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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 35743

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

2010 DEC 27 P 4: 34
MINGO CIRCUIT CLERK

JIMMY G.
Respondent Father Below - Petitioner.

VS.

CIRCUIT COURT OF MINGO COUNTY
JUVENILE CASE No.: 09-JN-34, 35, 36, 37

STATE OF WEST VIRGINIA,
Plaintiff Below - Respondent,

APPEALLANT'S BRIEF

Counsel for Petitioner:
Lauren Thompson
THOMPSON LAW OFFICE, PLLC
183 East Second Avenue
Williamson, WV 25661
(304) 235-2223
WV No.: 11109

TABLE OF AUTHORITIES

In re Elizabeth F., 35486 (WVSC June 2nd, 2010).

In the Matter of Bryanna H. and Skylar H., No. 35306 (WVSC June 10, 2010).

Syl. pt. 1, Nancy Viola R. v. Randolph W., 177 W.Va. 710, 356 S.E.2d 464 (1987).

Syl. pt. 1, In re: Willis, 157 W.Va. 225, 207 S.E.2d 129.

In Re Michael Ray T., 206 W.V. 434, 525 S.E.2d 315 (1999).

In re Carol B. 209 W.Va. 658, 550 S.E.2d 636 (W.Va., 2001)

In State ex rel.. WVADHHR v. Hill, 532 S.E.2d 358, 207 W.Va. 358 (W.Va., 2000).

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BEFORE THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Petitioner Below,

v.

(Mingo County Circuit Court Case No. 09-JN-34,35,36,37. Chief Judge Thornsbury)

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TARA P..
VERNER P.,
DOROTHY P.,
MARCUS A.,
JOSHUA G.,
JIMMY G.,
Respondents Below

IN THE INTERESTS OF THESE MINOR CHILDREN IN THE RESPONDENT'S CUSTODY

NOAH P.	**DOB: 04/05/2009**
IAN A.	**DOB: 02/21/2003**
CARSON P.	**DOB: 03/18/2004**
PRESTON P.	**DECEASED**
MICAH P.	**DOB: 09/29/2008**

BRIEF OF APPELLANT, JIMMY G.

PROCEDURAL HISTORY AND NATURE OF RULINGS BELOW

This appeal stems from Abuse and Neglect Proceedings filed in Mingo County Circuit Court. The Petitioner appeals the decision of the Circuit Court to place custody of his infant son with the child's maternal grandparents.

At all times the abusing mother alleged that Joshua G., her current boyfriend, was the father of Micah P. Petition. On March 2nd, 2010, after conducting a series of DNA tests, Joshua G. was determined not to be the biological father of the infant, Micah P. and the State filed a

Second Amended Petition was filed in which the State declared that Jimmy G. was the biological father of Micah P. and named him as a respondent. Sec.Amend. Petition. The Final Dispositional Order, granting custody to the maternal grandparents and denying Jimmy G. custody of his son, was entered on May 21st, 2010 and your Petitioner appeals from same.

STATEMENT OF FACTS

Child Protective Services ("CPS") and the Department of Health and Human Resources ("DHHR") have been involved with the family since May of 2004 after a suicide attempt by the Respondent Mother. Petition p. 2. The Respondent Mother in the instant case, Tara P. had five male children: Noah, Ian, Carson, Preston, and Micah. Id. On October 17th, 2007, the child Preston, died while in bed with his mother. Petition p. 4. Upon completion of an autopsy, the medical examiner noted "anal stretching and lacerations/fissuring" which cannot be explained by the mother's explanation of "constipation." Petition p.4. The Respondent Mother and Maternal Grandparents have engaged in multiple instances of abuse requiring police intervention against each other in front of the grandchildren. Tara P.'s rights to her children were terminated at the March 15, 2010 dispositional hearing. See Dispositional Order. Testimony from multiple witnesses showed that the maternal grandparents failed repeatedly to keep their abusive and neglectful daughter, Tara P. away from the children. See Final Dispositional Order. Multiple men were named as potential fathers for the five boys, after a series of DNA tests, your petitioner, Jimmy G., was found to be the biological father of the infant, Micah P. At all times Jimmy G. has complied with all requests made of him by the State. There were no viable allegations of abuse or neglect (outside of his being merely named as a Respondent) were raised against the Respondent Father. Sec. Amended Petition.

ASSIGNMENTS OF ERROR

The Circuit Court erred when it failed to give adequate contemplation to the placement of the child, Micah P., in the home of his biological father, Jimmy G , as he is a non-abusing parent with rights to his child in accordance with West Virginia Supreme Court precedent and the West Virginia Constitution.

