Docket No. ~~[illegible]~~ 35718

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Petitioner,

v.

TRISTEN K.,
Infant under the age of eighteen (18) years,

AND

JOSHUA K.,
ALEXSIS S.,
Parents of said infant,

Respondents.

FILED
1 3 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

From Marion County Abuse and Neglect Case No: 10-JA-2
The Honorable David Janes

THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES' RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES' RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Comes now the West Virginia Department of Health and Human Resources ("the Department") by and though its counsel, Assistant Attorney General, Katherine M. Bond, and responds to the Petition for Writ of Prohibition filed by Susan Riffle, guardian ad litem ("GAL") for the infant, Tristen K., on September 21, 2010. In her petition, the GAL contends that the Circuit Court erred in granting Tristen's parents pre-adjudicatory improvement periods because nine (9) months have passed since the petition was filed. The Department argues that the parents have demonstrated their likelihood to participate in pre-adjudicatory improvement periods; therefore, the Circuit Court did not abuse its discretion in granting the pre-adjudicatory improvement periods.

STATEMENT OF FACTS

On January 5, 2010, the Department filed a Petition for Abused or Neglected Children alleging that Alexsis S. and Joshua K. had abused their child, Tristen. The allegations of the petition are set forth in the GAL's Petition for Writ of Prohibition, and the Department agrees with the allegations as set forth therein. On January 14, 2010, Alexsis filed a motion for a pre-adjudicatory improvement period. The Circuit Court held a hearing on January 15, 2010, at which time both Alexsis and Joshua waived their right to a preliminary hearing. An adjudicatory hearing was set for March 15, 2010.

On March 12, 2010, the Circuit Court continued the March 15, 2010 adjudicatory hearing so that it could finish a jury trial it started on March 10, 2010. The adjudicatory hearing was rescheduled for May 6, 2010. On March 16, 2010, Alexsis refiled her motion for a pre-adjudicatory improvement period. On May 6, 2010, the Circuit Court held a hearing in Tristen's case. The hearing was set for adjudication; however,

because Joshua was not transported from the North Central Regional Jail, the adjudicatory hearing was continued without objection from any party, including the GAL. At the hearing on May 6, 2010, the Department informed the Court that Alexsis was participating in services and following all recommendations of the multidisciplinary treatment team ("MDT"). *See* Exhibit A, Family Case Plan dated May 6, 2010, p.3. The Circuit Court rescheduled the adjudicatory hearing for July 1, 2010.

The Circuit Court held a judicial review on June 1, 2010. The Department reported that Alexsis was participating in services and following all recommendations of the MDT. The Department further reported that Joshua was not currently participating in services due to his incarceration, but that services would be offered upon his release from jail. On June 17, 2010, the Circuit Court continued the July 1, 2010 adjudicatory hearing because a material witness was not available to testify that day. The Circuit Court rescheduled the adjudicatory hearing for September 9, 2010.

On September 2, 2010, the Department prepared a Court Summary in which it reported that Alexsis was participating in services and following all recommendations of the MDT. The Department further reported that Joshua had been released from jail and that the Department referred him for services. *See* Exhibit B, Court Summary, September 2, 2010, p.3. On September 6, 2010, Joshua filed a motion for a pre-adjudicatory improvement period. *See* Exhibit C, Motion for Pre-Adjudicatory Improvement Period.[1]

On September 9, 2010, the Circuit Court held a hearing on Tristen's case. The Circuit Court considered the motions for pre-adjudicatory improvement periods filed by

[1] According to the certificate of service, Joshua neglected to serve the GAL with a copy of his motion.

Alexsis and Joshua. The Department argued in favor of the pre-adjudicatory improvement periods because the parents were participating in services and following all recommendations of the MDT. The GAL objected to the pre-adjudicatory improvement periods on the basis that nine (9) months had already passed since the filing of the petition and pre-adjudicatory improvement periods would only delay the abuse and neglect case. Over the objection of the GAL, the Circuit Court granted Alexsis and Joshua pre-adjudicatory improvement periods for ninety (90) days.[2] On September 21, 2010, the GAL filed a petition for writ of prohibition asking the West Virginia Supreme Court to prohibit the Circuit Court from granting Alexsis and Joshua pre-adjudicatory improvement periods.

