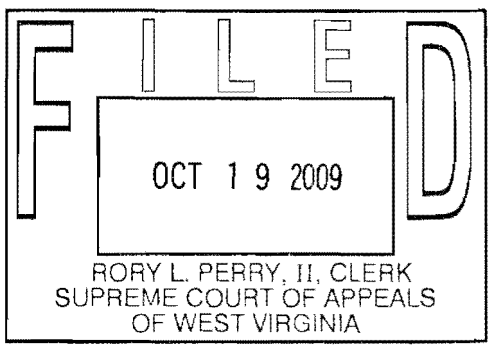
NO: 35031

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: ISAIAH A.

APPELLEE'S BRIEF OF THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES



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DOCKET NO. 35051
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

In Re:
ISAIAH A.

APPELLEE'S BRIEF OF THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

I. KIND OF PROCEEDING AND NATURE OF RULINGS IN THE LOWER TRIBUNAL

This abuse and neglect case started with the filing of a petition on September 13, 2006, based on drug use and domestic violence. The Respondent child in this case is now four (4) years old. The preliminary hearing was held on October 2, 2006, where probable cause was found that the child's physical well being was in imminent danger.

On December 19, 2006, the Court granted the Appellee Mother a ninety (90) day pre-adjudicatory improvement period.

The adjudicatory hearing was scheduled on January 4, 2007, but was continued due to Appellee Mother's motion to continue.

On March 15, 2007, an adjudicatory hearing was held where the Appellee Mother did not contest that the child was abused and/or neglected and made a stipulation to that effect. A post-adjudicatory improvement period was granted on that date.

On May 3, 2007, Appellee Mother executed a document purporting to transfer legal custody of the child to the West Virginia Department of Health and Human Resources (hereinafter DHHR), but later withdrew the relinquishment of her parental rights.

A family case plan was created by the MDT and filed with the Court on August 8, 2007. The Appellee Mother agreed to call the caseworker on a weekly basis, seek medical treatment for bi-polar disorder, submit to random drug screens and seek help for her inability to control her anger.

The dispositional hearing scheduled for July 12, 2007, was rescheduled to October 11, 2007. On August 15, 2007, DHHR filed a motion to terminate parental rights. On October 11, 2007, the Court granted Appellee Mother's motion to extend her improvement period for ninety (90) days.

Another dispositional hearing was scheduled on January 10, 2008. On January 10, 2008, the Court again extended the Appellee Mother's post-adjudicatory improvement period for an additional ninety (90) days.

Another dispositional hearing was set for April 10, 2008, where the Court extended Appellee Mother's post-adjudicatory improvement for an additional ninety (90) days.

The DHHR filed an Amended Petition for Termination of Parental Rights on July 18, 2007, and a hearing was set for September 17, 2008. A hearing was held on September 17, 2008, held in recess until September 25, 2008, where testimony was given, and held in recess until September 30, 2008.

On September 30, 2008, the Court denied the termination of parental rights, denied a dispositional improvement period and ordered permanent foster care.

It is from this order that the Guardian ad Litem appealed, and DHHR now joins.

II. STATEMENT OF FACTS

At the beginning of this case, DHHR identified five (5) areas of concern, including drug use, parenting, visitation, anger management and disassociation from criminal peers. A family case plan was devised with the Mother's help and agreement at the onset of the case. Throughout the two (2) years of improvement periods, the Mother was provided services to overcome these concerns, to which Appellee Mother utterly and completely failed.

The Appellee Mother abused substances throughout the entirety of this case. She admitted to abusing PCP, cocaine and morphine, and tested positive for benzodiazepines, other opiates, oxymorphone and marijuana. She tested positive for benzodiazepines at the preliminary hearing on October 2, 2006, for morphine on March 18, 2008, and at the dispositional hearing on September 30, 2008, she tested positive for hydrocodone, oxycodone, oxazepam and tetrahydro cannabinoid.

