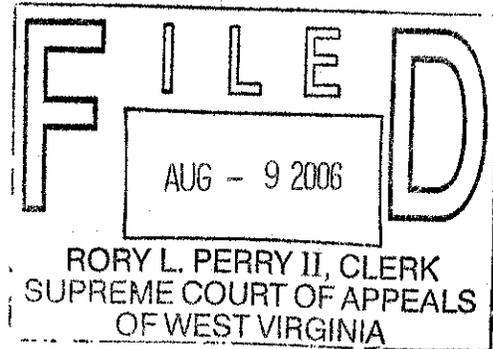


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THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This was a case initiated by the West Virginia Department of Health and Human Resources (DHHR) alleging abuse and neglect against Alisha G., Bradley R., Larry W., Margaret V., and Billy V. in which a Petition was filed for the immediate custody of the minor children, namely, Austin G. and Breona R. The Petition was filed on or about September 1, 2005. The Honorable Judge Michael Thornsby entered an Order removing said minor children from their parents to the DHHR. After the removal, a preliminary hearing was held on September 6, 2004, an adjudicatory hearing was held on December 5, 2004, and the final dispositional hearing was held on January 10, 2006. The Dispositional Order was entered on February 3, 2006, terminating the parental rights of Bradley R. and denying his Motion for Custody and Motion for Visitation from which this Petition for Appeal is filed.

NATURE OF RULING OF LOWER TRIBUNAL

Comes now the Petitioner, Bradley R., Respondent, by and through counsel, Jeffrey S. Simpkins, and does hereby file his Petition for Appeal of the Final Dispositional Order of the Honorable Judge Michael Thornsby of the 30th Circuit, Mingo County, West Virginia, which was entered on or about February 3, 2006.

The Final Dispositional Order denied Bradley R.'s Motion for Custody and also denied his Motion for Post-Dispositional visitation. Bradley R., Petitioner herein, was a Respondent Parent who was seeking custody and visitation of both children. However, the Honorable Judge Michael Thornsby denied both Motions and placed custody of Austin G. and Breona R. with DHHR.

It is from the denial of the Motion for Custody and Motion for Visitation which were denied that the Petitioner, Bradley R., Respondent, filed this Petition for Appeal.

STATEMENT OF FACTS

The children who are subject of this Petition are Austin G. and Breona R. At the time of the filing of this Petition, the children were residing with the Respondent parents in Mingo County, West Virginia. The natural mother of Austin G. is Alisha G; the natural father of Austin G. is Larry W. The natural mother of Breona R. is Alisha G.; the natural father of Breona R. is Bradley R. The maternal grandparents of Austin G. and Breona R. are Margaret and Billy V. In March 2004, CPS in Wyoming County, West Virginia, substantiated substance abuse by the Respondent mother, Alisha G. At that time, a CPS case was opened, however, no services were offered because Alisha G. informed CPS that the child was residing with the maternal grandparents who were filing for legal custody of the child.

In April 2005, Mingo County CPS became involved with the family after receiving a referral that the Respondent mother tested positive for barbituates and opiates at the time of Breona R.'s birth. The child did not test positive for drugs but exhibited some symptoms of withdrawal.

CPS received a referral that the Respondent Parents were neglecting the medical needs of the infant child, Breona R, and that they were failing to feed her properly. Upon receiving the referral, CPS performed a CPS check on the Respondent father, Bradley R., which revealed that there was an open CPS case involving another child and Bradley R. in Wyoming County, West Virginia.

Therefore, due to these allegations and referrals, CPS filed a Petition for the removal of the infant children who are subject of this Petition.

ASSIGNMENT OF ERROR BELOW IN MINGO COUNTY CIRCUIT COURT

1. The Court erred in denying the Petitioner's Motion for Custody and Motion for Post-Dispositional Visitation with the minor children, Austin G. and Breona R., and in granting custody of both children to the DHHR.

