

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS AT CHARLESTON

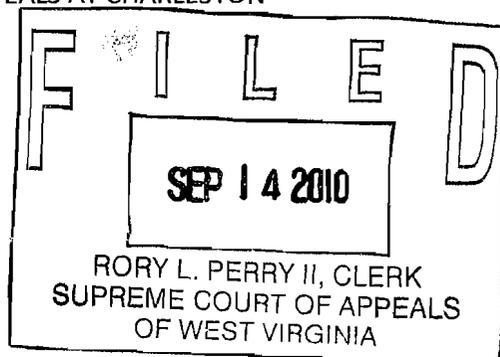
DOCKET NO.: 35659

IN RE: CECIL T., INFANT

D.O.B. 09-06-2008

LOGAN COUNTY CIRCUIT COURT

CASE NO.: 09-JA-21



RESPONSE BRIEF ON BEHALF OF THE APPELLEE, CECIL T.

Submitted by:

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STATEMENT OF FACTS

On September 9, 2008, an Emergency Petition was filed by the West Virginia Department of Health and Human Resources (hereinafter referred to as WVDHHR) in which it was alleged that the Infant, Cecil T. II, was in imminent danger of abuse and neglect due to aggravated circumstances surrounding the biological mother's prior involuntary terminations; the Infant being born presumptively positive for benzodiazepines, methadone, and barbiturates; the Adult Respondent, Cecil T., admitting to taking a half of a valium during labor; and because the Adult Respondent, Cecil T., had pending felony charges. On September 17, 2008, an Order was entered which dismissed the felony charges against Cecil T. Subsequently, Cecil T. was granted a pre-adjudicatory improvement period.

During Cecil T's improvement period, the WVDHHR made several allegation against the Adult Respondent, but none of said allegations were ever substantiated and no additional or amended petitions were filed during the course of said improvement period. During the improvement period, numerous visits took place between the Infant and his father. These visits were part of a plan to transition the Infant into Cecil T.'s home. Many of the visits were for multiple days at a time. On February 9, 2009, the Court found that Cecil T. had successfully completed his pre-adjudicatory improvement period and, therefore, returned legal and physical custody of the Infant to Cecil T.

This action arises out of a Petition filed by the WVDHHR in the Circuit Court of Logan County, WV on March 9, 2009. Said petition alleged that the Infant, Cecil T. II, was in imminent danger of abuse and neglect. The allegations, insofar as they relate to Cecil T., were that on February 9, 2009 the Adult Respondent was found to have successfully completed his improvement period, and that he was arrested by Federal authorities on March 6, 2009. Cecil T. stipulated to the allegations as stated in the original petition.

On July 24, 2009, the WVDHHR filed an Amended Petition. Said petition reasserted all points of the original petition and expanded on the facts surrounding Cecil T.'s arrest on March 6, 2009. Cecil T. again stipulated to the fact that he was a party to a prior abuse and neglect matter in which he successfully completed a pre-adjudicatory improvement period, that he was currently incarcerated because of his arrest on March 6, 2009, and that he had not visited with the Infant since his incarceration. Cecil T. did not stipulate to the last sentence in paragraph four of the Amended Petition on the grounds that said statement is a legal conclusion rather than an allegation.

On October 27, 2009, a dispositional hearing was held at which the Court denied the WVDHHR's Motion to Terminate the Parental Rights of Cecil Edward T. and found that the WVDHHR had failed to show by clear and convincing evidence that there is no reasonable likelihood that the conditions causing the Petition to be filed could be substantially corrected in the future. At said hearing, the Court awarded legal and physical custody to the Intervenors and made the Intervenors the Infant's guardians. Subsequently, in January 2010, the Court, upon the motion of the Intervenors, returned legal custody to the WVDHHR for the purpose of providing the Infant with a medical card and any subsidy to which he might be qualify.

The child remains in the physical custody of the Intervenors as of the date of this filing.

Also, as of the date of this filing, Cecil T. remains incarcerated.

ISSUES

- I. The Court did not err in denying the Motion to Terminate the Parental Rights of the Adult Respondent, Cecil Edward T., because the West Virginia Department of Health and Human Resources failed to prove by clear and convincing evidence that there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the near future.**

- II. The Court, in its disposition, properly provided a meaningful permanency plan for the Infant, Cecil T. II, by placing the Infant in the guardianship of the Intervenors.**

STANDARD OF REVIEW

A compound standard of review is used by the Court in reviewing appeals from abuse and neglect proceedings in which conclusions of law are subject to a de novo review and findings of fact are weighed against a clearly erroneous standard. According to the Court in In re Emily, 208 W.Va. 325, S.E.2d 542 (2000), “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 reviewed in its entirety.”

