

BEFORE THE WEST VIRGINIA SUPREME COURT
OF APPEALS
AT CHARLESTON

STATE OF WEST VIRGINIA
PETITIONER BELOW,

V.

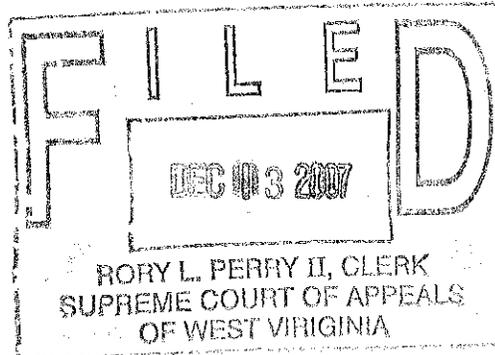
DOCKET NO. 07-130

FAYE ANN S.
JOE S.

RESPONDENTS BELOW,

MABEL T. AND JOHN T.
MATERNAL GRANDPARENTS,
INTERVENORS BELOW,

LARRY S. AND DEBRA S.
PATERNAL GRANDPARENTS,
APPELLANTS/INTERVENORS BELOW.



IN THE INTEREST OF THE MINOR CHILDREN:

SAMANTHA S.
HOPE S.

D.O.B. 01-06-00
D.O.B. 06-05-01

APPELLANTS' BRIEF

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**KIND OF PROCEEDING AND NATURE
OF RULINGS IN THE LOWER TRIBUNAL**

This action arises from a Petition filed by the West Virginia Department of Health and Human Services (hereinafter WVDHHR) on March 10, 2005 in which they sought custody of Samantha S. and Hope S. on the grounds the children were at substantial risk of abuse/neglect because of the domestic violence and drug abuse of their parents Faye S. and Joe S.. At the conclusion of the Preliminary Hearing of the Petition, the Court placed the children in the custody of their maternal grandparents, John T. and Mabel T..

Prior to an Adjudicatory Hearing of the Petition filed by WVDHHR, Faye S. and Joe S. moved for a pre-adjudication improvement period. Their Motion was granted based on their agreement to participate in services provided by WVDHHR.

The Adjudicatory Hearing of the Petition on June 14, 2005 resulted in an Order granting the request of Mabel T. and John T. that their grandchildren be moved from their home and placed in the home and custody of the paternal grandparents of the children, Appellants Larry S. and Debra S.. The Court modified its original Order and placed the children in the physical custody of Larry S. and Debra S. following the June 14, 2005 hearing. Legal custody of the children remained with WVDHHR.

At the Dispositional Hearing of this matter, the parental rights of the father of the children, Joe S. were voluntarily and permanently terminated. The parental rights of Faye Ann S., mother of the children, were involuntarily and permanently terminated.

The parental rights of Faye Ann S., mother of the children, were terminated based on the evidence presented by WVDHHR.

At the Dispositional Hearing of this matter, both sets of intervening grandparents sought custody of the children. In its termination Order of August 1, 2005, the Court placed the children in the physical custody of Petitioners Larry and Debra S., paternal grandparents, but reserved unsupervised visitation of the children with John T. and Mabel T., maternal grandparents, and visitation between the children and their mother Faye Ann S., upon her release from jail, to be supervised by her parents John T. and Mabel T..

A Motion of WVDHHR to terminate visitation between the children and John T. and Mabel T. was brought before the Mingo County Circuit Court on May 10, 2006. The Motion was based on reports by the children to Court appointed psychologist Pam Ryan and Dr. Ryan's findings that the behavioral problems the children were exhibiting were directly linked to their visits in the home of maternal grandparents John and Mabel T..

The Court, in its Order of June 7, 2006, discontinued visitation between the children and John and Mabel T, but only to the degree it was unsupervised. It granted the motion of John and Mabel T. that additional, alternative psychological evaluation of the children and the parties be Ordered to determine whether continued visitation of the children with John and Mabel T. was in the best interests of the children. The Court granted the WVDHHR Motion that they be awarded legal custody of the children while the children remained in pre-adoptive placement with Appellants Larry and Debra S..

In its Judicial Review Order of June 28, 2007, the Court found, based on the alternative psychological evaluations of the children and their grandparents, that legal and physical placement of the children with Larry and Debra S. served the best interests of

the children. Without additional explanation, the Court reversed its prior ruling that John T. and Mabel T. would be allowed only supervised visitation. Instead it Ordered unsupervised visitation between the children and John T. and Mabel T. on a default schedule and future visitation between the children and their mother, when she is released from her present incarceration, under the supervision of John and Mabel T.. It is this Order that the Appellants seek to appeal.

STATEMENT OF FACTS

The West Virginia offices of DHHR first became involved with the children Samantha S. and Hope S. when they were asked by their counter-part in Kentucky to monitor the Kentucky files on these children after their parents Faye S. and Joe S. moved to the state of West Virginia. On December 30, 2004, WVDHHR received a referral that there was domestic violence and substance abuse in their West Virginia home, as a result of which Joe S. was arrested. The children were placed in the home of their maternal grandparents John and Mabel T.

In interviews following their placement, the children reported to Caseworkers that their parents had used drugs and engaged in acts of domestic violence in their presence. Faye Ann S. admitted to the Caseworkers that she abused drugs and that there had been occasions of domestic violence in the home while the children were present. She agreed to being tested for drugs. The result was positive.

Faye Ann S. joined her children in her parents' home, following the domestic violence incident. On March 3, 2005, she was arrested on the Complaint of her father,

1. Citations to the Court Findings of Fact and Conclusions of Law as stated in Orders of Court, will be found at the conclusion of the Statement of Facts.

John T. that he was a victim of domestic violence at her hand.