POINTS AND AUTHORITIES

West Virginia Department of Human Services v. La Rea Ann C.L., 175 W.Va. 330, 336, 332

S.E.2d 632, 637 (1985)

James M. v. Maynard, 185 W.Va. 648, 408 S.E.2d 400 (1991)

Suter v. Suter, 128 W.Va. 511, 37 S.E.2d 474 (1946)

State ex rel. Brandon L. v. Moats, 209 W.Va. 752 (2001)

Syllabus Point 5, In re Christine L. and Kenneth J.L., 194 W.Va. 446, 460 S.E.2d 692 (1995)

In Re Tiffany P., 215 W.Va. 622, 600 S.E.2d 334, (2004)

West Virginia Code Section 46-9-5(c)

DISCUSSION

The Supreme Court of Appeals of West Virginia has “repeatedly held that in contests involving the custody of infants the welfare of the child is of paramount and controlling importance and is the ‘polar star’ by which the discretion of the court will be guided.”

West Virginia Department of Human Services v. La Rea Ann C.L., 175 W.Va. 330, 336, 332 S.E.2d 632, 637 (1985). It is obvious from the above referenced case law that the children are the polar stars by which the Circuit Court shall be guided. The Court must consider the best interests of the children in considering placement. The best interest and welfare of the children is the controlling consideration in determining custody. See Suter v. Suter, 128 W.Va. 511, 37 S.E.2d 474 (1946). However, in our case at hand, the Circuit Court of Mingo County did abuse its discretion by awarding legal custody of both minor children, Austin G. and Breona R., to the DHHR. It is from this ruling that the Petitioner appeals.

The Court in the instant case did not consider the best interest of the children. The Court completely ignored the law in James M. v. Maynard, 185 W.Va. 648, 408 S.E.2d 400 (1991), in which the Supreme Court held that “When placing a child outside the custody of a natural parent, there is a preference, whenever possible and practical, to effectuate placement with the child’s relatives.” The Petitioner herein, Bradley R., Respondent, requested from the beginning of these proceedings that he receive custody of both children. Bradley R. is the father of both children and have a bond with his child, Breona R. and Austin G. Vickie Fields, DHHR CPSW, did not oppose an Improvement Period for Bradley R. and did not oppose visitation with the children. Vickie Fields felt that it would be in the childrens’ best interest to have visitation with Bradley R.. Bradley R. has lived in the home with these children and have a close bond with them. The Court, however, proceeded to grant custody to the DHHR in complete disregard to Maynard. *Id.*

Also in Maynard, the Court held "In cases where there is a termination of parental rights, the circuit court should consider where the continued association with siblings in other placements is in the child's best interests, and if such continued association is in the child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continue contact." It has already been established that Bradley R. should have contact with the children and should have been considered for placement. However, at the time of the Dispositional Hearing, Bradley R. was incarcerated and was unable to attend the hearing. Due to his absence, the DHHR opposed placement with Bradley R. and also opposed visitation. Bradley R. should have been considered for placement due to the familia relationship and because the siblings could have been placed together. It would have been in the childrens' best interest to be placed together in the home of Bradley R. However, the Court proceeded to place young Austin G. and Breona R. with the DHHR, who is a non-relative to both children, in complete disregard of Maynard. Also, West Virginia Code Section 49-6-5(a)(6) states "upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental, custodial or guardianship right and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency." The burden always remains on the department. The department failed to prove that Bradley R. was an abusive parent. The only allegations were that he had a substance abuse problem. There was no evidence that Bradley R. was an abusive parent or that he could not correct any issues in regard to his parenting. West Virginia Code Section 46-9-5(c) also provides that "the Court may, as an alternative disposition, allow the parents or custodians an improvement period not to exceed six

months. During this period the court shall require the parent to rectify the conditions upon which the determination was based. The court may order the child to be placed with the parents, or any person found to be a fit and proper person, for the temporary care of the child during the period. At the end of the period, the court shall hold a hearing to determine whether the conditions have been adequately improved and at the conclusion of the hearing shall make a further dispositional order in accordance with this section.” The court denied Bradley R.’s Motion for Post-Dispositional improvement in complete disregard of this section and would not allow Bradley R. to rectify any issues before the Court. It is this decision from which Bradley R. appeals and feels that the Court clearly abused its discretion.