The Circuit Court erred when it placed the subject children with the maternal grandparents and failed to consider the clear and convincing evidence against grandparent placement.

POINTS AND AUTHORITIES RELIED UPON

"The right of a parent to the custody of his or her child is foremost . . ." Id.

"A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Id. citing State ex rel. Kiger v. Hancock, 153 W.Va. 404, 168 S.E.2d [798] (1969).' Syllabus pt. 2, Hammack v. Wise, 158 W.Va. 343, 211 S.E.2d 118 (1975)."

"In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. pt. 1, *In re: Willis*, 157 W.Va. 225, 207 S.E.2d 129.

Circuit Courts must contemplate the placement of a child in the home of a non-abusing parent. In the Matter of Bryanna H. and Skylar H., No. 35306 (WVSC June 10, 2010).

ARGUMENT AND DISCUSSION OF LAW

Petitioner, Jimmy G., is entitled to the custody of his son as the decision of the Circuit Court is clearly erroneous. Clear error is committed where, upon review of the entire record, the reviewing court is left with the definite and firm conviction that an error has been committed. In re: Tiffany Marie S., 196 W.V. 223, 470 S.E.2d 177 (1996).

The Circuit Court failed to consider that (I.) a biological parent has a fundamental right to the custody of his infant child which supersedes the rights of all others, where the parent is neither unfit or abusing and (II.) placement with the maternal grandparents is inappropriate under this Court's Elizabeth F. decision.

A Non-Abusing Parent's Right to Custody of his Infant Child

As a non-abusing parent, Jimmy G. has a fundamental right under the West Virginia Constitution and West Virginia Supreme Court precedent to the custody of his infant son, Micah P. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." In the Matter of Bryanna H. and Skylar H., No. 35306 (WVSC June 10, 2010) citing Syl. pt. 1, In re: Willis, 157 W.Va. 225, 207 S.E. 2d 129.

The child at issue, Micah P., is the youngest of the abusing mother's four surviving children and four years younger than the next youngest child. Petition. Jimmy G. is the biological father of Micah P.. Second Amended Petition. Jimmy G. and his wife, are registered and approved foster parents with Kanawha Valley (KVC) and had one foster child in their custody

prior to institution of these proceedings and they continue to raise that child. T. p. 242. Immediately upon request, Jimmy G. submitted to a paternity test which confirmed that he was the biological father of the youngest child, Micah P. Second Petition. Jimmy G. is entitled under the law to custody of his son.

This Court has recognized that "the right of a parent to the custody of his or her child is foremost and has repeatedly emphasized the importance of parental rights:

> "A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d [798] (1969).' Syllabus pt. 2, *Hammack v. Wise*, 158 W.Va. 343, 211 S.E.2d 118 (1975)."'

In the Matter of Bryanna H. and Skylar H., No. 35306 (WVSC June 10, 2010) citing from Syl. pt. 1, Nancy Viola R. v. Randolph W., 177 W.Va. 710, 356 S.E.2d 464 (1987). There was no determination of abuse and or neglect against Jimmy G. and, to date, his parental rights remain in tact.

The Circuit Court reasoned that placement with the Maternal Grandparents is in the best interests of the children because the siblings share a bond and the Maternal Grandparents are the psychological parents of Micah P. this ruling is contrary as it is in conflict with this Court's precedence.

Bond Between Siblings

The bond between a two year old and his older brothers should not be held to defeat a biological parent's right to parent his son.[1] Micah is two years old. Petition. Micah's next closest sibling is four years older. Id. The petitioner admits that there is value in being raised with siblings but that value pales in comparison to the value of being raised by one's biological parent. Further, Micah's young age and the fact that his siblings are much older than he creates a weaker bond than would be found in older children or even possibly amongst Micah's older brothers.

