NO: 35486

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE INTEREST OF JAMES M., ELIZABETH F.,
KYIA F., and JEBADIA F.

BRIEF OF APPELLEE
STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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James M.
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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

On March 28, 2008, the State of West Virginia, through the Department of Health and Human Resources (DHHR), filed a petition alleging abuse and neglect of James, Elizabeth and Kyia, by their parents, Mary F., Christopher F., father of Elizabeth and Kyia, and Timothy F., father of James. The allegations were "excessive corporal punishment of the children by father, substance abuse by both parents, failure to submit to random drug screens and domestic violence by father."

At the adjudicatory hearing held on April 29, 2008, Mary F. and Christopher F. were found to be abusive and neglectful and were given an improvement period. Timothy F. was given a pre-adjudicatory improvement period.

On May 12, 2008, there was an emergency hearing due to Christopher F. breaking a safety plan that he would not use any physical discipline. He was arrested for the incident and the Court ordered Mary to take her children and live with the children's grandmother, Janice B., and to have no contact whatsoever with the father,

Christopher F. This no contact order was in effect for six (6) months, the majority of the improvement period. The mother cooperated with many aspects of her improvement period, but had repeated positive drug screens for opiates. She was usually able to provide a prescription, but not always.

The children were removed from her custody in December, 2008, due to a positive drug screen for methamphetamine in addition to moving her children into the home of her brother who has a drug addiction, as well as criminal and CPS histories. There was current domestic violence in the home of her brother as well. The father was cooperative on and off during his improvement period. The Judge found that, overall, he did not cooperate with his improvement period.

On November 2, 2008, Jebedia was born and a petition was filed against Mary F. on December 10, 2008. At the time of the birth, the father of Jebedia was unknown.

Mary F. relinquished her parental and custodial rights to all four children on February 13, 2009. Soon thereafter, the father of Jebedia was found to be James H. James H. relinquished his parental and custodial rights to Jebedia on April 6, 2009. Timothy F. relinquished his parental and custodial rights to James on May 6, 2009. Christopher F. relinquished his parental and custodial rights to all four children on July 23, 2009.

After the parents had relinquished their rights to the children, Janice and Hollie B., the maternal grandparents of all the children, and Elizabeth B., the paternal aunt of Elizabeth and Kyia, were granted intervenor status. The maternal grandparents requested permanent placement of the children in their home.

A hearing was held on September 24, 2009 to decide the placement of the children with the maternal grandparents. A number of individuals had contacted the DHHR to be considered as a possible adoptive home(s) for the children, but these individuals were never considered by the Court at this hearing. The Circuit Court determined that the grandparent preference was not overcome by the evidence and, therefore, the Circuit Court placed the children with the maternal grandparents. It is from this Order that the GAL appealed, and DHHR now responds.

II. STATEMENT OF FACTS

Upon the relinquishment/termination of the biological parents of the children, Hollie and Janice B. petitioned the Circuit Court to be considered as an adoptive placement for the children. The DHHR performed a homestudy on the home of the maternal grandparents. The homestudy indicated that the home was appropriate.

At the hearing held on this issue, Janice B. admitted to allowing her unfit adult biological children to be around her infant adoptive children. Janice B. testified that if the Circuit Court ordered her not to allow her biological children, who were using drugs and had multiple criminal charges, around her adoptive children, then she would comply with the order. Historically, Janice B. has been unwilling to sever her relationships with her biological children for the best interests of her adoptive children.

Three of Janice B.'s biological children, Amy B., Christopher George M. and Mary F., are well known for their severe drug abuse and extensive criminal history. For many years, Christopher George and his wife, Misty, lived in a trailer which is approximately fifty (50) feet from the back door of Janice's home. During the time Christopher George and his wife lived in the trailer, Christopher George was convicted

for battery, petit larceny, shoplifting and contributing to the delinquency of a minor. During this time, Christopher George and Misty were also the subjects of a CPS court case for substance abuse problems and domestic violence issues.

Mary M. also has a significant and long-standing substance abuse problem and was recently charged with third degree sexual assault. James H., father of Jebedia, was fourteen (14) years old when Mary M. conceived. Mary M. lived in the home of Janice B. while she was abusing substances.

Janice B. has demonstrated repeatedly that she places the needs of her biological children over the needs of her infant adoptive children. She has done this by allowing Mary M. to stay in her home with Janice's adoptive children. At the same time, she allowed Christopher George and his family to live in the backyard trailer. During all of this time, Mary M., Christopher George and Misty were using illegal substances and Christopher was convicted of several criminal charges. Janice B. was aware of all of these issues since she was the one who notified the DHHR of such.

At the conclusion of the September 24, 2009, hearing, the Circuit Court of Nicholas County ordered that the children be placed with the maternal grandparents over the objection of the Guardian *ad litem* for James M. and Jebedia F., and the Guardian *ad litem* for Elizabeth F. and Kyia F. The Circuit Court based its decision on WV Code § 49-3-1 and *Napoleon S. v. Walker,* 217 W. Va. 254, 617 S.E.2d 801. The Circuit Court specifically stated: "Absent the grandparent preference, the Court doubts this decision would be the same."

Since the September 24, 2009, hearing, the DHHR has discovered that Janice bonded her son, Christopher George, out of jail and encumbered her home after he

was arrested for delivery of methamphetamine. On his public defender application, he used Janice's address for his mailing address. Clearly, there is still a tie between Janice and son. She is willing to risk the home in which her infant adoptive children, as well as possibly the children in this case, are living.

Janice is still exposing her infant adoptive children to her unfit adult biological children in defiance of the Circuit Court's order against such contact.

