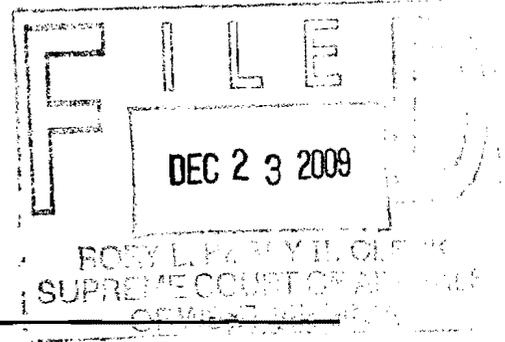


No. 35307

In The
Supreme Court of Appeals
of
West Virginia
Charleston

IN RE: NELSON B.



FROM THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA
CASE NO: 08-JA-20
THE HONORABLE JUDGE LAWRENCE S. MILLER, JR., PRESIDING

BRIEF ON BEHALF OF APPELLANT, PAUL EUGENE B.,
IN SUPPORT OF PETITION FOR APPEAL

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**TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**

**I. STATEMENT OF THE KIND OF PROCEEDING
AND NATURE OF THE RULING BELOW**

This appeal arises out of an abuse and neglect proceeding from Preston County, West Virginia, which resulted in the permanent transfer of custody from the Appellant, Paul Eugene B., the Biological Father or the Respondent Father below, to the minor child's maternal aunt and uncle, Patricia and Joseph B. On May 30, 2009, Melissa J. McCabe, Child Protective Social Worker for the West Virginia Department of Health and Human Resources ("Department"), filed an "Imminent Danger Petition" regarding Appellant, and his son, Nelson B., the minor child herein.

This "Imminent Danger Petition" alleged that Appellant had a chronic history of mental illness and that his mental illness regularly reached levels when he was not competent to direct his own actions or correctly perceive reality affecting his ability to adequately parent a child. The "Imminent Danger Petition" further alleged a specific instance relating to this alleged mental illness that caused the minor child to be removed from the home of Appellant on or about May 21, 2008. The Petition also alleged that the biological mother of the minor child was deceased.

By Order entered by the Court on May 30, 2008, counsel was appointed for the minor child and Appellant, and a preliminary hearing was set before the Circuit Court of Preston County, West Virginia (the "trial court") on June 10, 2008. At the June 10th hearing, the trial court found probable cause to maintain the minor child outside the home of Appellant and set an adjudicatory hearing in the matter for June 30, 2008. As a result of this Preliminary Hearing, the trial court also appointed a Guardian ad Litem for Appellant, Attorney Cheryl Warman. The

adjudicatory hearing was subsequently rescheduled to July 17, 2008, because of a scheduling conflict.

On July 17, 2008, an adjudicatory hearing was held before the Circuit Court of Preston County, West Virginia. Appellant appeared with his counsel and his Guardian ad Litem and entered a stipulated adjudication. After questioning Appellant, his counsel and his Guardian ad Litem, the trial court accepted the stipulation and made various findings of fact and conclusions of law, all contained in the trial court's "Order Following Adjudicatory Hearing and Granting Post-Adjudicatory Improvement Period" entered August 11, 2008. Counsel for Appellant then moved, in writing, for a post-adjudicatory improvement period for Appellant. As no party opposed the trial court granting the motion, the trial court did grant the motion.

The trial court continued to have regular review hearings regarding these matters, as reflected by the record herein. On February 19, 2009, a disposition hearing was held in this matter. After hearing all the testimony and evidence presented, the trial court found that a disposition under W.Va. Code §49-6-5(a)(5) was appropriate and in the best interests of the minor child. The trial court further ordered that the minor child be placed in the legal guardianship of the minor child's maternal aunt and uncle, Patricia and Joseph B. The "Order Following Disposition Hearing" was entered by the trial court on May 15, 2009. Appellant appeals this ruling of the circuit court.

II. STATEMENT OF THE FACTS

The Appellant, Paul Eugene B., is the father of one (1) son, Nelson B., who was born on August 17, 2002. Appellant was married to the biological mother of Nelson, Donna Sue (Teter) B., when the minor child was born. The biological mother died on July 16, 2005, and Appellant

was left to raise his son on his own. Appellant and the minor child lived together in Kingwood, Preston County, West Virginia.

