. In Re Christina L. and Kenneth J. L., 194 W.Va. 446, 460 S.E. 2d 692 (1995). In the instant case, the Department moved repeatedly to dismiss its own petition. During a series of five hearings, neither DHHR nor Appellants produced any witnesses to show that there is any present condition of abuse or neglect.

Appellants complain that there are registered sex offenders around the children, but neither they nor DHHR produced any witness to provide proof of sexual contact or sexual abuse of any of the children. The position of DHHR is that the mere presence of sex offenders is not abuse or neglect unless they make a move on the children. The definition of abuse and neglect

does not include the mere presence of sex offenders as being abuse or neglect in and of itself as Appellants would urge you to believe.

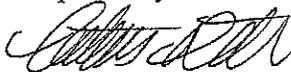
Appellants complain that the presence of Simon H. in the household is a problem for the children, but the Prosecuting Attorney said at the hearing on November 3, 2005, that DHHR did not have an issue with Mr. H.'s return to the household. Mr. H. is not a registered sex offender. He had sex with his 26-year old stepdaughter, for which he entered a guilty plea to the misdemeanor offense of lewd and lascivious behavior. Mr. H.'s sexual indiscretion involved an adult, not a child, and DHHR, with full knowledge of the situation, does not believe he is a threat to the children in the household.

In conclusion, the circuit court did not err in dismissing the amended petition. DHHR and Appellants had the opportunity during the many hearings set and held in this case to show the court a reason for the case to proceed and they did not do so. On the contrary, there was unrefuted, clear and credible testimony showing the remedy of the conditions of neglect underlying the prior termination and neither the petitioner nor the Appellants produced convincing evidence of present conditions of abuse or neglect to support the petition. The circuit court had the opportunity to view the witnesses and to review the record. It had ample evidence before it to support its decision to dismiss the case and committed no error for which its decision should be overturned.

PRAYER FOR RELIEF

On the basis of the foregoing, and consistent with the statutory and case law of this state, the undersigned requests that the appeal be dismissed.

Respectfully submitted,



Patricia L. Kotchek

CERTIFICATE OF SERVICE

I, Patricia L. Kotchek, do hereby certify that on this 19th day of July, 2006, I have served a true and complete copy of the foregoing Response of Lucinda H to Petition for Appeal, on the person or persons set forth below by first class mail, postage prepaid, addressed as follows:

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