Faye Ann S. and Joe S., following their release from incarceration, failed to cooperate with the efforts of WVDHHR to establish a program for them to visit with their children. A Petition was filed by WVDHHR charging the children were at risk of abuse or neglect as a result of the drug usage of Faye S. and Joe S. and the continued incidences of domestic violence between them.

Following a Preliminary Hearing of the Petition, the children were left in the home of John and Mabel T.. Faye Ann S. and Joe S. were granted a pre-adjudicatory improvement period on May 9, 2005, when they appeared for an Adjudicatory Hearing.

At the time the Adjudicatory Hearing was finally conducted on June 14, 2005, Faye Ann S. and Joe S. were again incarcerated. WVDHHR reported that John and Mabel T. had been initially non-compliant with WVDHHR requests regarding the children. Counsel for John T. and Mabel T. advised the Court that they would voluntarily relinquish custody of Samantha S. and Hope S. to the paternal grandparents, Appellants Larry and Debra S. The children's Guardian ad litem agreed to this modification of the prior Order and the Court placed the children in the willing custody of Larry and Debra S., reserving unsupervised visitation for John and Mabel T. .

The Dispositional Hearing of the Petition was conducted on July 18, 2005. The children's father Joe S. appeared and relinquished his parental rights. On this basis the Court terminated his rights. Faye Ann S. was incarcerated at the time of the hearing on charges of kidnapping, unlawful or malicious wounding and assault during the commission of a felony. These charges had been filed between the Adjudicatory and Dispositional Hearings of this matter and subsequent to the charges of domestic battery

brought against her by her father John T.

WVDHHR Case Manager Vickie Fields testified that although Faye Ann S. had completed a parenting program and a Court Ordered psychological evaluation before her arrest, several positive drug screens caused Ms. Fields continued concern about Faye Ann's ability to control her drug usage. The Case Manager expressed her additional concern that John and Mabel T. failed to keep their appointments for Court Ordered psychological evaluations and failed to reschedule the appointments. Moreover, they did not comply with Court Orders that the children were to have no contact with their mother and allowed them to speak with her on the phone during the childrens' visits, calling into doubt the ability of John and Mabel T. to protect the children from the bad behavior of their mother when she is released from jail. Ms. Fields opined that although the children love John and Mabel T., they interact well with Larry and Debra S. and do well in the more disciplinary structure of their home. Case Manager Fields recommended that the children remain in the custody of Larry and Debra S. and that they supervise any post-termination visitation between the children and their maternal grandparents.

John T. testified that his alleged failure to comply with the Court's directives was the result of miscommunication. He stated that he believed the children should have contact with their mother, but that he would keep the children from her if the Court so Ordered.

The Dispositional Order from the July 18, 2005 hearing provided that the parental rights of Faye Ann S. and Joe S. were permanently terminated, however, post-dispositional visitation was reserved for the mother. This was to include weekly phone contact during the time the mother was incarcerated and weekly visitation supervised by

John and Mabel T. once the mother was released from jail. Legal and physical custody of the children pending adoption was awarded to Larry and Debra S. in concurrence with the recommendations of WVDHHR and the Guardian ad litem for the children.

At the time of the Dispositional Hearing a completed home study of John T. and Mabel T. was not available to the Court as a result of their initial refusal to provide requested financial information and fingerprints for a CIB investigation and their failure to appear for Court Ordered psychological testing. The home of John and Mabel T. had been found by WVDHHR workers to be physically insufficient to accommodate the children and it was not clear when planned additions would be constructed. Finally, the Court observed that John and Mabel T. had previously relinquished their custody of Samantha and Hope S. to Larry and Debra S. voluntarily. Regardless, the Court Ordered unsupervised visitation of the children with John and Mabel T. in their home following disposition because: there was a bond between the children and John and Mabel T.; because they "...have been more cooperative of late"; and because they contended that their previous failure to comply with Court Orders was the result of miscommunication.

Legal and physical custody of Samantha and Hope was awarded to Larry and Debra S. with default, unsupervised visitation reserved for John and Mabel T. as soon as they resolved the space and safety concerns of WVDHHR regarding their home. Until that time, visitation between the children and John and Mabel T. was to occur bi-monthly in the home of Larry and Debra S.. The Order provided "The Ts shall not allow the Respondent, Faye Ann S. to have contact with the children until further Order of the Court."

On May 8, 2006, a Judicial Review of the placement was conducted. WVDHHR

representatives advised the Court that the children were experiencing significant behavior problems following their unsupervised visits with John and Mabel T.. They reported that the children's treating psychologist Pam Ryan believed there was a correlation between the behavior issues they experienced and the visitation with John and Mabel T..

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WVDHHR moved to terminate future visitation.

An Evidentiary Hearing was conducted on May 10, 2007. Psychologist Pam Ryan, Ph.D., testified that the children had done well in the physical custody of Larry and Debra S. with supervised visitation with John and Mabel T., however, they began to evidence de-compensation almost immediately following initial unsupervised visits with John and Mabel T.. Hope S. became lethargic. Samantha S. became aggressive and defiant in the home of Larry and Debra S. and in school. Her grades declined.

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Psychological reports of the children Samantha S. and Hope S. and their mother Faye S., prepared by psychologist Pam Ryan, Ph.D. were admitted without objection. Dr. Ryan, who also testified at the hearing, reported bizarre behavior of the children, which she felt was exacerbated by them moving back and forth between the home of Larry and Debra S. and that of John and Mabel T. She reported that each set of grandparents had different perceptions of the seriousness of the emotional problems the children were experiencing and each addressed the problems in their own manner. Dr. Ryan opined that these children were in need of consistent parenting and discipline. She saw the divergence between the parenting models of the maternal and paternal grandparents as having a negative affect on the children.

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Dr. Ryan testified the children reported being "whipped" in the home of John and Mabel T. and they expressed to Dr. Ryan their desire to discontinue visitation. Hope S.