In 2007, the Department filed a petition alleging abuse and neglect of Nelson by Appellant. This petition was subsequently heard and dismissed by the Circuit Court of Preston County. The West Virginia Department of Health and Human Resources (the "Department") provided services to Appellant, who also received mental health services from Valley Health Care in Kingwood, West Virginia.

On May 21, 2008, the Preston County Sheriff's Department received a 911 telephone call from Appellant stating that a man with a knife was in his home. Sergeant Kenneth Wotring of the Preston County Sheriff's Department reported to the scene, but did not find that anyone else was in the home and did not find any evidence of a break in to the home. Sergeant Wotring observed Appellant's behavior and believed that Appellant was hallucinating. Sergeant Wotring called Paul Eugene B.'s case manager from Valley Health Care and arrangements were made for the minor child to go temporarily to the home of the child's maternal aunt and uncle, Patricia and Joseph B., who live in Rowlesburg, Preston County, West Virginia. A referral was also made to the Department and this instant case was commenced in the Circuit Court of Preston County, West Virginia.

After entering his stipulated adjudication, Appellant participated with his in-home service provider and received parenting and adult life skills instruction. Paul Eugene B. also received services from Valley Health Care. During the course of these proceedings, and because of the stress of these proceedings, Paul Eugene B. voluntarily admitted himself to Chestnut Ridge Hospital on at least two (2) occasions on a short-term basis to help stabilize his behaviors and regulate his medication.

Throughout these proceedings, Appellant received assistance with transportation to and from his services with the Department, and the Department also assisted with transportation to and from the visitations with the minor child. By all accounts, the visitations between Appellant and his minor child went well. After the disposition hearing in this matter, Department services to Paul Eugene B. were discontinued as the minor child was not returned to his home. Appellant was then responsible for transporting himself to and from visitations with the minor child.¹

ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN TRANSFERRING LEGAL GUARDIANSHIP OF THE MINOR CHILD TO THE MATERNAL AUNT AND UNCLE BECAUSE THERE WAS A LESS DRASTIC ALTERNATIVE AVAILABLE.

POINTS AND AUTHORITIES RELIED UPON

CASE LAW

IN RE TIFFANY MARIE S., 196 W.Va. 223, 470 S.E.2d 177 (1996)

STATUTES

West Virginia Code § 49-6-2 (1996)

West Virginia Code § 49-6-5 (2002)

¹ Appellant does not have a vehicle at this time. The maternal uncle is willing to transport Appellant home from a visit if Appellant is able to get to the visit at the home in Rowlesburg, West Virginia. At this time there is no public transportation service between Kingwood and Rowlesburg. At the May review hearing, the Circuit Court of Preston County ordered that the Multi-Disciplinary Team meet and develop a visitation schedule that would also incorporate visitation in the Kingwood area to help accommodate Appellant. Since the filing of the Petition for Appeal, counsel for Appellant has been advised that Appellant is receiving transportation services from Valley Health Care to assist in transporting the Appellant to and from his visitations.

STANDARD OF REVIEW

The Standard of Review for conclusions of law determined by circuit courts are normally subject to a *de novo review*. However, because abuse and neglect matters are tried upon the facts without a jury, the findings of fact and conclusions of law made by the judge in an abuse and neglect case are subject to a “clearly erroneous” standard. This instant court set forth these standards of review more fully in Syllabus Point 1 of In re Tiffany Marie S., as follows:

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.

196 W.Va. 223, 470 S.E.2d 177 (1996).

DISCUSSION

THE CIRCUIT COURT ERRED IN TRANSFERRING LEGAL GUARDIANSHIP OF THE MINOR CHILD TO THE MATERNAL AUNT AND UNCLE BECAUSE THERE WAS A LESS DRASTIC ALTERNATIVE AVAILABLE.