LEGAL ARGUMENT

- I. **The Court did not err in denying the Motion to Terminate because the West Virginia Department of Health and Human Resources failed to prove by clear and convincing evidence that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future.**

The Court was correct to deny the WVDHHR's Motion to Terminate the Parental Rights of Adult Respondent, Cecil Edward T., because the WVDHHR failed to prove by clear and convincing evidence that there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the future. West Virginia Code §49-6-5(a)(6) states that, "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, or guardianship rights and/or responsibilities of the abusing parent."

West Virginia code §49-6-5(b) expounds upon the meaning of "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected." According to §49-6-5(b), said phrase 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." Section 49-6-5(b) then sets forth six circumstances in which said conditions exist. According to §49-6-5(b),

- (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;

- (2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;
- (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 continuations or insubstantial diminution of conditions which threatened the health, welfare or life of the child;
- (4) The abusing parent or parents have abandoned the child;
- (5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child; or
- (6) The abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills.

None of the six circumstances reference, consider, or in any way consider incarceration as the type of condition which would justify termination.

The six circumstances listed in §49-6-5(b), while not specifically including incarceration, are not exclusive either. However, the issue of incarceration and termination was addressed in In re Emily, 208 W.Va. 325, 540 S.E.2d 542 (2000); In re Brian James D., 209 W.Va. 537, 550 S.E.2d 73 (2001); and State ex rel. Acton v. Flowers, 154 W.Va. 209, 174, S.E.2d 742 (1070). In Syllabus Point 7 of In re Emily, this Court held that, "a natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses." The Court continued in In re Brian James D. by stating, "In other words, incarceration, *per se*, does not warrant the termination of an incarcerated parent's parental rights." Instead, incarceration is merely one factor to be considered along with other conditions and circumstances in assessing whether a parent can remedy conditions of abuse and neglect. In re Brian James D., 209 W.Va. at 540 and 541, and 550 S.E.2d at 77 and 78.

In the case at issue, the sole allegation pertaining to Cecil T. is the fact that he is incarcerated. Here, none of the conditions listed in 49-6-5(b) are present. There are no allegations of substance abuse, no allegations of domestic violence, no allegations of emotional abuse, and no allegations of sexual abuse. On the contrary, the Emergency Petition filed by the WVDHHR acknowledges that Cecil T. completed a pre-adjudicatory improvement and was awarded legal and physical custody of the Infant. In other words, the Court found that Cecil T. was a fit and proper parent, and the Infant was not in any danger while in his custody. Thus, it is not unreasonable to state that but for his incarceration, Cecil T. would still have legal and physical custody of the Infant.

The Intervenor and the Guardian *ad Litem* fail to even acknowledge the fact that their respective arguments fail to meet the standards prescribed by either statutory or case law in this area. Neither argument has an answer for how the facts of this case fit into the language of West Virginia Code §49-6-5(a)(6) or §49-6-5(b). Neither argument has an answer for how the facts of this case fit into the holdings of In re Emily, In Re Brian James D., or State ex rel. Acton v. Flowers. These issues are not addressed because the facts of the instant case simply do not justify the termination of Cecil T.'s parental rights.

Additionally, an application of the holdings of In re Emily, In re Brian James D., and State ex rel. Acton v. Flowers, reveals that termination is not warranted because incarceration, on its own, is not sufficient to terminate Cecil T.'s parental rights. Furthermore, there are no other factors or allegations to consider in the present case. Thus, because Cecil T.'s incarceration is the only allegation at issue, the holdings in the aforementioned cases should apply, and the rule that incarceration, *per se*, does not warrant termination of parental rights should control.

Finally, the aforementioned cases are not new law. In re Emily was decided in 2000, In re Brian James D. in 2001, and State ex rel. Acton v. Flowers in 1970. Yet, in the face of these decisions, the West Virginia legislature has not amended the West Virginia Code to include incarceration as a ground for termination. A rule including incarceration as a ground for termination is a slippery slope. If the door is opened to include incarceration as a basis for termination, then where does it end? Is the WVDHHR then going to file an Emergency Petition against every individual who is arrested with children in his/her home? Is every individual that is incarcerated then going to be subject to termination if he/she does not have any family to step in and care for the child? The position of the Intervenors and the Guardian *ad Litem* with regard to this point is shortsighted and impractical. A rule expanding abuse and neglect to include incarceration is not in the best interests of the children which are the subject of these proceedings, and it is not in the best interests of the Infant at issue, Cecil T. II.

