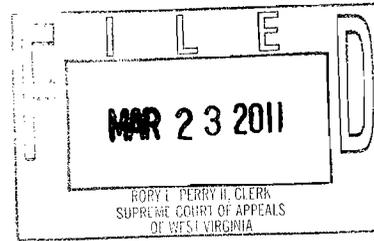


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0300

In Re: Kristin Y., Arther Y., Scharlotte Y., and William Y.



Respondent Mother Anna Y.'s Response Brief

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STATEMENT OF THE CASE

The Respondent Mother, Anna Y., and the Respondent Father, Ricky Y., were married for approximately ten years. During that time, Anna Y. had been subjected to, and had participated in, extreme domestic violence, some of which involved their children. (Petition, Section V, ¶ 1, filed April 9, 2008).

On April 7, 2008, Anna Y. was a patient at the Psychiatric Unit of Fairmont General Hospital, having overdosed on pills. (Petition, Section V, ¶ 20, filed April 9, 2008). Prior to that commitment, Anna Y. had separated from Ricky Y., but was living with her children in a rental unit owned by Ricky Y.'s then current paramour. Anna Y. had also just been fired from her job, and was in the process of being evicted from her residence. (Petition, Section V, ¶ 20, filed April 9, 2008). On April 9, 2008, the West Virginia Department of Health and Human Resources (the "WVDHHR") then filed an abuse and neglect petition alleging that the Respondent Mother, Anna Y., and the Respondent Father, Ricky Y., were abusive and/or neglectful parents. (Petition, filed April 9, 2008). Later, when she was released from the hospital, Anna Y. did not have a place to live, nor did she have employment. (Petition, Section V, ¶ 20, filed April 9, 2008).

On June 18, 2008, Anna Y. entered into a Stipulated Adjudication wherein she admitted to her children having inappropriate sexual knowledge, that she had allowed them to be exposed to domestic violence, and that she had educationally neglected them. (Stipulated Adjudication of Respondent, Anna Y[.], entered June 18, 2008). On July 9, 2008, she was granted a six-month post-adjudicatory improvement period, the terms and conditions of which were outlined in her Family Case Plan. (Order Following Granting Respondents' Motion for Post-Adjudicatory Improvement Periods, entered July 29, 2009). On December 17, 2008, all parties agreed that

Anna Y. was in substantial compliance with the terms and conditions of here Family Case Plan, and Anna Y. was granted a three-month extension to her post-adjudicatory improvement period. (Order Granting Extensions to Post-Adjudicatory Improvement Periods of Respondents, entered January 7, 2009). All parties were again in agreement on April 9, 2009, that Anna Y. had made enough progress with the terms and conditions of her Family Case Plan to have made a substantial change in circumstances warranting a dispositional improvement period which was granted. Due to disclosures by the children, Anna Y. also admitted on April 9, 2009, to subjecting the children to physical abuse, and addressing the same was added to her Family Case Plan. (Order Granting Dispositional Improvement Period to Respondents, entered May 5, 2009).

On July 23, 2009, the WVDHHR filed a “Motion to Revoke Dispositional Improvement Period of Respondent – Anna Y[.]” The WVDHHR alleged that Anna Y. was not complying with the terms and conditions of her Family Case Plan – that she had not attended therapy since March 2009, that she was not keeping in contact with the WVDHHR, that she was not fully complying with drug tests, and that she did not inform the WVDHHR that she was not attending therapy. (Motion to Revoke Dispositional Improvement Period of Respondent – Anna Y[.], filed July 23, 2009).

The Family Case Plan of Anna Y. required her to address the following issues: parenting, allowing the children to gain inappropriate sexual knowledge, domestic violence, inappropriate discipline, and unstable and inadequate housing. (Order Following Granting Respondents’ Motion for Post-Adjudicatory Improvement Periods, entered July 29, 2009). The Family Case Plan was later amended to add the issue of physical abuse. (Order Granting Dispositional Improvement Period to Respondents, entered May 5, 2009).

