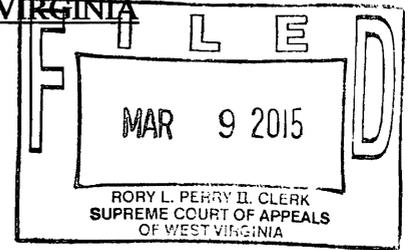


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



IN RE: D.H.

SUPREME COURT DOCKET NO: 14-1203
(HANCOCK COUNTY CIRCUIT COURT CASE NO: 13-JA-29)

GUARDIAN AD LITEM'S AMENDED SUMMARY RESPONSE

Guardian ad litem for D. H.
Cathryn A. Nogay, Esq.
P. O. Box 2993
Weirton, WV 26062
304-723-4430
cathynogay@comcast.net
WV Bar No. 2742

STATEMENT OF THE CASE

This brief is in response to the Petition for Appeal and Brief filed on behalf of the State of West Virginia, citing error on the part of the Circuit Court and requesting that the parental rights of S. H. to D. H. be terminated in accordance with West Virginia statutory and case law. This Guardian supports that appeal and agrees with the **Statement of the Case** set forth in the State's brief.

CURRENT STATUS

D. H., now 20 months old, was in foster care from September, 2013, until the Dispositional Hearing on September 26, 2014. Following that hearing, D. H. was placed with her maternal great-aunt and uncle, who reside in the State of Georgia. The Aunt and Uncle had cooperated in the I.C.P.C. process and are approved foster parents in Georgia. The Aunt and Uncle had traveled from Georgia to visit with D. H. in the foster home several times prior to the move, and so she was familiar with them. The Aunt and Uncle also traveled from Georgia to participate in the Dispositional Hearing. D. H. has done very well in her placement with the Aunt and Uncle. The family recently traveled back to West Virginia for the Christmas holidays and the Aunt facilitated a visit between D. H. and S. H. The permanency plan is subsidized Legal Guardianship, if the lower court's ruling stands, or adoption, if S. H.'s parental rights are terminated. The father of D. H. is unknown. Paternity testing was done on one man that S. H. identified as the father of D. H., but he was ruled out and S. H. claimed not to know who else might be the father of D. H.

S. H. was released from jail in Ohio in late January, 2015. She is currently living

and working in Wheeling, West Virginia. The parties have held an MDT and will be submitting a Post-Dispositional Plan of Improvement to the Court below in accordance with its September, 2014, Dispositional Ruling.

ASSIGNMENTS OF ERROR AND RESPONSE

(NOTE - this Guardian is aware that House Bill 2200 revised, rearranged, consolidated and recodified Chapter 49 of the West Virginia Code, effective February 19, 2015. Any Code sections cited are those that were in effect at the time of the Dispositional Hearing which is at issue in this appeal.)

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO TERMINATE THE RESPONDENT MOTHER'S PARENTAL RIGHTS.

This Guardian supports the State's position that S. H.'s parental rights should have been terminated. The totality of the evidence submitted to the Circuit Court, both at the September, 2014 Dispositional Hearing and at the many Court reviews while the case was pending, clearly demonstrates that there is no reasonable likelihood that the Respondent Mother could rectify the conditions of abuse and neglect in the near future, and it is necessary for the welfare of the infant child to terminate the parental rights. W. Va. Code Section 49-6-5(1)(6). The Respondent Mother did little to comply with the Plan of Improvement, designed to address her parenting deficiencies and substance abuse, when she was not incarcerated and able to do so, and her voluntary criminal behavior resulted in her incarceration for much of her young daughter's life, resulting in her inability to participate in the Plan or maintain a relationship with her daughter. Respondent Mother admitted to the same at the Dispositional Hearing (App., Vol. 1, p. 78; Appl, Vol. 2, pp. 90-

91, and p. 104).

Further, it is necessary for the welfare of D. H. to terminate her mother's parental rights, due to her young age and need for safety and security. "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. 4, *In Re: Frances J.A.S.*, 213 W.Va. 636, 584 S.E.2d 492 (2003) That principle is particularly important for a child who is so young and who has spent so little time with the Respondent Mother. "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN GRANTING THE RESPONDENT MOTHER A TWELVE-MONTH IMPROVEMENT PERIOD TO BEGIN UPON HER PROSPECTIVE RELEASE FROM JAIL IN FEBRUARY OF 2015.

The criteria for granting a Post-Dispositional Improvement Period is clearly spelled out in West Virginia Code Section 49-6-5 (c) and 49-6-12. 49-6-5 (c) allows a six-month Improvement Period as a Dispositional Alternative, and 49-6-12, relating to the criteria for granting Improvement Period requires that "The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement

period” (49-6-12(a) (2)) and “Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances the respondent is likely to fully participate in a further improvement period” (49-6-12(b)(4).