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reported to Dr. Ryan that a young boy in the neighborhood had repeatedly sexually exposed himself to her and Samantha. They reported this to Mabel T. who took no action
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to protect them. Samantha also reported to Dr. Ryan her frustration regarding her living
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situation.

Dr. Ryan referred Samantha to Highland Hospital after it was reported that she unsuccessfully tried to kill a kitten by sitting on it and successfully killed the kitten by throwing it against the wall. This was consistent with her behavior in play therapy with Dr. Ryan where she often attempted to stab stuffed animals and dolls. The child was confined in Highland Hospital for seven days.

Dr. Ryan opined that, based on her observation of Samantha and Hope during the three to four times a month she met with them, the childrens' unsupervised contact with John and Mabel T. and Faye Ann S., their mother, had directly led to the de-compensation of the children. She found their visitation to be their only identified stressor and recommended that their unsupervised visitation with John and Mabel T. be
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terminated.

Case Manager Fields testified that, after investigating the children's allegation that a neighborhood child was exposing himself to them, she prepared a protection plan.
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Mabel T. signed the plan. John T. refused to sign the plan. Mabel T. stated the alleged offender was her grandson and denied that the children had told her about the incidents. She also denied spanking the children or saying anything negative to them regarding
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Larry and Debra S..

The Case Manager testified that both John and Mabel T. deny aggressive behavior by Samantha in their home and blame any problems the children experience on their

medication or on their mother's continued incarceration. John T. suggested to Case Manager Fields that Larry and Debra S. were the actual aggravators or perpetrators of all incidents that Dr. Ryan described. He believed Samantha accidentally killed the kitten and refused to believe the report of both children that his grandson had exposed himself to them.

Case Manager Fields testified that the children continued to have phone contact with their mother during visits with John and Mabel T. in violation of the Court's prior Orders. Ms. Fields recommended that the unsupervised visits between the children and John and Mabel T. be terminated and that all phone contact between the children and their mother cease.

The Court determined that sufficient evidence had been presented to support the Motion by WVDHHR to terminate visitation of the children with John and Mabel T, but only so far as it was unsupervised. The Court Ordered visitation, supervised by WVDHHR, for six hours on alternate Saturdays. Legal custody of the children was granted to WVDHHR. Physical custody remained with Larry and Debra S..

Upon the Motion of John and Mabel T., the Court Ordered alternate psychological evaluation of the children for a "...final determination of the issues before the Court."

Supervised Psychologist Heather M. Fouch, M.A. interviewed Samantha S. on December 14, 2007, January 4, 2007 and January 11, 2007. A battery of psychological tests were conducted on Samantha on December 11, 2006. Psychologist Fouch concluded that "...both girls are confused and vacillate about their desired living arrangements. They also struggle with their emotions toward their mother and both

grandmothers....since both sets of grandparents apparently have different expectations and rules, the girls most likely do not know which way to comply and must alter their behavior to the grandparents in charge at the time.”³⁶

The Psychologist expressed concern regarding John T.'s "...adamant dislike of Samantha being prescribed psychotropic medication...[which] suggests that [s]he (sic.) would be unlikely to cooperate with psychiatric opinions and recommendations.”³⁷ She found “The T.'s [John and Mabel] contentions that their granddaughters do not exhibit behavior problems were contradicted by the records reviewed by the doctor in this matter and the report of the paternal grandparents.”³⁸

The psychologist also opined, “Mrs. T.'s attitude about the sexually inappropriate behavior reported by Hope S. to her therapist [Dr. Pam. Ryan] about Mrs. T.'s grandson was a serious concern...her lack of concern could lead to a failure to protect her granddaughters from abuse. ...the types of behavior exhibited by Samantha are typically progressive in nature...she was exhibiting some behavioral problems while residing with the T. family, but they were not appreciated due to their [John and Mabel T.'s] lack of awareness/insight.”³⁹

The psychologist concluded “While this child's [Samantha] behavioral problems may be reactive to the continuing upheavals in her life, they are likely to continue or escalate over time if not provided structure, immediate consequences and consistent support. ...The T.'s [John and Mabel] seem to continually minimize the girls' mal-adaptive behaviors, while the S.'s [Larry and Debra] voice their sincere concerns and have been evidenced to initiate and comply with mental health treatment...the S.'s children [Samantha and Hope] vacillating between two homes with different attitudes,

expectations, routines and disciplines can be detrimental to their development...the S.'s [Larry and Debra] have displayed a greater sense of awareness and sincere appreciation of their granddaughters' problematic issues." 40

Psychologist Fouch also evaluated Hope S.. She reported: "Based on the behavioral observations and standardized psychological testing results, Hope is likely an average intellectually functioning child. Her most challenging issues ...are attention and concentration...Hope and Samantha's presentation in time is predicted to change, hopefully for the better. They lack attachment to a parent, security of a home and predictable routes... The S.'s [Larry and Debra] seem to be doing well in their attempts to provide Hope and Samantha with structured routines and security, as best they can. However, the children have still not been given permanency. In fact, sadly, they lack normalcy. They have two troubled biological parents, and two sets of loving grandparents that are disputing of their custody." 41

Psychologist Fouch concluded "Hope presented as an easily distracted, somewhat hyperactive, demanding child. ...serious concerns about her behavior were raised...the presentations of the grandparents have never significantly changed during any of the interactions with the children. The T.'s [John and Mabel] seem to continually minimize the girl's maladaptive behaviors, while the S.'s [Larry and Debra] voice their sincere concerns. In closing, Hope and Samantha's wavering between the two homes with different attitudes, expectations, routines and discipline can be very detrimental to their development. Their placement in an adoptive home where the severity of their potential behaviors can be appreciated will be critical to their overall well-being and long-term development." 42

Psychologist Kimberly P. Parson, M.A. evaluated John T. and advised the Court that, "The problems that currently exist between the grandparents are likely to continue as Mr. T. believes his way of raising the grandchildren is correct and he speaks of the paternal grandparents in very negative terms. He would be very likely to continue to engage in these types of behaviors without supervision during visitations as he fails to appreciate the way in which he presents to others. Derogatory comments by Mr. T. toward the S.'s will perpetuate continued confusion in his granddaughters. Mr. T. also appears to be the dominate member of his marriage as he was much more outspoken than Mrs. T."