Throughout the two (2) years of improvement periods, the Appellee Mother has refused inpatient treatment and routinely refused or been unavailable for drug screens. During the last extension of her post-adjudicatory improvement period between March 5, 2008, and September 30, 2008, Appellee Mother refused eight (8) drug screens, missed three (3) appointments for drug screens, failed one (1) drug screen, had one (1) arrest for a domestic altercation and missed two (2) visitations with the child.

The Appellee Mother denied having a substance abuse problem throughout the case, even stating at the final dispositional hearing that she did not have a drug problem.

The Appellee Mother did not visit with her child during the pendency of this case. She missed fifteen (15) of twenty-eight (28) visits. She cancelled four (4) and failed to show for the remainder. Appellee Mother telephoned the foster mother to say that she was not going to visit in the future because "it was not worth her time."

Appellee Mother refused to disassociate with her criminal paramour, Wendell T. Wendell is also a respondent to an unrelated abuse and neglect petition regarding his own children. The Appellee Mother and Wendell were involved in domestic altercations during the pendency of this case. On one occasion, March 22, 2008, the Appellee Mother was arrested for a domestic altercation. Appellee Mother has chosen Wendell as her partner and has refused to give him up to be reunified with her child.

Parenting services and instruction were set up for Appellee Mother, but she missed these sessions, stating that she did not need services. The CPS worker, Vandall, testified on September 30, 2008, that she, as well as service providers, had a difficult time reaching the Appellate Mother and also testified that the mother continued to use drugs and demonstrated a lack of cooperation the entire time while working with her.

Service providers, Jason McVey, Andrea Saunders and Dara Acord testified on September 30, 2008, that the mother denied needing services, believing that she was already an excellent mother, and refused the recommended amount of services.

After working with Appellee Mother for two (2) years, the caseworker testified on September 30, 2008, that this mother did not possess the appropriate motivation for parenting, that there is no likelihood that this mother will improve, that termination of

parental rights is in Isaiah's best interests, and that there was nothing more the Department could have done.

III. STANDARD OF REVIEW

This Supreme Court has set forth the standard of review in abuse and neglect cases, previously stating 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: Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

IV. DISCUSSION OF LAW

For the court to terminate parental rights, there must be a finding that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future, and that it is necessary for the welfare of the child that the parental rights be terminated. W. Va. Code § 49-6-5(a)(6).

The definition of "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" is found in W. Va. Code § 49-6-5(b) which states:

> "(b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean

that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help."

The same Code section goes on to explain the evidence needed for the court to make this finding:

> "Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive:
>
> (1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning...
>
> (3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child."

When a finding of this nature is made, the court is guided by W.Va. Code § 49-6-5(a)(6) [emphasis added], which states:

> "(6) 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 and guardianship rights and 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."

Case law also guides the court in the termination of parental rights. The cases of In re: Katie S., 198 W.Va 79, 479 S.E.2d 589 (1996), In re: R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980), and In the Interest of Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991) state that "[c]ourts are not required to exhaust every speculative possibility of

improvement before terminating parental rights." These same cases go on to state that the primary goal in abuse and neglect cases must be the health and welfare of the child.

This Supreme Court has also stated:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 [1977] may be employed without the use of invervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980); In re Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989); In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

The case of State v Michael M., II, 202 W.Va 350, 504 SE 2d 177 (1998) also gives the court guidance when deciding permanency for the child, specifically discussing what is needed to order permanent foster care and the preferred permanency option of adoption:

> "Where parental rights have been terminated and it is necessary to remove the abused and/or neglected child from his family, an adoptive home is the preferred out-of-home placement of the child and the circuit court shall give priority to such a placement and shall consider other alternatives, including permanent foster care, **only** where the court finds that the adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found. [Emphasis added.]

V. ARGUMENT

In the case at hand, the concerns throughout the case were substance abuse, anger management, domestic violence and association with peers with a criminal history. A family case plan was created with the Mother's help to provide services to resolve these concerns. DHHR provided in-home services, drug screening and counseling, visitation and aid in domestic violence prevention.