Further, the need to reunify siblings is lessened where the needs and behaviors of the other siblings could cause problems and decrease the attention available in the home. This Court's In Re Michael Ray T. decision should lead a circuit court to question whether continued association with siblings is in the child's best interests in a foster care placement. 206 W.V. 434, 525 S.E.2d 315 (1999). This Court again addressed the appropriateness of separating siblings, subsequent to the termination of parental rights, in In re Carol B. 209 W.Va. 658, 550 S.E.2d 636 (W.Va., 2001)(finding that separation in foster care placements is warranted under some circumstances). In Carol B., this Court held that harm could result where there was fierce competition between siblings and one child suffered from hyperactivity to such a degree that reunification with siblings was inappropriate. In the present case, testimony was presented as to the psychological issues facing the older boys. Micah's older brother, Ian, receives a social security disability stipend. One boy has alleged sexual abuse thought it has not been confirmed. All three of the older boys have been subjected to years of life in the abusive household of the Respondent Mother and Maternal Grandparents. According to the Respondent Grandmother the

[1] Counsel for Petitioner G. was unable to locate precedent which directly addresses this point.

boys lie a lot and frequently soil their pants for attention. Whether this is simply the Maternal Grandmother's attempt to minimize the troubling behaviors of her grandchildren or an indication of continuing abuse, it is no situation for Micah to be raised in when his biological father has an appropriate home and stands at the ready to take custody of him. Jimmy G.'s right to raise his own child should trump the desire to keep siblings together in the instant case.

Psychological Parents

The bond between an infant and his psychological parent should be trumped by the rights of a biological parent who has never had opportunity to parent his child.[2] The State's first abuse and neglect petition against the Respondent Mother and Maternal Grandparents was filed in August of 2009. Petition. As such, Micah was removed from the home of the Respondent Grandparents before he was a year old. He did not have ample opportunity to develop a strong bond with his Maternal Grandparents before being removed from the home.

In State ex rel., WVADHHR v. Hill, this Court discussed the due process rights of absentee fathers and the need to secure the termination of the rights of both parents before proceeding to adoption. 532 S.E.2d 358, 207 W.Va. 358 (W.Va., 2000). At present, Jimmy G. has been not been declared unfit because of misconduct, neglect, immorality, abandonment, or other dereliction, he has not waived any right to his child, and, as a result, Jimmy G. is entitled to custody of his son. It is in the best interest of the Micah to develop a strong bond with his biological father.

It is clear error to deny Jimmy G. the constitutionally protected right to raise his child. This Court should award its Petitioner custody of his child.

Placement with the Maternal Grandparents

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[2] Counsel for Petitioner G. was unable to locate precedent which directly addresses this point.

The Circuit Court erred when it placed the children with the Maternal Grandparents because it failed to consider clear and convincing evidence by the DHHR and the children's Guardian that the placement was not in the best interests of the subject minor children. West Virginia Code § 49-3-1 requires that appropriate grandparents be a preferred placement of the children. However, this presumption is properly rebutted where the State and guardians ad litem show by clear and convincing evidence that it is against in the best interests of the children to order placement of the children with the grand(parents). In re Elizabeth F., 35486 (WVSC June 2nd, 2010).

The presumption was properly rebutted and placement with the maternal grandparents is inappropriate when viewed in consideration of factors contemplated in In re Elizabeth F., 35486 (WVSC June 2nd, 2010). In Elizabeth F., the state did not produce convincing evidence sufficient to prevent placing the children with the maternal grandmother and her husband. Id. The court found it significant where the State could not show that (1) the age of the grandparents prevented an obstacle to a safe placement for the children, (2) the psychological profile of the grandparents did not present a safety concern, and (3) the grandparents did not tolerate the behavior and drug abuse of their abusing daughter and as such there were no impediments to placement. Id. In stark contrast to the record in Elizabeth F., in the instant case, the State and the Guardian presented clear and convincing evidence which warrants the removal of the children from the grandparents' home under all three guideposts provided in Elizabeth F.

Physical Impediments to a Safe Placement

When examined under the Elizabeth F. factors, the State and Guardian demonstrated that the age and health of the grandparents prevented an obstacle to the safe placement of the children. The maternal grandmother reports that she has diabetes and arthritis in her knee. T. p.

260. She takes blood pressure medication, that she takes several different pills (and a has a pacemaker) for a heart arrhythmia problem, and takes anti-depressants. T. p 275. Only upon further examination does she admit additional problems with her kidneys which she begrudgingly reports is "last stage kidney failure". T. p 276. The maternal grandmother also reported that activity is difficult due to her "knees being what they are" and that she planned to "have them fixed." T. p. 284. The Maternal Grandmother's ability to provide a safe placement is further hampered by the fact that she has frequent doctor's appointments which take her hours from home. T. p. 277. She also must care for her son's children. T. p. 275. When asked about her whereabouts the night that the infant Preston died, the maternal grandmother reported that she had to go to Virginia to babysit her son's children. Id. Her infirm medical condition and other obligations present real concern as to whether she will be able care for four active young boys with a litany of behavioral and mental health issues.