After reviewing the record of the case, including the recommendations of psychologists Pam Ryan, Heather Fouch and Kimberly Parson, the Court, on June 28, 2007, Ordered that pre-adoptive physical and legal custody of Samantha and Hope S. was awarded to their paternal grandparents Larry and Debra S.. Since "Their home study and psychological evaluations demonstrate that it would be an ideal placement for the children and certainly in the children's best interests."

The Court found that although the intentions of John and Mabel T. regarding their granddaughters were good, they "...do not appreciate how disruptive, confusing and emotionally painful it is for their granddaughters to be torn between grandparents while trying to resolve their feelings about their own parents."

The Court without further explanation found it to be in the best interests of the children to modify its earlier Order of supervised visitation between the children and John and Mabel T. to allow unsupervised visitation between them every other Friday from 6:00 p.m. until 1:00 p.m. on Saturday "...so long as all previously Ordered

conditions are complied with.”

CITATIONS

1. See Court’s Order of August 1, 2005, Finding of Fact A 3.
2. See Court’s Order of August 1, 2005, Finding of Fact A 4.
3. See Court’s Order of August 1, 2005, Finding of Fact A 6.
4. See Court’s Order of August 1, 2005, Finding of Fact A 5
5. See Court’s Order of August 1, 2005, Finding of Fact A 7
6. See Court’s Order of August 1, 2005, Finding of Fact A 9 & 11.
7. See Petition filed by WVDHHR.
8. See Court’s Order of August 1, 2005, Finding of Fact A 17
9. See Court’s Order of August 1, 2005, Finding of Fact A 20
10. See Court’s Order of August 1, 2005, Finding of Fact A 18.
11. See Court’s Order of August 1, 2005, Finding of Fact A 22.
12. See Court’s Order of August 1, 2005, Conclusions of Law B 17.
13. See Court’s Order of August 1, 2005, Conclusions of Law B 19a – 19h
14. See Court’s Order of August 1, 2005, Findings of Fact, B 10, 11 & 14
15. See Court’s Order of August 1, 2005, Findings of Fact B 16 & 20.
16. See Court’s Order of August 1, 2005, Finding of Fact B 30.
17. See Court’s Order of August 1, 2005, Conclusions of Law B 22 & 23.
18. See Court’s Order of August 1, 2005, Conclusions of Law B 24.
19. See Court’s Order of August 1, 2005, Conclusions of Law B 25.
20. See Court’s Order of August 1, 2005, Conclusions of Law B 25, 26, 27, 28, 29 & 30.

21. See Court's Order of May 10, 2006, Findings of Fact 9.
22. See Court's Order of May 10, 2006, Findings of Fact 11.
23. See Court's Order of May 10, 2006, Findings of Fact 13.
24. See Court's Order of May 10, 2006, Findings of Fact 14.
25. See Court's Order of May 10, 2006, Finding of Fact 16.
26. See Court's Order of May 10, 2006, Findings of Fact 17.
27. See Court's Order of May 10, 2006, Finding of Fact 18.
28. See Court's Order of May 10, 2006, Findings of Fact 19.
29. See Court's Order of May 10, 2006, Findings of Fact 22 & 23.
30. See Court's Order of May 10, 2006, Findings of Fact 24 & 27.
31. See Court's Order of May 10, 2006, Findings of Fact 27, 28, 29 & 30.
32. See Court's Order of May 10, 2006, Conclusions of Law 2.
33. See Court's Order of May 10, 2006, Findings of Fact 20.
34. See Court's Order of May 10, 2006, Conclusions of Law 5 & 6.
35. See Court's Order of May 10, 2006, Conclusions of Law 7.
36. Report of Psychologist Heather Fouch, M. A. Page 13, Petitioners' Exhibit 1.
37. Exhibit 1, Pg. 14 attached to Petition for Appeal.
38. Exhibit 1, Pg. 15 attached to Petition for Appeal.
39. Exhibit 1, Pg. 16 attached to Petition for Appeal.
40. Exhibit 1, Pg. 17 attached to Petition for Appeal.
41. Exhibit 2, Pg. 13 attached to Petition for Appeal.
42. Exhibit 2, Pgs. 15 & 16 attached to Petition for Appeal.
43. Exhibit 3, Pgs. 13 & 14 attached to Petition for Appeal.

44. See Court's Order of June 28, 2007, Paragraph 10.
45. See Court's Order of June 28, 2007, Paragraph 4.
46. See Court's Order of June 28, 2007, Paragraph 11.

ASSIGNMENT OF ERRORS

1. The Court below erred when, following termination of the parental rights of the parents of Samantha S. and Hope S., it awarded unsupervised visitation rights to the maternal grandparents of the children despite the motion of DHHR to terminate visitation with the maternal grandparents and the evidence of Court appointed experts that the visitation Ordered was not in the best interests of the children.
2. The Court below erred when it failed to secure a meaningful permanency plan for the children.

STANDARD OF REVIEW

“This Court explained in In Re: Emily, 208 W. Va. 325, 332, 540 S.E.2d 542, 549 (2000) that, “For appeals resulting from abuse and neglect proceedings, such as the case sub-judice, we employ a compound standard of review: Conclusions of Law are subject to a de novo review, while findings of fact are weighted against a clearly erroneous standard.”

