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OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-1203

IN RE: D.H.

Hancock County Case No. 13-JA-29
The Honorable Ronald E. Wilson

REPLY BRIEF ON BEHALF OF THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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REPLY BRIEF ON BEHALF OF THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Comes now the West Virginia Department of Health and Human Resources ("the Department") and replies to the arguments presented by the Respondent Mother, S.H., in her Response Brief. The Respondent Mother argues that the Circuit Court correctly did not terminate the Respondent Mother's parental rights because the Respondent Mother was not offered the appropriate services to combat her drug addiction; that the Circuit Court did not grant the Respondent Mother an additional improvement period; and that W. Va. Code § 49-6-6 does not apply to this case because the Circuit Circuit's order did not contemplate that the Respondent Mother would request to change the dispositional order. As discussed below, these arguments lack merit.[1]

ARGUMENT

I. THE EVIDENCE PRESENTED DURING THE DISPOSITIONAL HEARING CLEARLY DEMONSTRATED THAT THERE WAS NO REASONABLE LIKELIHOOD THAT THE RESPONDENT MOTHER COULD CORRECT THE CONDITIONS OF ABUSE AND NEGLECT IN THE NEAR FUTURE.

The Respondent Mother argues that the Circuit Court correctly determined not to terminate her parental rights because she was not provided with inpatient drug treatment and therefore the services provided during her improvement period were inadequate to meet her needs. Consequently, the Respondent Mother argues that the Circuit Court correctly granted her a disposition pursuant to W. Va. Code § 49-6-5(a)(5) and a further opportunity to rectify her parenting deficiencies. However, the Respondent Mother's position, and the Circuit Court's order, ignore that the Respondent Mother was given an improvement period and services to address her drug addiction and her parenting deficiencies.

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[1] The Department adopts, in full, its "Statement of the Case" and "Statement Regarding Oral Argument and Decision" as set forth in its opening brief to this Court.

The Respondent Mother agreed to the terms of the improvement period and the Circuit Court accepted those terms. (App., Vol. 1, p. 27.) The Respondent Mother did not ask for inpatient treatment, and by the time it became apparent to the multidisciplinary treatment team ("MDT") that the Respondent Mother needed inpatient treatment, the Respondent Mother's criminal activity had resulted in her incarceration and inability to participate in further services. (App., Vol. 1, p. 38.) For that reason, the Circuit Court terminated the Respondent Mother's improvement period and stated that D.H. needed stability and permanency. (App., Vol. 1, pp. 38, 41.)

West Virginia law is clear that there is no reasonable likelihood that a parent can substantially correct the conditions of neglect or abuse when the parent is addicted to drugs and has not responded to or followed through with the services provided to combat that drug addiction. W. Va. Code § 49-6-5(b)(1). This Court has said, "under West Virginia Code § 49-6-5(a)(6), courts are directed to terminate an abusing parent's parental rights '[u]pon a finding that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future and, when necessary for the welfare of the child . . .'" *In re Timber M.*, 231 W.Va. 44, 57, 743 S.E.2d 352, 365 (2013). As evidenced by the Respondent Mother's behavior during her improvement period, she did not follow through with services to combat her drug addiction; therefore, the Circuit Court should have terminated her parental rights.

As this Court has said,

> [a]lthough it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life, and because part of that permanency must include at minimum a right to rely on his or her caretakers to be there to provide the basic nurturance of life.

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 260, 470 S.E.2d 205, 214 (1996). D.H. was two months old when this abuse and neglect case began. She is now twenty-one months old. D.H. cannot continue to wait on the Respondent Mother to perhaps, this time, overcome her drug addiction. D.H. needs permanency now. The Circuit Court's failure to terminate the Respondent Mother's parental rights and its disposition allowing the Respondent Mother an additional three and a half years to work on her sobriety is not in D.H.'s best interests and does not provide resolution or permanency for D.H.

II. THE CIRCUIT COURT CLEARLY STATED THAT, UPON THE RESPONDENT MOTHER'S RELEASE FROM INCARCERATION, IT WOULD PUT IN PLACE AN IMPROVEMENT PLAN TO BE REVIEWED MONTHLY FOR TWELVE MONTHS.