During the evidentiary hearings on the Motion to Revoke Dispositional Improvement Period of Respondent – Anna Y[.], the multiple hearings continued until the end of the Disposition Improvement Period, causing said motion to be moot, and the matter continued into Disposition. (Order Setting Forth Status of Dispositional Proceedings and Reducing Visitation Between Respondent, Ricky ... Y[.], and the Infant Children, entered November 18, 2009). During said hearings, there was testimony that Anna Y. had participated in her Family Case Plan in that she: actively worked with Steve Richardson, Outreach Coordinator with Homebase, Inc., on parenting and adult life skills, although she had not successfully completed the same at the end of the Dispositional Improvement Period (Disposition Order, Findings of Fact, ¶¶ 68, 69); she obtained appropriate housing; she attended CNA classes while working, and later obtained her CNA license (Disposition Order, Findings of Fact, ¶ 56); she began consistently working the issues regarding domestic violence, the children obtaining inappropriate sexual knowledge, inappropriate discipline and physical abuse on August 20, 2009, through individualized therapy with Tom Hill at Valley Healthcare Systems (Disposition Order, Findings of Fact, ¶ 62). Mr. Hill testified that from then on Anna Y. was consistently attending individual therapy, and that the issues specified in Anna Y.'s Family Case Plan were being addressed; that first she needed to address her own trauma which would be within the next six months, and that she would be able to address the issues in the Family Case Plan within the three to four following months; and at that point she would be ready for family therapy to begin the reunification process with her children (Disposition Order, Findings of Fact, ¶¶63-65). Mr. Hill also opined that family counseling would be necessary prior to the reunification of Anna Y. with her children, similar to the opinion of the children's counselor. (Disposition Order, Findings of Fact, ¶ 65).

Based on all the evidence before it, the Court then concluded the following:

1. “While the Court acknowledges the fact that the respondent, Anna Y[.] has a deep affection for her children, she clearly lacks the requisite judgment and mental stability to effectively protect the health, safety and welfare of her children, including addressing the children’s significant mental health issues, **at this time**. (Disposition Order, Conclusions of Law, ¶ 3, emphasis added).

2. That the “therapists were adamant that the respondents be able to fully acknowledge their respective roles and be able to apologize to the children for the trauma prior to family therapy commencing” and that the “therapists all agreed that family therapy was a crucial prerequisite to reunification.” (Disposition Order, Conclusions of Law, ¶ 9).

3. That Anna Y. “made progress in that she has obtained a residence, transportation and employment, [but] these facts do not excuse her complete lack of attendance at individual counseling for a period of six (6) months. The Court finds the testimony of her therapist significant in that, had Ms. Y[.] attended therapy during that time period, she could have been at a place where family therapy could have begun. **However, the Court is mindful that she has resumed her individual therapy.**” (Disposition Order, Conclusions of Law, ¶ 9, emphasis added).

4. “The position of counsel for the children was that in a limited set of circumstances, post termination contact with *only* the respondent, Anna Y[.] may be appropriate for the children. Counsel for the children is of the opinion that post termination contact with Ms. Y[.] should only occur if all of the following conditions are met: (a) the minor children request said contact; (b) the counselors and/or mental health professionals treating the children believe that the contact will not be detrimental to the child(ren); (c) that the contact be strictly supervised by an appropriate adult; and (d) if after contact the children deteriorate in any manner, as

determined by their counselor and/or mental health provider, that the contact be terminated.” (Disposition Order, Conclusions of Law, ¶ 24).

5. “Termination of the parental rights of Anna Y[.] is not warranted in this matter given the specific, tragic facts before the Court. It has been proven to the Court throughout this matter that both Anna Y[.] and the children suffered mental and physical abuse at the hands of Ricky Y[.]. Anna Y[.] has committed herself to a course of treatment to remedy the conditions of abuse and neglect for which she is responsible.” (Disposition Order, Conclusions of Law, ¶ 26).

6. “The disposition available to it [the Court] pursuant to West Virginia Code § 49-6-5(a)(5) is most appropriate for Anna Y[.], wherein the Court specifically finds that Anna Y is presently unable to provide for the children’s needs, and the children shall therefore be committed to the temporary legal and physical custody of the West Virginia Department of Health and Human Resources for continued placement in their respective foster homes until such time as reunification can be accomplished. The Court further believes that a disposition pursuant to West Virginia Code § 49-6-5(a)(5) is appropriate because it allows for a gradual transition period, allowing time for the children to emotionally adjust to all the changes while maintaining as much as stability as possible.” (Disposition Order, Conclusions of Law, ¶¶ 27, 28).

7. “It is in the best interest of the children that the disposition of the Respondent mother, Anna Y[.], be pursuant to West Virginia Code § 49-6-5(a)(5).” (Disposition Order, Conclusions of Law, ¶ 30).

SUMMARY OF ARGUMENT

The decision of the Circuit Court of Harrison County should be affirmed because placing the Respondent, Anna Y[.], in an alternative disposition pursuant to West Virginia Code § 49-6-

5(a)(6) is in the best interest of the children in that the children are not yet ready to be reunified and the alternative disposition does not threaten their welfare, and that the Court was within its discretion to determine that the conditions of abuse and neglect are reasonably likely to be corrected in the near future.