The next issue to be brief before this Honorable Court is whether the Court erred or abused its discretion by denying the Petitioner’s, Bradley R., Respondent Father, Motion for Visitation with the minor children. The Supreme Court held In Re Tiffany P., 215 W.Va. 622, 600 S.E.2d 334, (2004) held that supervised post-dispositional visitation to the Respondent father was appropriate even though the Respondent father had a criminal history and mental illness because he had not been abusive toward his children and displayed strong emotional bond with them. In the present case, Bradley R. did display a strong emotional bond with the children and had not been abusive towards the children. Also, Bradley R. only issues before the court were substance abuse and slight instances of domestic violence with the Respondent mother. Therefore, Bradley R. should have been granted visitation with the children.

The Supreme Court of Appeals of West Virginia has held “When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interests of the child. The evidence must indicate that such visitation or continued contact would

not be detrimental to the child's well being and would be in the child's best interests." *Syllabus Point 5, In re Christine L. and Kenneth J.L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). This case allows an abusing parent continued visitation with a child when it is in the child's best interest. In our case at hand, Bradley R. was denied visitation even though there were no allegations of abuse and/or neglect towards him. The DHHR even recommended visitation from the onset with Bradley R. The DHHR even reported that Bradley R. and the children had a bond together and that the children need to know Bradley R. The DHHR proceeded to oppose visitation after Bradley R. failed to attend the Dispositional Hearing. The Court concluded that Bradley R. should be denied visitation even though he was not an abusive parent and that visitation would not be in the children's best interest. This was clearly erroneous and an abuse of discretion. Due to the above reasons, Petitioner, Joyce Horn desires to appeal and asks that this Honorable Court reverse the Circuit Court of Mingo County's Order of February 3, 2006.

CONCLUSION

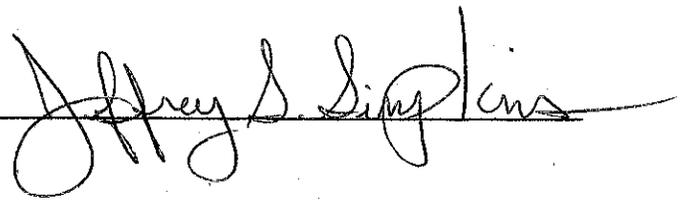
For the foregoing, the Petitioner, Bradley R., Respondent, prays that his Petition for Appeal be accepted, that this Honorable Court review the record below and reverse the Order entered by the Circuit Court of Mingo County, West Virginia, and place legal custody of both minor children, with Bradley R.

PRAYER FOR RELIEF

Your Petitioner, Bradley R., prays that this Court reverse the ruling of the Circuit Court of Mingo County, and remand the case with direction to place the legal custody of both children with the Petitioner and for such other relief as this Honorable Court deems just.

BRADLEY R., Appellant,

BY

A handwritten signature in black ink, reading "Jeffrey S. Simpkins", written over a horizontal line. The signature is cursive and includes a long horizontal stroke at the end.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,
Petitioner Below/Appellee,

VS.

Mingo County Case No.: 05-JN-47, 48

ALISHA G.,
BRADLEY R.,
LARRY W.,
MARGARET V.,
BILLY RAY V.,
Respondents,

IN THE INTERESTS OF THE MINOR CHILDREN:

AUSTIN G.
BREONA G.

DOB: 02-18-03
DOB: 04-25-05

CERTIFICATE OF SERVICE

I, Jeffrey S. Simpkins, counsel for Bradley R., do hereby certify that the foregoing **BRIEF OF APPELLANT** was sent via U.S. Mail, Postage Prepaid, on the 7th day of August, 2006, to the following:

Teresa Maynard
Prosecuting Attorney
Williamson, WV 25661

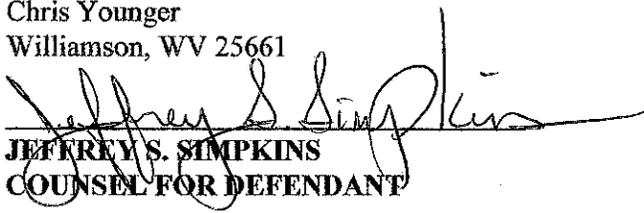
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