To further complicate life at home, the maternal grandfather, Verner P., also takes anti-depressants and suffers from PTSD. T. p. 179-80. The maternal grandfather is undergoing Cancer treatments which require the attention of and regular transportation to be provided by his infirm wife. T. p. 272. The four young boys range in age from 10 to 2. Petition. The multiple physical ailments of both grandparents in combination with their age present a picture of a placement which is hazardous at best and clearly contrary to the best interests of such young children.

Psychological Impediments to a Safe Placement

The State and Guardian demonstrated that the psychological profile presented a safety concern to the children as outlined by Elizabeth F. The psychological profiles of the maternal grandparents were shocking and created several issues of grave concern but neither report was

ever discussed at length on the record. The Maternal Grandmother admitted to a need for anti-depressants. T p. 275. The Maternal Grandfather is diagnosed with PTSD and must also be medicated for depression. T. p. 279-80. The State alleged that the Maternal Grandfather struck his daughter with a broomstick during an altercation in the children's presence. Petition . The state alleged that the Respondent Mother and the Maternal Grandfather were the only two adults present when the infant Preston P. died. Petition p.4. The medical examiner testified that the infant had inexplicable bruising to his face and anal stretching. Department worker, Vicky Fields testified that she felt the Maternal Grandparents could not prevent the Respondent Mother from visiting and would continue to violate the Circuit Court's orders. The Maternal Grandmother admitted violation of the court's order barring the Respondent Mother from her children and that she gets visits, not because they allow it, it is because "she just came up." T. p 262. When questioned by the Guardian about the boys' accounts of being whipped, the maternal grandmother stated "Now, I am going to tell you, them two little boys lie. Now, they do; They make up stories . . ." T. p 273-74. The State proffered that the entire family had been provided services but that the services were not benefitting the family. Petition p. 6. The depressed, abusive, and self-serving nature of the Maternal Grandparents will prevent them from providing safe placement for the four young boys.

Relationship with the Abusing Parent as an Impediment to a Safe Placement

The instant case meets the last factor listed in Elizabeth F. because the State and Guardian demonstrated that the grandparents tolerate and facilitate the mother's behavior and drug abuse. When asked by the Guardian whether the maternal grandparents acknowledge the inadequacies in the abusing mother's parenting, CPS worker Vicky Fields answered "no" and then reported that the maternal grandparents "defend" the abusing mother's decisions. T. p. 255.

The maternal grandmother leaves the maternal grandfather at home and travels to Virginia when she "cannot stand the situation". Id. Under cross-examination, the maternal grandmother admitted that the Respondent Mother did not have a job and that they paid her rent, bills, and would help her whenever she needed it. T. p 269. She admitted that without their help the Respondent Mother used all of her disabled son Ian's Social Security Income to pay the rent, utilities, and purchase other incidentals. T. p. 269. The maternal grandmother admitted she provided her daughter a place to live and transportation. T. p. 269-170. She also admitted she allows the abusing mother to come to the house and get money when she needs it. T. p. 270.

Moreover, the grandparents taught the abusing mother all she knows. In 2006, Kanawha County CPS reported that the abusing mother left bleeding welts on her oldest son's back because he had an accident in his pants. Petition p. 3. Similarly, while being cross-examined the maternal grandmother admitted spanking the children for "accidents". And that the children had accidents in their pants to "get attention". The maternal grandparents are simply not equipped to handle the pressures and responsibility of four young boys. It is clear that the best interests of these minor children require placement outside of the grandparent's home.

CONCLUSION

Your Petitioner, Jimmy G , prays that the Order of the Circuit Court granting custody of his son to the Maternal Grandparents be reversed and that he be granted custody of his minor son, Micah P.

JIMMY G

By Counsel:

Lauren Thompson
THOMPSON LAW OFFICE, PLLC
183 East Second Avenue
Williamson, WV 25661
(304) 235-2223
WV No.: 11109

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MICAH P.	**DOB: 09/29/2008**

CERTIFICATE OF SERVICE

I, Lauren Thompson, hereby certify that on December 24th, 2010, service of the foregoing BRIEF IN SUPPORT OF PETITION FOR APPEAL was made upon the State of West Virginia by fax and first class mail to the Charles West, Attorney for the Respondent Grandparents, Office of the Mingo County Prosecuting Attorney, Diana Carter Weidel and all other parties of record.

Counsel for Petitioner

Lauren Thompson
THOMPSON LAW OFFICE, PLLC.
183 East Second Ave
Williamson, WV 25661
(304)235-2223
(304) 235-6458 fax
WV Id: 11109