Also, in Syllabus Point 1 of In The Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996), this Court held that: Although Conclusions of Law reached by a Circuit Court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the Circuit Court shall make a determination

based upon the evidence and shall make Findings of Fact and Conclusions of Law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing Court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing Court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the Circuit Court's account of the evidence is plausible in light of the record viewed in its entirety." In Re: Astin E. and Breona R. Docket No. 33134 W. Va. Supreme Court of Appeals (Feb. 21, 2007)

POINTS AND AUTHORITIES

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<u>Carter v. Carter</u> , 196 W.Va. 239, 470 S.E.2d 193 (1996)	21
<u>Holstein v. Holstein</u> , 152 W.Va. 119, 160 S.E.2d 177 (1968)	20
<u>Michael K.T. v. Tina L. T.</u> , 182 W.Va. 399, 405 387 S.E.2d 866, 872 (1989)	21
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<u>In Re: Astin E. and Breona R.</u> , Docket No. 33134 W.Va. Supreme Court of Appeals (2/21/07)	17
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<u>In Re: Carlita B.</u> , 185 W.Va. 613, 408 S.E.2d (1999)	22

<u>In Re: Charity H., Courtney H., and Victoria H.</u> 599 S.E.2d 631, 215 W.Va. 208 (2004)	32
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<u>In Re: David M.</u> , 182 W.Va. 57, 385 S.E.2d 912 (1989);	22
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<u>In Re: Francis J.A.S., Daryl Jean S., Crystal Nicole Smith, David Allen R., Jr.</u> , 213 W.Va. 636, 584 S.E.2d 492 (2003)	20
<u>In Re: Jason S. and Jasmine B.</u> , 219 W.Va. 485, 637 S.E.2d 583 (2006)	21
<u>In Re: Jeffrey R.L.</u> , 190 W.Va. 24, 435 S.E.2d 162 (1993)	21
<u>In Re: Jonathan G.</u> , 482 S.E.2d 893 (W.Va. 1996)	25, 32
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<u>In Re: Tyler D., Alexander A. and Nevaeh D.</u> , 212 W.Va. 149, 578 S.E.2d 343 (2003)	32
<u>In the Interest of Tiffany Marie S.</u> , 196 W.Va. 223, 470 S.E.2d 177 (1996)	17
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<u>State ex rel. Amy M. v. Kaufman</u> , 196 W.Va. 251, 260, 470 S.E.2d 205, 214 (1996)	33

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CONSTITUTION, STATUTES, RULES

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DISCUSSION OF LAW

I.

ALL MATTERS REGARDING CUSTODY OF CHILDREN MUST BE DETERMINED BY THE BEST INTERESTS OF THE CHILDREN

A.

This Court Has Established Clear And Unequivocal Precedent To Provide Direction For The Lower Courts In Determining Matters Of Child Custody

This Court has historically emphasized that “[i]n a contest involving the custody of an infant, the welfare of the child is the polar star by which the discretion of the Court will be guided.” Syl. Pt. 2, State ex rel. Lipscomb v. Joplin, 131 W.Va. 302, 47 S.E.2d 221 (1948); see also Holstein v. Holstein, 152 W.Va. 119, 160 S.E.2d 177 (1968). In Bowens v. Maynard, 174 W.Va. 184, 324 S.E.2d 145 (1984), this Court stated that “[c]hild neglect and abuse procedures that include the custodian of the children in all the proceedings are calculated to achieve a valuable social goal. Their motivating factor is the often stated standard of the ‘best interests of the child.’” 174 W.Va. at 186, 324 S.E.2d at 147. This Court has not deviated from that principle, and it has become the ultimate benchmark by which all custody decisions are appraised. While this Court has also observed that the rights of the parents are entitled to respect and protection, the rights of the children are paramount, as accentuated in Syl. Pt. 3 of In Re Katie S. 198 W.Va. 79, 479 S.E.2d 589 (1996): “Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family matters, must be the health and welfare of the child. In RE: Francis J.A.S., Daryl Jean S., Crystal Nicole Smith, David Allen R., Jr.

213 W.Va. 636, 584 S.E.2d 492 (2003)

Because I am committed to making certain that the 'best interests of the child' remains the polar star for child custody decisions in West Virginia, I write separately to caution the lower Courts that when conducting a hearing subsequent to any relinquishment proceedings they must give high regard to the interests of the child(ren) involved. See William D.A. Sr. v. Shawna Renee A., 206 W.Va. 679, 683, 527 S.E.2d 790, 794 (1999) (Davis, J. concurring) "When addressing issues involving children, especially custody issues, consideration of the best interests of the child must be paramount."; Kessel v. Leavitt, 204 W.Va. 95, 174, 511 S.E.2d 720, 799 (1998) ("Superior to the rights of parents to the custody of their own children, however, is the overriding consideration of the child's best interests. Thus, the natural rights of parents to the custody of their children is always tempered with the Court's overriding concern for the well-being of the children involved,"); Syl. Pt. 7 In Re: Brian D., 194 W.Va. 623, 461 S.E.2d 129 (1975); ("Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child[ren]."); In Re: Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162, 170 (1993) ("Although the rights of the natural parents to the custody and the interests of the State as *parens patriae* merit significant consideration by this Court, the best interests of the child are paramount."); Michael K.T. v. Tina L.T., 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[t]he best interests of the child is the polar star by which decisions must be made which affect children.") State ex rel Rose L. v. Pancake, 209 W.Va. 188, 544 S.E.2d 403 (W.Va. 2001) (Davis, J. concurring)

This Court has over the last twenty years consistently reiterated its position that in

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all custody matters and especially in matters involving children who are the victims of abuse or neglect, the best interests of the child are the polar star for the Court in

2. See Syl. Pt. 5, Carter v. Carter, 196 W.Va. 239, 470 S.E.2d 193 (1996); In Re: Jason S. and Jasmine B., 219 W.Va. 485, 637 S.E.2d 483 (2006) for application of the standard in Family Court proceedings.

determining the child's future. (See In Re: Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1999); In Re: David M., 182 W.Va. 57, 385 S.E.2d 912 (1989); In Re: Jeffrey R.L., supra, In Re: Katie S., Syl. Pt. 3, 198 W.Va. 79, 479 S.E.2d 589 (1996). Despite the fundamental nature of parental rights, they can be forfeited if the parents are shown by clear and convincing evidence to be unfit and unworthy of the guardianship of their children. In Re: Jeffrey R.L., supra; State v. Jessica M., 191 W.Va. 302, 445 S.E.2d 254 (1994).