STATUS OF MINOR CHILDREN AND PERMANENCY

The minor children in this matter currently remain in the physical and legal custody of the WVDHHR. At this time, the lower tribunal terminated the parental rights of the Respondent Father, Ricky Y[.], and placed the Respondent Mother, Anna Y[.] in a disposition pursuant to West Virginia Code § 49-6-5(a)(5). Accordingly, the permanency plan for the minor children is legal guardianship with foster families; however, the WVDHHR herein is appealing the decision of the lower tribunal as to the Respondent Mother, Anna Y[.], and if successful, would have a permanency plan for the children of adoption with foster families.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the decisional process would be significantly aided by oral argument; all of the parties have not waived oral arguments; the appeal is not frivolous; the principle issues have not been authoritatively decided; and the facts and legal arguments are not adequately presented in the briefs and on the record on appeal, pursuant to West Virginia Revised Rules of Appellate Procedure, Rule 18(a), this matter is appropriate for oral argument. Further, this case is appropriate for oral argument under Rule 19 of the West Virginia Revised Rules of Appellate Procedure and disposition by memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT TERMINATE THE RESPONDENT MOTHER, ANNA Y[.]’S PARENTAL RIGHTS WHEN IT FOUND THAT THERE IS REASONABLE LIKELIHOOD THAT THE CONDITIONS OF ABUSE AND NEGLECT CAN BE SUBSTANTIALLY CORRECTED IN THE NEAR FUTURE.

1. Standard of Review

The standard of review for abuse and neglect cases is well established. The West Virginia Supreme Court has held

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.

Syl. Pt. 1, In the Interest of: Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996). The

West Virginia Supreme Court has also held

When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard.

Syl. Pt. 1, McCormick v. Allstate Ins. Co., 197 W.Va. 415, 475 S.E.2d 507 (1996).

2. The Circuit Court correctly found that there is a reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future by the Respondent Mother, Anna Y[.]’.

The Circuit Court found that the Respondent Mother, Anna Y[.]’s, rights did not need to be terminated because Anna Y[.] had not only made progress in correcting the conditions of abuse and neglect, but was continuing to do so having committed herself to a course of action to complete those goals, and there was a less restrictive alternative available.

In making that determination, the Court had to consider the performance of Anna Y[.] during her improvement period. “At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court’s discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify return of the child.” Syl. Pt. 6, In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 7, In re Jonathan G., 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 2, Jonathan Michael D., 194 W. Va. 20, 459 S.E.2d 131 (1995). The Court found that Anna Y. had participated in her Family Case Plan in that she: actively worked with Steve Richardson, Outreach Coordinator with Homebase, Inc., on parenting and adult life skills, although she had not successfully completed the same at the end of the Dispositional Improvement Period (Disposition Order, Findings of Fact, ¶¶ 68, 69); that she obtained appropriate housing; that she attended CNA classes while working, and later obtained her CNA license (Disposition Order, Findings of Fact, ¶ 56); that she began consistently working the issues regarding domestic violence, the children obtaining inappropriate sexual knowledge, inappropriate discipline and physical abuse on August 20, 2009, through individualized therapy with Tom Hill at Valley Healthcare Systems (Disposition Order, Findings of Fact, ¶ 62). Mr. Hill testified that from then on Anna Y. was consistently attending individual therapy, and that the issues specified in Anna Y.’s Family Case Plan were being addressed; that

first she needed to address her own trauma which would be within the next six months, and that she would be able to address the issues in the Family Case Plan within the three to four following months; and at that point she would be ready for family therapy to begin the reunification process with her children (Disposition Order, Findings of Fact, ¶¶63-65). Mr. Hill also opined that family counseling would be necessary prior to the reunification of Anna Y. with her children, similar to the opinion of the children's counselor. (Disposition Order, Findings of Fact, ¶ 65).

The Court then has the discretion to determine if the respondent successfully completed the improvement period. “[A] judgment regarding the success of an improvement period is within the court's discretion regardless of whether or not the individual has completed all suggestions or goals set forth in family case plans.” *In the Interest of Carlita B.*, 184 W.Va. at 64, 399 S.E.2d at 464 (1991). Further, the Court has the discretion under *West Virginia Code* § 49-6-5 to select a disposition for cases of abuse and neglect based on the facts specific to each case. This is evident from the inclusion of six potential dispositions in the Code from which the Court may select. In fact, the Court must base its decision on the specific facts presented in each case. *In re: Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973). The decision made by the trial court will stand unless clearly erroneous. *In Re: William John R., Dana R., and Sidney L., Jr.*, 200 W. Va. 627, 490 S.E.2d 714 (1997).