II. The Court, in its disposition, provided a meaningful permanency plan for the Infant, Cecil T. II, by placing the infant in the guardianship of the Intervenors.

By placing the Infant, Cecil T. II, in the guardianship of the Intervenors, the Court properly provided a meaningful permanency plan for the Infant. West Virginia Code §49-6-5(a)(5) states that “upon a finding that the abusing parent or parents are presently unwilling or unable to provide 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.”

Here, after properly denying the WVDHHR’s Motion to Terminate, the Court, based upon Cecil T.’s present inability to meet the Infant’s needs as a result of his incarceration, placed the Infant in the guardianship of the Intervenors. Said Order was done in accordance with West Virginia Code §49-6-5(a)(5). As the lower stated at the dispositional hearing, “I believe the appropriate finding to be made at

this time is under 49-6-5 where the parents are unable to provide adequately for the child's needs, the child be assigned a guardian and I will name the Intervenor's as guardians for the child, to make all relevant decisions about the child's welfare." The Court made a finding that was consistent the directives of §49-6-5.

The fact that the Court stated that "at the time of Mr. T's release, should he wish to make a record that he is fit to resume exercising his parental rights, that he could do so in the appropriate Family Court" is of no consequence. In other words, the Court stated that because Cecil T.'s rights were not terminated, that he would be eligible, upon his release, to petition a Family Court for some parenting time with his child. Such an Order is present in nearly every abuse and neglect action that does not end in either reunification or termination. Guardianship effectively leaves the door open for a parent to resume the role of a parent at some future date. If the position of the Intervenors and the Guardian *ad Litem* were adopted, then it would effectively eliminate guardianship as a proper means of disposing of an abuse and neglect matter.

If guardianship is found to not achieve permanency, then nearly every abuse and neglect matter will be forced to end in re-unification or termination. Currently, guardianship is often used as a practical disposition when neither reunification nor termination is justified. The position of the Intervenor and the Guardian *ad Litem* that guardianship does not achieve permanency because it leaves the door open for future proceedings regarding the custody of the Infant, is without merit and is simply not practical. In effect, said position would eliminate guardianship as a means to dispose of abuse and neglect matters. Such a result is not contemplated by the West Virginia Code, and it is certainly not in the best interests of the children which are the subject of abuse and neglect proceedings. Likewise, such a finding is not in the best interests of the Infant, Cecil T. II.

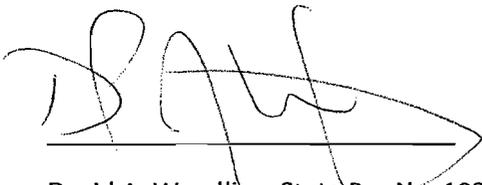
CONCLUSION

The Court was not in error when it found no clear and convincing evidence to terminate the parental rights of Cecil T. The facts of this case and the sole allegation of incarceration do not meet the standards for termination of parental rights set forth in the West Virginia Code or the holdings of In re Emily, In re Brian James D., or State ex rel. Acton v. Flowers. Thus, the lower court ruling with regard to the denial of the motion to terminate should be affirmed.

Furthermore, the lower court properly ordered a disposition that provided for a meaningful permanency plan for the Infant. The lower court's finding that because Cecil T. is currently unable to meet the Infant's needs, and therefore, guardianship with the Intervenor's is appropriate and in the Infant's best interests, is consistent with the rules set forth West Virginia Code §49-6-5. Thus, said finding is not clearly erroneous and should, therefore, be affirmed.

Respectfully submitted,

Cecil T., by counsel

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CERTIFICATE OF SERVICE

The undersigned, David A. Wandling, counsel for the Appellee, Cecil T., does hereby certify that he has on this the 13th day of September, 2010, served a true copy of the attached **Brief on behalf of the Appellee** upon the following individuals:

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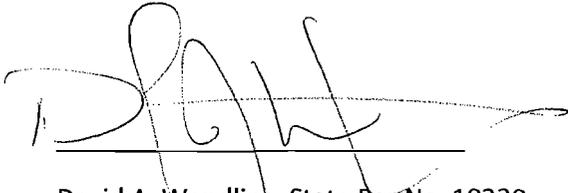
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