III. ASSIGNMENT OF ERROR

The Circuit Court erred in ruling that based upon *Napoleon v. Walker,* it had no other alternative than to place the children with the maternal grandparents in spite of the overwhelming evidence presented to the Court that it is not in the best interest of the children to be placed in that home.

IV. STANDARD OF REVIEW

> "This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*."

Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

> "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).

V. DISCUSSION OF LAW

The issue before the Court today is the application of the grandparent preference. In determining permanent placement of children in abuse and neglect cases, the law mandates a preference that children be placed with their grandparents. This preference is presumptively in the best interests of the child. This preference may only be overcome when the record reviewed in its entirety concludes that placement with the grandparents is not in the best interests of the child. In *Napoleon v. Walker,* 217 W. Va. 254, 617 S.E.2d 801 (2005), this Court held that:

> West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child.

The Court in that case explains the requirement of DHHR and the circuit court to examine the best interests of the child. DHHR and the circuit court in its determination of best interests of the child must consider the totality of the circumstances of the case. That Court states:

> "By specifying in West Virginia Code § 49-3-1(a)(3) that the home study must show that the grandparents "would be suitable adoptive parents," the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances of the case."

The *Napoleon* court further explains the definition of best interests and that it will vary from case to case. That Court explains that the circuit court has broad discretion in its determination of best interests as it hears witnesses and observes parties. That Court's specific guidance was:

> "Our holding does not mean that relatives' adoption petitions must be granted automatically. The terms "best interests," "good cause to the contrary" and "detriment" do not lend themselves to standardized definitions. The best interests of potential adoptees will vary from case to case, and the trial court retains broad discretion because of its opportunity to observe the parties and hear the witnesses."

In the present case, there is extensive history that would indicate that Janice will not protect infant children from her unfit biological children. Even after Janice adopted Christopher and Hollie, she continued to allow Christopher George and Misty to live in the backyard trailer. Janice allowed them to live near and have contact with her infant children even after Christopher George had been arrested and was convicted of violent crimes. Janice allowed them to live there after she herself had turned them in to Child Protective Services for abusing drugs. She allowed them to live in close proximity to her infant children even when she knew there was domestic violence in their home.

Janice allowed Mary to live in the same home as her infant children, even though she was well aware of Mary's drug abuse problem. It was only after the multi-disciplinary team met and the GALs and DHHR indicated they would not recommend Janice as an adoptive placement that Janice asked Christopher George and Misty to move.

After the hearing in September, 2009, Janice encumbered her own home in order to get a surety bond for Christopher George following his arrest for delivery of

methamphetamine. The address that Christopher George uses in all of his arrest documents is his mother's address, even his affidavit for public defender services. Clearly, Janice has no intention of keeping her unfit biological children from infant children in her care.

Even after the Circuit Court reprimanded Janice about her adult biological children being around her infant adoptive children, she allowed her biological children to eat dinner with her adoptive children. She allowed Christopher George to have contact with the children, even though he was out on bond for delivering methamphetamine. Janice is unwilling to protect her adoptive children from drug addicted criminals. Janice has chosen her adult biological children over her infant adoptive children.

What is troublesome to DHHR is the Court's statement: "Absent the grandparental preference, the Court doubts this decision would be the same." It appears to DHHR that the Court did feel that this placement was not in the best interests of the children, but felt that "his hands were tied" by the preference. The Circuit Court's hands were not tied, as it is required to look at the totality of evidence.

Therefore, the Circuit Court clearly erred in placing the children with Janice, ignoring the extensive history of allowing children to be exposed to drug addicts and criminals. This Honorable Court requires that the record be examined in its entirety to determine the best interests of the children. Considering the extensive history of Janice choosing her unfit adult biological children over infant children, the Court's finding is clearly erroneous and it should have found that the grandparent preference had been overcome.

VI. CONCLUSION

Taking into consideration the totality of evidence, the Circuit Court of Nicholas County's finding was clearly erroneous in placing these children with the maternal grandparents. DHHR and the GALs presented overwhelming evidence to overcome the grandparent preference. The maternal grandmother's history is extensive and convincing that she will not protect infant children in her care from exposure to drug usage, nor from criminal activity.

Clearly, it is not in the best interests of these children to be placed with the grandparents. What proves this is the Circuit Court's own statement: "Absent the grandparent preference, the Court doubts this decision would be the same."

VII. PRAYER FOR RELIEF

WHEREFORE, DHHR respectfully requests that this Court find that the Circuit Court of Nicholas County clearly erred in placing the children with the maternal grandparents and any other relief this Honorable Court deems appropriate.

Respectfully submitted,

West Virginia Department of Health
and Human Resources

By counsel

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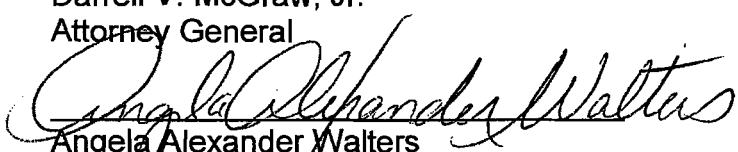

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CERTIFICATE OF SERVICE

I, Angela Alexander Walters, do hereby certify that I served a true and accurate copy of the Brief of Appellee, State of West Virginia Department of Health and Human Resources, by first class mail, postage prepaid, on this the 23rd day of March, 2010, to the following:

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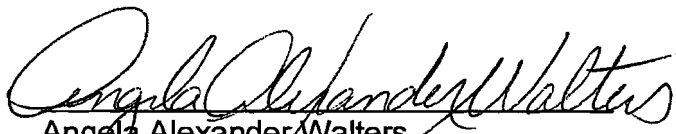

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