West Virginia Code § 49-6-5 dictates that the dispositions be considered in order. *West Virginia Code* § 49-6-5 (a). The court may (1) dismiss the Petition; (2) refer the child, the abusing parent, or other family members to a community agency for needed assistance and dismiss the Petition; (3) return the child to the home under the Department's supervision; (4) order the terms of supervision to assist the parents and child; (5) commit the child to the

temporary custody of a suitable person; or (6) terminate the parents' rights. Of those options, the Court is to impose a disposition that is the least restrictive while considering the best interest of the child(ren). See Syl. Pt. 7, in part, *In interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991) [quoting Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).] (“As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code 49-6-5 [1977] will be employed....”). See also *In re: Hammond*, 142 W.Va. 208 at 216, 95 S.E.2d. 345 at 349 (1956). (“[T]he Court is authorized to exercise a discretion conducive to the best interests of the child.”). Herein, the Court concluded that termination of the parental rights of Anna Yoho was not warranted in this matter given the specific, tragic facts before the Court. It was proven to the Court throughout this matter that both Anna Y[.] and the children suffered mental and physical abuse at the hands of Ricky Y[.] and that Anna Y[.] had committed herself to a course of treatment to remedy the conditions of abuse and neglect for which she is responsible. (Dispositional Order, Conclusions of Law, ¶ 26).

The Court also concluded that the children are not yet ready to be reunified to the home of Anna Y[.], and that a course of family therapy will be required before reunification can be accomplished. The Court therefore believed that the disposition available to it pursuant to *West Virginia Code* § 49-6-5-(a)(5) was the most appropriate for Anna Y[.], wherein the Court specifically found that Anna Y[.] was presently unable to provide for the children’s needs, and the children should therefore be committed to the temporary legal and physical custody of the WVDHHR for continued placement in their respective foster homes until such time as reunification can be accomplished.

The Court further believed that a disposition pursuant to *West Virginia Code* § 49-6-5(a)(5) is appropriate because it allows for a gradual transition period, allowing time for the

children to emotionally adjust to all the changes while maintaining as much stability as possible. *See James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d. 400 (1991), (citing *Honaker v Burnside*, 182 W.Va. at 453, 388 S.E.2d at 326 (1991)). (The “[l]ower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods ‘should be developed in a manner intended to foster the emotional adjustment of ... [the] children to this change ...’ and to maintain as much stability as possible in their lives.”).

In making this finding, the Court was mindful that it is not required to exhaust “every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened...” as stated in *Syl. Pt. 1, In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980), nor did the Court believe it is doing so. Rather, the Court concluded that Anna Y[.] had already demonstrated improvement. Anna Y[.] had made marked improvements in her life which would benefit the children and address the issues that were of concern to the Court.

Accordingly, the Circuit Court correctly found that there is a reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future by the Respondent Mother, Anna Y[.]

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT TERMINATE THE RESPONDENT MOTHER, ANNA Y[.]’S PARENTAL RIGHTS WHEN IT FOUND THE DISPOSITION PURSUANT TO WEST VIRGINIA CODE § 49-6-5(a)(5) TO BE IN THE BEST INTEREST OF THE CHILDREN

1. Standard of Review

The standard of review for this issue is the same as for the above issue.

2. The Circuit Court correctly found that there is a reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future by the Respondent Mother, Anna Y[.].

The Circuit Court found that it was in the children's best interest to allow the Respondent Mother, Anna Y[.], an alternative disposition under West Virginia Code § 49-6-5(a)(5) rather than terminating her parental rights. In determining permanency decisions for the children, the West Virginia Supreme Court has held that the welfare of the child is the polar star in guiding that decision.

Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must *be* the health and welfare of the children.

Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). The best interest of the child also includes terminating parental rights when necessary. As stated by the Supreme Court

Courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 7, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

The Court found that at the end of the disposition improvement period, the children were not yet ready to be reunified to the home of Anna Y[.], and that a course of family therapy would be required before reunification could be accomplished. Further, the position of counsel for the children was that in a limited set of circumstances, post termination contact with *only* the respondent, Anna Y[.] may be appropriate for the children. Counsel for the children is of the opinion that post termination contact with Ms. Y[.] should only occur if all of the following conditions are met: (a) the minor children request said contact; (b) the counselors and/or mental health professionals treating the children believe that the contact will not be detrimental to the child(ren); (c) that the contact be strictly supervised by an appropriate adult; and (d) if after

contact the children deteriorate in any manner, as determined by their counselor and/or mental health provider, that the contact be terminated.” (Disposition Order, Conclusions of Law, ¶ 24).

Accordingly, the Court found that it was not in the children’s best interest for the parental rights of Anna Y[.] to be terminated. The Court found that in addition to the analysis above, the welfare of the children would not be seriously threatened by the Respondent Mother, Anna Y[.], being granted an alternative disposition pursuant to West Virginia Code § 49-6-5(a)(5).

CONCLUSION

The Circuit Court’s Order granting the Respondent Mother, Anna Y., an alternative disposition should be affirmed.

Signed:  _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2011, true and accurate copies of the foregoing **Respondent Mother Anna Y.'s Response Brief** were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

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