The Respondent Mother argues that the Circuit Court did not grant her a twelve month improvement period and that, consequently, the Department's second assignment of error is inapposite to this case. However, in its dispositional order, the Circuit Court stated,

> [S.H.] is to remain under the jurisdiction of this court and this case shall remain open for 5 years. During the first 12 months after her release from jail, which is anticipated to occur in February, 2015, she is to demonstrate to the Court that she will do whatever it takes to address her parenting deficiencies and substance abuse issues. Upon her release from incarceration, the MDT will draft and recommend, and the Court will put in place, an improvement plan that shall be reviewed monthly. This plan shall incorporate the following: [S.H.] must be free of drugs and alcohol. With the assistance of the Department she must seek inpatient treatment. [S.H.] may never have any contact of any kind with [R.S.], or anyone who is a danger to herself or her daughter. [S.H.] must participate in, and complete, parenting education. [S.H.] must obtain suitable housing and a job to support herself and her daughter. [S.H.] must responsibly address all of her pending legal matters. [S.H.] will be responsible for the implementation and completion of all of these requirements. She will be required to substantially comply with all of the terms of the plan and her progress will be reviewed monthly.

(App., Vol. 1, 80-81.) While the Circuit Court may not have written the words "improvement period" in its dispositional order, it is clear from the Circuit Court's order that it was giving S.H.

a delayed twelve month improvement period as a "final opportunity to change." Moreover, the terms outlined by the Circuit Court are strikingly similar to the terms of the Respondent Mother's actual post-adjudicatory improvement period which she did not successfully complete. (App., Vol. 1 pp. 23-24.)

III. THE CIRCUIT COURT'S ORDER CLEARLY REQUIRES THE RESPONDENT MOTHER TO PETITION THE CIRCUIT COURT TO CHANGE THE LEGAL GUARDIANSHIP GRANTED TO D.H.'S RELATIVES IN GEORGIA.

Lastly, the Respondent Mother contends that W. Va. Code § 49-6-6 is not applicable to this case because the Circuit Court's order does not "contemplate a request by Respondent, or any other party, to change the Order." (Respondent Mother's Brief, p. 12.) But, the Circuit Court's order clearly states otherwise. The Circuit Court states that it is granting the Respondent Mother a disposition consistent with W. Va. Code § 49-6-5(a)(5) and that the permanency plan for D.H. is legal guardianship with her relatives. (App., Vol. 1, p. 80.) The Circuit Court later addresses when and how the Respondent Mother can request D.H. to return to her custody:

> If [S.H.] is successful in addressing her substance abuse issues and parenting deficiencies, she may not **Petition** for the return of [D.H.] until June 2018, when the child is at least 5 years old. If she does **Petition** the Court, the Judge assigned to the case is required, pursuant to this Order in which the Court finds that this plan is in the best interest of the child, [S.H. sic], to look favorably **upon her request to end the legal guardianship and return the child to S.H.**

(App., Vol. 1, p. 82 (emphasis added).) The Circuit Court's order clearly states that the Respondent Mother will need to petition the Circuit Court to change the legal guardianship that the Circuit Court determined would be the appropriate disposition for D.H. W. Va. Code § 49-6-6 is the only legal mechanism through which S.H. can petition the Circuit Court to return custody to her and end the legal guardianship. The Circuit Court's direction that any such petition cannot be filed until the child is five years old and that any judge is required to look favorably upon the request to end the legal guardianship contradicts this Court's mandate that, "[i]n a contest

involving the custody of an infant the welfare of the child is the polar star by which discretion of the court will be guided." Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W. Va. 302, 47 S.E.2d 221 (1948).

CONCLUSION

Wherefore, the Department respectfully requests that this Court remand the case to the Circuit Court with directions to terminate the Respondent Mother's parental rights. The Department asks for any other relief this Court deems fit.

Respectfully Submitted,

West Virginia Department of
Health and Human Resources,

By counsel.

PATRICK MORRISEY
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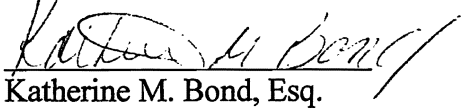

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CERTIFICATE OF SERVICE

I certify that I have, on this 21st day of February, 2015, served a true and accurate copy of the foregoing REPLY BRIEF ON BEHALF OF THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES the following parties of record by sending a copy, via U.S. first-class mail, to the following addresses:

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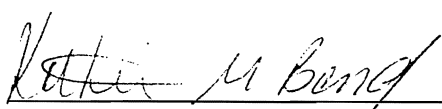

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