The West Virginia Code clearly reflects the intent of the legislature that abuse/neglect proceedings are to be used to protect and secure the well-being of the child who is the subject of the proceedings.

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, custodian and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the non-abusive parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency...if the Court shall so find, then in fixing its Dispositional Order, the Court shall consider the following factors: (A) the child's need for continuity of care and caretakers; (B) the amount of time required for the child to be integrated into a stable and permanent home environment; and (C) other

factors the Court considers necessary and proper.
W.Va. Code §49-6-5

Finally, the West Virginia Rules for Procedure for Child Abuse and Neglect

Proceedings direct:

These rules shall be liberally construed to achieve safe, stable, secure permanent homes for abused and/or neglected children and fairness to all litigants. These rules are not to be applied or enforced in any manner which will endanger or harm a child. W.Va. Rules of Procedure for Child Abuse and Neglect, Rule 2 (January, 1997)

The parents of Samantha and Hope S. first placed their parental rights in jeopardy by their incidents of drug usage and domestic violence, which came to the attention of Child Protective Services workers in the State of Kentucky. In apparent response to the Kentucky investigation, Joe and Faye Ann S., parents of Samantha and Hope, moved to West Virginia. West Virginia C.P.S. workers were alerted by their Kentucky counterparts that Samantha and Hope were at risk of neglect and/or abuse because of the state of chaos in their home created by the reckless and dangerous behavior of their parents.

Joe S. was placed in jail in West Virginia because of continuing acts of domestic violence against Faye Ann S., mother of the children. Samantha and Hope were removed from the custody of their mother and placed with their maternal grandparents

3. The abuse/neglect Courts are, in addition, required by Federal law (Adoption and Safe Families Act of 1997) and regulations to provide findings that local child welfare agencies have made reasonable efforts to prevent removal of the child from his home and "...with the child's health and safety being paramount, to preserve the family" but have left the Court with no less restrictive alternative than removal of the child from the dangerous environment created in the child's home by their caretakers. W.Va. Code §49-6-5(a)(6)

John T. and Mabel T.. Faye Ann joined them in her parents home until John T., her father, filed a domestic violence complaint against her and had Faye Ann removed from their home. She was taken to jail and did not return to her parents' home upon her release.

Faye Ann S. was arrested for unrelated violent felonious behavior prior to the Adjudicatory Hearing below. Both of Samantha and Hope's parents were in jail at the time of the Adjudicatory Hearing below.

Samantha S., age 5 at the time of the Court's Order, and Hope, age 4, had lived in chaos throughout their short lives with their parents. They were placed in the home of their maternal grandparents John and Mabel T. when they were removed from their parents' custody on March 15, 2005. On June 14, 2005, during the Adjudicatory Hearing, John and Mabel T. asked the Court to remove the children from their home and place them in the home of the paternal grandparents Larry S. and Debra S.. The Appellants gladly accepted custody and the children have remained in their physical custody at all times since.

Faye Ann S. remained in jail at the time of the Disposition Hearing below. Joe S. appeared at the Disposition Hearing to voluntarily relinquish his rights to parent Samantha and Hope. The Court properly terminated the rights of both parents. No appeals of the termination were filed.

B.

**West Virginia Law Has Recognized That
Post-Termination Visitation Between A Child And
Her Prior Caregivers Is Appropriate If
It is Shown To Be In The Child's Best Interests**

Although West Virginia law provides a Circuit Court with authority to Order post-termination visitation with prior parents or caretakers of a victim of abuse or neglect, the authority is limited to those situations in which the proposed visits facilitate the adjustment of the child to her new custodial arrangements; foster a healthy emotional development of the child; and, at a minimum, will do no harm to the child.

...The Circuit Court may, nevertheless in appropriate cases, consider whether continued visitation or other contact with the abusing parents is in the best interest of the child. Among other things, the Circuit Court should consider, whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such a request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well-being and would be in child's best interest. In Re: Christina L., 194 W.Va. 446, 460 S.E.2d 692, 448 (1995) [Also see In Re: Katie S. and David S., supra) Emphasis added

The case of In Re: Jonathan G., (482 S.E.2d 893 (W.Va. 1996)) the Court extended the possibility of post-termination visitation to non-parental figures.

We hold that a child has a right to continued association with individuals with whom he has formed a close emotional bond [ft. excluded] ...provided that a determination is made that such continued contact is in the best interests of the child. In Re: Jonathan G., 482 S.E.2d 893 (W.Va. 1996) Emphasis added.

This theory was codified in the W.Va. Rules of Procedure For Child Abuse and Neglect Proceedings.

