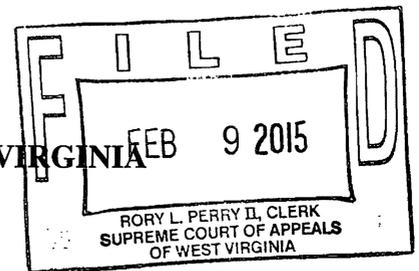


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-1203



IN RE: D.H.

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

BRIEF OF THE RESPONDENT, S.H., NATURAL MOTHER OF D.H.

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The Respondent, S.H., asks this Court to affirm the Dispositional Order entered on October 24, 2014. That Order approved a resolution under West Virginia Code § 49-6-5(a)(5), commonly known as a Disposition 5, based on the decision of the Court that Respondent was not presently able to care for her daughter. The Order was not open-ended, but instead placed a one year time limit, set forth specific requirements for Respondent S.H., placed the child in the physical care of relatives, and addressed the future review of the progress of this matter. If the Respondent succeeded, her child would be returned to her upon attaining the age of five years. The Order also addressed the factors to be considered as the case concludes, with emphasis on Respondent's compliance and also on whether the child is then comfortable with a return to her mother and that such a transition would not be too traumatic for the child.

ASSIGNMENTS OF ERROR

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

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.

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 § 49-6-6.

FACTUAL BACKGROUND

This matter originated in late August, 2013. D. H., born on _____, 2013 and the infant herein, was found to have suffered facial injuries at a time when R. S. and S. H., the Respondent herein, were charged with the infant's care. The Department of Health and Human Services

(hereafter referred to as Department) immediately began an investigation, and on August 29, 2013 filed a Petition in Abuse/Neglect was filed. App. Vol. 1, pp 1-6.). S. H. waived her preliminary hearing on September 11, 2013, and the matter was set for status review on October, 2013. At the status hearing it was disclosed that on October 16, 2013, Respondent and her boyfriend R. S. had staged a fake robbery at S. H.'s place of employment.

An Adjudicatory Hearing was held on November 25, 2013, at which time S. H. admitted the fake robbery, stated that she had drug issues, and that the crime was committed to get money to buy drugs. (App. Vol.1, pp 25-27; App. Vol 2, p 90.

The Court granted Respondent a post-adjudicatory improvement plan, which required, *inter alia*, that she remain free of drugs, receive parenting education, and secure therapy, housing, and employment. The parties were not then aware of the duration and severity of Respondent's drug problems and did not require as part of the plan that Respondent be admitted to an in-patient facility. The recommendation that in-patient treatment be included came on April 3, 2014, but Respondent was arrested on that very day for criminal offenses.

Respondent began her plan well, and also began participation in the Brooke County Drug Court treatment program. At a March 17, 2013 review the Court learned that Respondent had tested positive for heroin and had been sanctioned by spending a weekend in jail. After two "clean" weeks the Court continued her improvement period. (App. Vol. 1, p 33.)

On April 28, 2014, Respondent was arrested in the State of Ohio breaking and entering and theft, was sentenced to six months in jail, and had tested positive for heroin. At the hearing the Court terminated the improvement plan. (App. Vol. 1, P. 38.

On May 28, 2014 the Court cited the need for D. H., who was very near her first birthday, to

have stability and permanence and on July 23, 2014, the Department filed a dispositional case plan, calling for termination of Respondent's rights. The Court set the date for a dispositional hearing for September 26, 2014.

At the dispositional hearing (App. Vol. 1, pp 72-85) Petitioner introduced evidence of criminal activity, drug usage, and other deficits in S. H.'s compliance with her improvement plan, including the need for an in-patient program to address both her substance abuse and psychological issues. It was noted that the goal of in-patient care was frustrated by Respondent's incarceration.

Respondent testified, and admitted to all the salient facts: that she had continued using drugs, and committed crimes to finance drug purchases; that incarceration had interfered with her ability to obtain employment and housing; that she had not been able to fully bond with her daughter or complete parenting classes. However, she testified that she would be released from jail in Ohio around February 1, 2015, had already begun classes at her Ohio jail to address her drug and parenting deficiencies, and her psychological issues. Upon her release she stated that she would continue to do everything necessary to obtain custody of her daughter. (App. Vol. 1, p78, App. Vol. 2, pp 90-102.)