STANDARD OF REVIEW

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1. The West Virginia Supreme Court has held

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five

[2] The order reflecting the September 9, 2010 hearing has not yet been entered with the Circuit Clerk's Office.

> factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

ARGUMENT AND DISCUSSION

The GAL argues that the Circuit Court erred in granting Alexsis and Joshua pre-adjudicatory improvement periods because of the lapse of time between the filing of the petition and the adjudicatory hearing. The GAL contends that pre-adjudicatory improvement periods should not have been granted because they will only prolong the time before adjudication can occur. The Department disagrees and responds as follows: (1) The Circuit Court did not exceed its legitimate powers in granting Alexsis and Joshua pre-adjudicatory improvement periods; and (2) The Circuit Court correctly delayed the adjudicatory hearing to allow Joshua and Alexsis pre-adjudicatory improvement periods.

1. The Circuit Court did not exceed its legitimate powers in granting Alexsis and Joshua pre-adjudicatory improvement periods.

The GAL contends that the Circuit Court should not have granted Alexsis and Joshua pre-adjudicatory improvement periods because nine months had elapsed between the filing of the petition and the granting of the pre-adjudicatory improvement periods. However, the West Virginia Supreme Court has held

> W.Va. Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial.

Syl. Pt. 2, State ex rel. W.Va. Department of Health and Human Services v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987). The West Virginia Rules of Procedure for Child

Abuse and Neglect Proceedings ("WVRCAN") also allow pre-adjudicatory improvement periods. WVRCAN 23 states, in pertinent part,

> At any time prior to the final adjudicatory hearing, including at the preliminary hearing or emergency custody proceedings, a respondent may move for a pre-adjudicatory improvement period in accordance with W.Va. Code §§ 49-6-2(b) and 49-6-12(a).

WVRCAN 23(a). On January 14, 2010 and again on March 16, 2010, Alexsis moved for a pre-adjudicatory improvement period. Joshua similarly moved for a pre-adjudicatory improvement period on September 6, 2010. Consequently, as both Alexsis and Joshua moved for pre-adjudicatory improvement periods prior to the September 9, 2010 adjudicatory hearing, the Circuit Court correctly considered their motions.

West Virginia Code allows the Circuit Court to grant a pre-adjudicatory improvement period. In determining whether to grant a pre-adjudicatory improvement period, the Circuit Court must determine, by clear and convincing evidence, whether a respondent is likely to fully participate in the improvement period. W.Va. Code § 49-6-12(a)(2). In the case at hand, the evidence adduced by the Department demonstrated that Alexsis has been complying with all recommendations of the MDT since the case began. According to the GAL's own Petition for Writ of Prohibition, Alexsis has completed parenting classes, had a psychological evaluation, participated in visits with Tristen, and followed through with adult life skills training. Petition for Writ of Prohibition, pp.5-6. Because Alexsis has been participating in services, the Circuit Court correctly determined, by clear and convincing evidence, that Alexsis is likely to fully participate in a pre-adjudicatory improvement period. Therefore, the Circuit Court did not exceed its legitimate powers in granting Alexsis a pre-adjudicatory improvement period.

Likewise, the evidence suggests that Joshua is likely to fully participate in an improvement period. Due to his incarceration, Joshua was unable to begin services as early as Alexsis. However, according to the Department's September 2, 2010 Court Summary, upon his release from jail the Department made referrals for services for Joshua. *See* Exhibit B. Upon information and belief, Joshua currently has a psychological evaluation scheduled for October 18, 2010. Given Joshua's assertions at the September 9, 2010 hearing that he will participate in an improvement period, and absent any evidence to the contrary, the Circuit Court did not exceed its legitimate powers in granting Joshua a pre-adjudicatory improvement period.

2. The Circuit Court correctly delayed the adjudicatory hearing to allow Joshua and Alexsis pre-adjudicatory improvement periods.