The circuit court erred in not returning custody of Nelson B. to his father, Paul Eugene B., because there was a less drastic alternative available to the court. Once a court determines that a child is an abused or neglected child pursuant to West Virginia Code §49-6-2 (1996), and a child’s case plan is filed with the court, a court may proceed to disposition. West Virginia Code §49-6-5(a) (2002) lays out the sequence of dispositions available to the court and their order of

precedence. The code section allowing for a transfer of custody to a third party states, in part, that:

Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court. The court order shall state: (A) That continuation in the home is contrary to the best interests of the child and why; (B) whether or not the department has made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent or eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home; (C) what efforts were made or that the emergency situation made such efforts unreasonable or impossible; and (D) the specific circumstances of the situation which made such efforts unreasonable if services were not offered by the department. The court order shall also determine under what circumstances the child's commitment to the department shall continue.

West Virginia Code §49-6-5(a)(5) (2002).

In this matter, the circuit court determined that this transfer of custody, ultimately for the purpose of legal guardianship by the maternal aunt and uncle, was necessary and in the best interests of the minor child. However, the circuit court erred by not considering the least drastic alternative available in this matter. The least drastic alternative available in this matter was under West Virginia Code §49-6-5(a)(3) (2002); that is to "return the child to his or her own home under supervision of the department".²

The circuit court could have returned the minor child to the home of Appellant under the supervision of the Department. The circuit court could have ordered the Multi-Disciplinary Team (the "M.D.T.") to meet to develop such a plan. The circuit court did not. Therefore,

² Unfortunately, since the Petition for Appeal was filed, Appellant lost his home because of a lack of finances and has not been able to find a suitable home. At this time, Appellant does not have suitable housing in which it is appropriate for the minor child to live. Appellant is currently residing in a barn and receives room and board for odd jobs he performs for his landlord. However, Appellant is now employed through the Preston County Sheltered Workshop and has made applications for HUD approved and other subsidized

because a less drastic option was available to the circuit court, the lower court erred in transferring permanent custody of the minor child to the home of the maternal aunt and uncle.

CONCLUSION

The lower court erred in transferring legal guardianship of the minor child to the maternal aunt and uncle and by failing to order a less drastic alternative under West Virginia Code §49-6-5(a) (2002).

PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth herein, the Appellant respectfully requests that that this Court reverse the order transferring legal guardianship of the minor child to the maternal aunt and uncle and return legal custody returned to the Appellant; that this Court remand this case to the Circuit Court of Preston County, West Virginia, for further hearing on modification of disposition to consider less drastic alternatives than a permanent transfer of custody from the Appellant to the maternal aunt and uncle; and for such other relief that this Court may deem just and fair.

Respectfully submitted,
PAUL EUGENE B

By counsel,



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housing.

CERTIFICATE OF SERVICE

I, CHAELYN W. CASTEEL, hereby certify that on the 21st day of December, 2009, I served the foregoing "BRIEF ON BEHALF OF APPELLANT, PAUL EUGENE B., IN SUPPORT OF PETITION FOR APPEAL" upon all parties or counsel involved in this matter, by delivering a true copy thereof, by United States Postal Service, first-class mail, postage pre-paid, to the following:

Supreme Court of Appeals
Clerk's Office
Bldg 1, Room E317
1900 Kanawha Blvd E.
Charleston, WV 25305-0831

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MOTION FOR LEAVE TO FILE BRIEF

COMES NOW, the Appellant, PAUL EUGENE B, by and through his counsel, CHAELYN W. CASTEEL, and hereby files this motion for leave to file a brief in support of his previously filed Petition for Appeal pursuant to an Order issued from the West Virginia Supreme Court of Appeals after its Regular Term held on November 12, 2009.

WHEREFORE, the Appellant prays that this Honorable Court grant his motion and file the attached brief in support of his previously filed Petition for Appeal.

Respectfully submitted,
PAUL EUGENE B, Appellant,
by Counsel,



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CERTIFICATE OF SERVICE

I, CHAELYN W. CASTEEL, hereby certify that on the 21st day of December, 2009, I served the foregoing "MOTION FOR LEAVE TO FILE BRIEF" upon all parties or counsel involved in this matter, by delivering a true copy thereof, by United States Postal Service, first-class mail, postage pre-paid, to the following:

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