The effect of entry of an order of termination of parental rights shall be, inter alia, to prohibit

all contact and visitation between the child who is the subject of the petition and the parent who is the subject of the order and the respective grandparents⁴ unless the court finds the child consents and it is in the best interest of the child to retain a right of visitation. W.Va. Rules of Procedure for Child Abuse and Neglect Proceedings. Rule 15 (January, 1997)

In the case now before this Court, the lower Court has placed these very troubled children with their paternal grandparents with the goal of adoption. Larry and Debra S. were anxious to accept the responsibility for them at the time the maternal grandparents asked to be relieved of that responsibility during the Adjudicatory Hearing below. They remain committed to providing a safe, secure and nurturing home for Samantha and Hope as their adoptive parents. The Court reserved unsupervised visitation for the maternal grandparents at the dispositional phase despite their failure to cooperate with the DHHR Case Plan for the children and their repeated violation of the Court's Orders prohibiting contact between the children and their mother while she was in prison.

As the children went back and forth between the household of Larry and Debra S. and the home of John and Mabel T., they began to evidence serious behavior problems. Treating therapist Pam Ryan accredited their behavior problems to their confusion and frustration arising from the conflicting parenting styles of the two sets of grandparents and the disinclination of John and Mabel T. to acknowledge that the children's emotional problems existed. Dr. Ryan expressed additional concern that John and Mabel T. took no action to protect them from the sexual abuse they reported.

4. Footnote One to Rule 15 states, "This rule is intended to neither increase or decrease any rights of the grandparents as set forth in W.Va. Code §49-6-1 et seq. and 48-2B-1 et seq. (Now see W.Va. Code §48-10-101 et seq.)"

When Samantha's escalating aggressive behavior resulted in her third hospitalization, the Court agreed that DHHR had provided sufficient evidence to support their Motion that visits with John and Mabel T. be terminated, but only to the degree that they were unsupervised. The Court Ordered ongoing supervised visits. Moreover, it granted the Motion by John and Mabel T. that the Court appoint a new psychologist to evaluate the parties and test the findings of Dr. Ryan.

As set forth in the Statement of Facts above, the second team of psychologists unanimously agreed with Dr. Ryan's findings that the effect on the children of their visitation with John and Mabel T. had not facilitated their transfer to a new, stable home environment offered by the paternal grandparents, but had made it considerably more difficult. The refusal of John and Mabel T. to recognize the problems the children exhibited; their failure to protect the children from the sexual abuse alleged; and their insistence on following a parenting model that was in conflict with that utilized by Larry and Debra S., created ongoing turmoil and confusion in the minds of these children.

After reviewing the reports of the second team of psychologists, the Court amended its Order of supervised visitation entered at the Dispositional Hearing below to provide unsupervised overnight visitation for John and Mabel T., in their home on a bi-weekly basis, apparently disregarding the unanimous opinions of the Court appointed psychologists.

The Court provided no explanation for this reversal other than to state, "...it now appears that said [supervised] visitation schedule needs to be modified in the childrens' best interest while at the same time allowing reasonable visitation that would not harm the children...the Court finds that it would be in the best interests of the children to

modify the previous Dispositional Order and to have unsupervised visitation with the T.s and the same is hereby Ordered, so long as the previous conditions are complied with.

The T.s shall have visitation from 6:00 p.m. Friday until 1:00 p.m. Saturday, every other weekend commencing Friday (June 29, 2007) and every other weekend thereafter.”

State v. Faye Anne S. and Joe S., Juv. Case No. 05-JN-8,9, Mingo County Circuit Court Order from Judicial Review, (June 28, 2007).

It is unclear what “...previously Ordered conditions” the Court refers to in its Order. The Court has failed to provide any evidence to support its conclusion that the visitation it has Ordered is in the best interest of the children and has ignored the evidence presented by DHHR that the visits are contrary to their best interests.

C.

The Lower Court Has Allowed The Preferences of Caretakers To Supercede The Best Interests Of The Children

A heavy burden is placed on the lower Courts to determine the point at which a child’s caretaker forfeits their rights to custodial control of the child. The decision will, undeniably, cause pain to persons who may not understand how they have failed in their caregiving responsibilities. An intricate system of counseling, parenting instruction, psychological evaluation and assistance, material assistance and judicial review has been created by case law, Federal and State statute, and State regulation to provide caregivers every opportunity to understand how their behavior can injure a child and what they can do to correct their destructive behavior. If they do not or cannot utilize this system, the Court must take action to protect the child’s best interest.

This case appears to exemplify a practice that is not unique in the abuse/neglect

Courts in the State. Faced with the tortuous task of depriving parents, or in this case grandparents, of contact with the child they love, the Court has attempted to compromise. To do this, the Court must ignore the clear directives of West Virginia law described above. Moreover, it fails to exercise any realistic balancing of the cost to these children to avoid the loss experienced by the caregivers. In the case now before the Court, the best interests of Samantha and Hope S. were disregarded in the Court's decision awarding ongoing unsupervised visitation rights to John and Mabel T.. The findings of the Court's own experts were disregarded.

When Dr. Ryan warned that the children appeared to be suffering serious emotional trauma as a result of their visits with their maternal grandparents, John and Mabel T. questioned the integrity of her findings and asked that the parties all be re-evaluated by another psychologist. The Court, in an unusual show of deference, agreed and appointed new and unrelated experts to perform psychological testing. The new team was unanimous in their concurrence with Dr. Ryan's findings. In the face of all evidence showing visitation with their maternal grandparents has been contrary to the best interest of Samantha and Hope, and the expression of the children that they wished to discontinue visitation, the Court Ordered them to proceed to an uncertain future of unsupervised visitation in the home of their maternal grandparents.

Compromise decisions such as occurred in the case now before the Court, not only subject children traumatized during their lives with their biological parents to additional injury, but create obstacles to adoption into the safe, secure homes which might otherwise be available for them. Potential adoptive parents can be discouraged when they are advised that they will be required by Court Order, to facilitate and

cooperate with a plan for visitation which has in the past caused the children to decompensate.