The GAL contends that the Circuit Court should not have granted Alexsis and Joshua pre-adjudicatory improvement periods because the improvement periods will only unnecessarily extend the time before adjudication can be completed. The Department concedes that the Circuit Court did not hold its adjudicatory hearing within thirty (30) days as mandated by WVRCAN 25. However, as the GAL states, the adjudicatory hearing was continued on multiple occasions for reasons outside the control of any party. *See* Petition for Writ of Prohibition, p.1. Given that both Alexsis and Joshua filed motions for pre-adjudicatory improvement periods, the Circuit Court correctly considered the motions before holding the adjudicatory hearing.

Furthermore, because the Circuit Court has granted pre-adjudicatory improvement periods, the adjudicatory hearing may now be postponed until the completion of the pre-adjudicatory improvement periods. WVRCAN 25 states, in pertinent part,

> The final adjudicatory hearing shall commence within thirty (30) days of the filing of the petition ***or, if a preadjudicatory improvement period has been ordered, as soon as possible, but no later than sixty (60) days, after the conclusion of such preadjudicatory improvement period.***

Emphasis added. Delaying the adjudicatory hearing for completion of a pre-adjudicatory improvement period is permissible under the WVRCAN. Therefore, the Circuit Court did not exceed its legitimate powers in granting pre-adjudicatory improvement periods even though the pre-adjudicatory improvement periods will delay the adjudicatory hearing.

Moreover, the West Virginia Supreme Court has stated,

> The goal of an improvement period is to facilitate the reunification of families whenever that reunification is in the best interests of the children involved.

State ex rel. Amy M. v. Kaufman, 196 W.Va. 251, 258, 470 S.E.2d 205, 212 (1996); In re Edward B., 210 W.Va. 621, 634, 558 S.E.2d 620, 633 (2001). If Alexsis and Joshua successfully complete their pre-adjudicatory improvement periods, there may be no need to adjudicate them as abusive and/or neglectful parents. Therefore, the Circuit Court's decision to grant them pre-adjudicatory improvement periods would not have delayed the abuse and neglect case. If, however, Alexsis and Joshua are not complying with the terms of their pre-adjudicatory improvement periods, the GAL may move to terminate the pre-adjudicatory improvement periods early. West Virginia Code provides,

> Upon the motion by any party, the court shall terminate any improvement period granted pursuant to this section when the court finds that respondent has failed to fully participate in the terms of the improvement period.

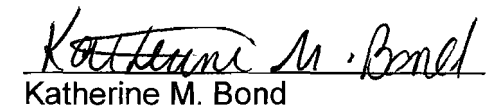
W.Va. Code § 49-6-12(h). Consequently, if Alexsis and Joshua are not successfully completing their pre-adjudicatory improvement periods, the GAL can ask the Circuit Court to move to adjudication before the end of the ninety (90) day improvement period. Therefore, the Circuit Court's decision to grant the pre-adjudicatory improvement periods is not automatically delaying adjudication for another three months. West Virginia Code, case law, and the WVRCAN all permit the Circuit Court to grant respondent parents pre-adjudicatory improvement periods which delay the adjudicatory hearing. Consequently, the Circuit Court did not exceed its legitimate powers by granting Alexsis and Joshua pre-adjudicatory improvement periods even though those improvement periods may delay adjudication.

CONCLUSION

WHEREFORE, as the Circuit Court did not exceed its legitimate powers in awarding Alexsis and Joshua pre-adjudicatory improvement periods, the Department respectfully requests that this Court refuse the GAL's Petition for Writ of Prohibition. The Department asks for any other relief this Court deems fit.

Respectfully Submitted,
West Virginia Department of
Health and Human Resources,
by counsel.

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE

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CERTIFICATE OF SERVICE

I certify that I have, on this 13th day of October, 2010, served a true and accurate copy of the foregoing THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES' RESPONSE TO PETITION FOR WRIT OF PROHIBITION on all parties of record by sending a copy, via U.S. first-class mail, to the following addresses:

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