Throughout the two (2) years of improvement period after improvement period, the Appellee Mother not only failed to correct the conditions of abuse and neglect, but worsened her condition.

The Appellee Mother failed to keep appointments with in-home services, argued with those providers and advocated to quit services all together. Appellee Mother did not believe she was in need of those services. She believed she was an excellent mother already.

The Appellee Mother never accepted her substance abuse problem. She missed or refused nearly all of her drug screens over the two-year period. Her positive results included PCP, cocaine, morphine, hydrocodone, oxymorphone, oxycodone and marijuana. At the last court hearing, after two (2) years of aid, she tested positive for four (4) of her drugs of choice.

There were twenty-eight (28) scheduled visits with her child. Fifteen (15) were missed. Appellee Mother verbally and voluntarily quit visiting her son, stating that it was a waste of her time.

During the pendency of this case, the Appellee Mother was arrested for a domestic altercation, failing to prove that she would protect her child if given the chance for reunification. She has stated that her paramour is physically aggressive with her, that he is a respondent parent of a separate abuse and neglect case, and that he has been convicted of felony drug possession, possession of stolen property and domestic battery. None of these facts has caused the Appellee Mother to give up her paramour to be reunified with her child.

In looking at all of these facts when deciding to terminate parental rights, the lower court's standard of review is "no reasonable likelihood to correct the conditions of abuse and neglect in the near future." W. Va. Code, § 49-6-5(b). However, it appears the lower court used a standard of whether there was "a glimmer of hope," as stated in the September 30, 2008, order. This standard is incorrect.

Over the two (2) year history of this case, the Appellee Mother proved that her drug usage and association with an abusive criminal were more important than being a loving, protective mother. Her multiple failed, refused and missed drug screens, failure to cooperate with services, association with abusive criminals, her own arrest for domestic violence and her voluntary cessation of visitation with her child demonstrated her priorities.

The same conditions that existed two (2) years ago are actually worse today. The only conclusion that anyone can make is that there is no reasonable likelihood that the Appellee Mother has, will or even wants to correct the conditions of abuse and neglect.

Termination of parental rights to this four (4) year old child is what is in this child's best interests. Permanent foster care is not warranted, as the Appellee Mother has not demonstrated a reasonable likelihood of improvement nor correction of the conditions of neglect. For the lower court to consider permanent foster care, the court must find that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found. Those findings were never made, and cannot be made, as there is an adoptive home willing and able to adopt this four (4) year old child.

VI. CONCLUSION

The lower court erred in using an incorrect standard for deciding a Motion to Terminate Parental Rights and subsequently erred by not terminating parental rights and ordering permanent foster care for a four (4) year old child. The lower court's only finding should be that there is no reasonable likelihood that the conditions of abuse and neglect can be corrected in the future. The order of the lower court which would be in the best interests of this child should be termination of parental rights. This four (4) year old child has an adoptive home willing and able to adopt him. This is the permanency that is not only preferred by the courts, but it is what this four (4) year old child deserves.

VII. PRAYER FOR RELIEF

WHEREFORE, the DHHR requests this Court reverse the Circuit Court's rulings denying DHHR's motion terminating the Appellee Mother's parental rights.

Respectfully submitted,

West Virginia Department of Health
and Human Resources

By counsel

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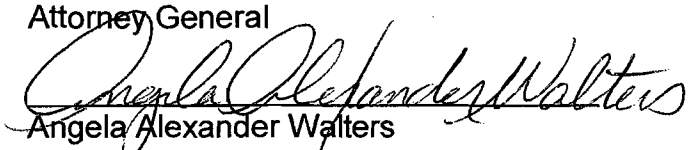

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

In Re:

Isaiah A.

CERTIFICATE OF SERVICE

I, Angela Alexander Walters, do hereby certify that on this 16th day of October, 2009, I served a true and accurate copy of **Appellee's Brief of the West Virginia Department of Health and Human Resources** on the following by first class mail, postage prepaid:

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