West Virginia adoption law provides:

Upon the entry of such order of adoption, any person previously entitled to parental rights, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such person, parent or parents, except any such person or parent who is the husband or wife of the petitioner for adoption, shall be divested of all legal rights, including the right of inheritance from or through the adopted child under the statutes of descent and distribution of this state, and shall be divested of all obligations in respect to the said adopted child, and the said adopted child shall be free from all legal obligations, including obedience and maintenance, in respect to any such person, parent or parents. From and after the entry of such order of adoption, the adopted child shall be, to all intents and for all purposes, the legitimate issue of the person or persons so adopting him or her and shall be entitled to all the rights and privileges and subject to all the obligations of a natural child of such adopting parent or parents. W.Va. Code §48-22-703(2001) Emphasis added.

Surely the authority of adoptive parents to deny visitation to biological grandparents who have refused to take action to protect their grandchildren from sexual abuse and who have subjected the children to situations which were threatening to their health and well-being are parental rights recognized under West Virginia adoption law.

5. Grandparent visitation rights available under West Virginia Code, Chapter 48, Article 10 are controlled by the paramount consideration of the best interests of the child. (W.Va. Code §48-10-101); "...the best interests of the child and [which] would not substantially interfere with the parent-child relationship (W.Va. Code §48-10-501); "...any history of physical, emotional, or sexual abuse or neglect being performed, procured, assisted or condoned by the grandparents...and any other factor relevant to the best interests of the child must be evaluated. (W.Va. Code §48-10-502(9) & (13) (2000).

This Court has made it clear that the best interests of the child must be the “polar star” in any award of custodial privileges over child victims of abuse or neglect if there is to be any hope of providing them with a future which is safe and secure. This case speaks to a need for redirection of the sympathies of lower Courts. John and Mabel T. were afforded all of the services available from WVDHHR to improve their understanding of the problems Samantha and Hope S. now face and what their caregivers needed to provide to help the children find their way through these problems. John and Mabel T. ignored or rejected most of the services offered to them, and in doing so, may have caused the children additional harm. They have waived their right to appeal to the sympathy of the lower Court to preserve their visitation. The Court erred in affording them this protection.

II.

THE COURT HAS FAILED TO PROVIDE SAMANTHA AND HOPE S. WITH A MEANINGFUL PERMANENCY PLAN

The Final Order entered by the Court in an abuse/neglect proceeding must be supported by substantial evidence that the best interests of the children who are the subjects of the Order are being served by it and that the subjects of the Order can rely on its permanency, to the degree it is within the Court’s power to provide permanency.

(See In Re: Charity H., Courtney H. and Victoria H. 599 S.E.2d 631, 215 W. Va. 208 (2004); 521 S. E. 2d 173 (1999); In Re: Katie S. and David S., supra.; In Re: Tyler D., Alexander A. and Nevaeh D. 212 W. Va. 149, 578 S.E.2d 343 (2003); In Re: Jonathan G., supra.) The Order entered below was unsupported by evidence that unsupervised

visitation between the children and John and Mabel T. was in the best interests of the children other than the Court's observation that a bond existed between the children and John and Mabel T.. The evidence presented at hearing of the WVDHHR Motion to Terminate Visitation would have supported a finding that if the bond existed, it had a very negative effect on the children as reflected by their anti-social behavior following their visits with their maternal grandparents. This finding would have been further supported by the unanimous conclusions by the Court appointed experts that the differing parenting styles of the maternal and paternal grandparents left the children in a state of confusion and turmoil as they went from one grandparents' home to the other and there was no evidence these conditions would improve in the future.

By placing these children in the same unsupervised visitation which has led to their de-compensation in the past, the Court has placed them in a setting which is unreliable and unpredictable. The ruling not only endangers the psychological health of the children, it disrupts the permanency of the pre-adoptive placement with Larry and Debra S. to a degree that jeopardizes hope that it will last.

Regulations require that permanent placement of a child shall be achieved within eighteen months of the Final Disposition Order. "...Permanent placement of each child shall be achieved...unless the Court specifically finds on the record extraordinary reasons sufficient to justify the delay." W.Va. Rules of Procedure For Child Abuse And Neglect, Rule 43.

Finally, this Court has stated that post-termination visitation should be allowed if it is in the child's best interest and "would not unreasonably interfere with their permanent placement." In Re: Alyssa W. and Sierra H. 619 S. E. 2d 220, 227 WV 707 (2005)

citing State ex rel Amy M. v. Kaufman 196 W. Va.
251, 260; 470 S.E.2d 205, 214 (1996)

The lower Court has delayed permanency in this matter for two years and six months past the time mandated by Rule 43 of the West Virginia Rules of Procedure for Child Abuse and Neglect. The matter remains on the Court's docket and is scheduled for ninety (90) day Judicial Reviews. There would seem to be no end in sight for the uncertainty in which the Court has placed Samantha and Hope S., in its effort to protect the visitation rights of John and Mabel T..

CONCLUSION

Wherefore, Appellants Larry and Debra S. pray that the Court reverses the decision of the lower Court set forth in its Judicial Review Order entered on June 28, 2007, but only as it provides for unsupervised visitation of Samantha and Hope with their maternal grandparents John and Mabel T.. Appellants pray that all visitation between the children and John and Mabel T. be terminated, in the best interests of the children.

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CERTIFICATE OF SERVICE

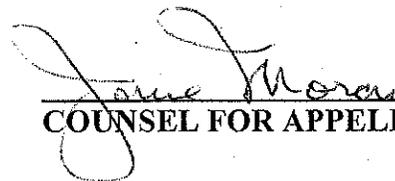
I, Jane Moran, hereby certify that a true and exact copy of the foregoing Appellants' Brief was served on the following persons when true and exact copies thereof were deposited in the U. S. Mail, First Class Postage Pre-paid, on this 11th day of DECEMBER 2007, addressed to:

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