The Improvement Period granted by the Circuit Court below does not comport with the statutory or case law. The Circuit Court’s Post-Dispositional Improvement Plan was to commence at least four months after the Dispositional Hearing. *In re Emily*, 208 W. Va. 325, 540 S. E. 2d 542 (2000), held that “the commencement of a dispositional improvement period in abuse and neglect cases must begin no later than the date of the dispositional hearing granting such improvement period.” The Plan was to last for 12 months, which violates 49-6-5(c), calling for a 6 month improvement period. The Improvement Period was the second one granted to S. H., the first granted at a hearing held on November 25, 2013 (App., Vol. 1, page 26, 27) and was not based on any evidence that S. H. was “likely to fully participate” or had experienced a “substantial change in circumstances that would make it likely she would fully participate”. (App. Vol. 1, pp. 80-81). Further, even if S. H. complied with the Plan and addressed her parenting deficiencies, the Court directed that there be no change in placement until D. H. turns 5 years old in June, 2018. Nothing in the established child abuse and neglect laws, or applicable statutes, in West Virginia allows a child to remain in legal limbo for more than three (3) years. (See citation to *In re R.J.M.* regarding Assignment of Error I.)

III. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DICTATING THE STANDARD OF REVIEW AND THE SCOPE OF A PROSPECTIVE HEARING ON A MOTION TO MODIFY THE RESPONDENT MOTHER'S DISPOSITION IN CONTRAVENTION OF THE CLEAR LANGUAGE OF W. VA. CODE SECTION 49-6-6

West Virginia Code Section 49-6-6 regulates the Modification of Dispositional Orders, and it allows a change only upon a "clear and convincing evidence a material change of circumstances and that such modification is in the child's best interests".

The Circuit Court's Dispositional Order, however, call upon any Court considering a Motion of D. H.'s Disposition to "look favorably upon her (S. H.) request . . . the entire focus of that hearing will be upon S. H.'s compliance with this Order, and whether she has bonded with her child to the extent that D. H. is comfortable being with her mother and that it will not be too traumatic to return her to her mother". And, of course, per the Court's directive, such consideration can not be given until D. H. is at least 5 years old in June, 2018. (App. Vol. 1, page 82). This directive violates both the letter of the law, requiring the child's best interest to be the deciding factor, and the intent of West Virginia child abuse laws and statutes, that children, particularly those of tender age, have a home that is safe, stable and predictable. This Guardian reiterates the State's position, citing *In re Carlita B.*, 185 W. Va. 613, 623, 408 S. E. 2d 365, 375(1991):

(T)he early, most formative years of a child's life are crucial to his or her development. There would be no adequate remedy at law for theses children were they permitted to continue in this abyss of uncertainly. We have repeatedly emphasized that children have a right to resolution of their life situations, to a basic level of nurturance, protection, and security and to a permanent placement.

CONCLUSION

This Guardian certainly understands the lower court's sympathy for S. H. She does not have friends or family that she could count on for support or guidance. She made very poor choices in the men she brought into her life. She has a high school diploma but no job skills, and given that she stole money from her pizza shop employer, shortly after the filing of the Petition, few employers would be willing to take a chance on her. S. H. did not open up to her caseworker or service providers and was very difficult to work with because she was so reticent. Unfortunately, she turned to illegal drugs, and illegal activity to obtain those drugs, apparently as a way to self-medicate.

Nevertheless, D. H. is in need of permanent stable care, and there is little hope that S. H. will be able to provide that care. Fortunately, the Aunt and Uncle stepped up and are willing and able to provide for D. H. They are further willing to allow some limited contact between D. H. and her mother, S. H., IF it is in the child's best interest. This Guardian believes that adoption is in the best interests of D. H. and would recommend that this Court ORDER the termination of the parental rights of S. H. to her so that she can be adopted. This Guardian reported the same to this Court, but acquiesced to the alternative disposition out of concern that D. H. would otherwise remain in foster care. The foster family is one of our area's best, having fostered more than 150 children, but they were not able to provide for D. H. long-term care, and it was not in her best interest to stay there any longer than necessary.

This Guardian respectfully supports the request of the State that this Court remand the case to the Circuit Court with directions to terminate the Respondent Mother's parental rights.

CERTIFICATE OF SERVICE

I, Cathryn A. Nogay, Guardian ad litem for D. H., do hereby certify that I have served a true copy of the foregoing "Respondent's **Amended** Summary Response" upon the following, via first class United States Mail and addressed as follows this 6th day of March, 2015:

Katherine M. Bond, Esq.
State of West Virginia, Office of Attorney General
Region 1 office
9038 Middletown Mall, Suite 200
White Hall, WV 26554

F. William Brogan, Esq.
Counsel for S. H.
Public Defender Corp. - 1st Judicial Circuit
3328 West Street
Weirton, WV 26062



Cathryn A. Nogay, Esq.
P. O. Box 2993
Weirton, WV 26062
304-723-4430
304-723-3634 (facsimile)
WV Bar 2742