At the dispositional hearing Respondent acknowledged that drug addiction was the source of all her troubles. She stated that the first time in-patient treatment was offered to her was April 3, 2014, **the very day she was arrested**, thereby precluding this ameliorative option until her release from incarceration. She affirmed her willingness to go to in-patient treatment (*ibid*, p. 94.) She also testified that she understood the meaning of a disposition under W. Va. Code § 49-6-5(a)5, in which she would admit that she was not presently able to care for her child, but

desired time to demonstrate to the Court that she had redeemed herself and could regain custody of her child.

SUMMMARY OF ARGUMENT

I. The Court did not abuse its discretion in awarding Respondent a Disposition 5 remedy instead of terminating her parental rights.

Before the hearing was concluded the parties conferred and reached an agreement that the Court be approached with a recommendation that a “Disposition 5” be approved by the Court. The Court below made reference to this approach as he began his decision announcement, which appears in App. Vol.2, pp 108-113:

“ The Court has been influenced by a proposed agreement that would cause the Court not to make the conclusion that parental rights should be terminated....

There is little doubt in the Court’s mind that if this hearing would have reached its final conclusion the Court would have had no choice but to terminate her parental rights....

More specifically, when the department recognized that she had to have inpatient drug treatment, the department did not have the opportunity to provide that plan for her because to her own conduct and the fact that she was then arrested and incarcerated. She did not have the opportunity to form any bonding with her child for the same reason.”

The Court then complied with the statutorily mandated checklist contained in West Virginia Code 49-6-5, placing in its October 24, 2014, Order, providing that legal custody of the child would remain with the Department, that legal guardianship and physical custody of the child would be placed with named relatives, that S.H. would have a specific time frame of one year to prove that she had corrected her deficiencies, that an MDT meeting be held to implement the services needed, and that Respondent's progress would be regularly and closely monitored. Respondent was also placed on notice that this was a final chance, and that should she fail, her parental rights would be terminated.

In making the decision to accept the "Disposition 5" the Court rejected the option of termination. The reasons for this decision appeared in this same Order. Respondent was suffering from drug addiction, and only an in-patient program would have a chance for success, but this was not realized until the day of her arrest, at which her incarceration prevented this necessary step. The Court noted:

"...the Department could not ask the Hancock County Circuit Court to place her in an inpatient drug rehabilitation program, a program she desperately needed. It was this failure of the Department, through no fault of its own, to be able to properly address (Respondent's) terrible addiction to heroin, combined with (Respondent's)lack of confidence in herself and a lack of maturity that doomed the improvement plan from the very beginning. It

was a hopeless plan. It never had a chance to succeed. Deprived of a proper foundation to cure her addiction, no improvement plan could ever be a success for this drug addict.” App. Vol.1, p.80.

At the dispositional hearing the Department and the Guardian ad Litem advanced Respondent’s deficiencies. Respondent was a heroin addict, and committed crimes and made bad decisions as a consequence, none of which was disputed. The Court observed:

“All of the issues that she has created appear to me to be based upon the drug addiction. So the fact that she didn’t comply with drug court program, the fact that she committed crimes, the fact she’s not been able to bond with child, if that’s the situation, all go back to the fact she is an addicted person to heroin. That being the case, then my concern is that we haven’t done enough, we haven’t done enough to give her the opportunity to address that addiction.....

Termination of parental rights is not something to be taken lightly, and we don’t want to do that if we have a mother who some day may be a great mother, but has not been able to do so because of an addiction to drugs.” App. Vol.2, p14.

The Court was then confronted with the argument that giving Respondent her first meaningful opportunity at effective drug rehabilitation placed Respondent’s needs ahead of the Child’s needs. The Court, clearly mindful also of the child’s best interests, responded:

“And the Supreme Court will jump right on that, saying that the judge is paying more attention to the parental rights. Well, that’s baloney. I’m paying attention to the rights of the child and what’s in the best interest of the child in the long run as to whether a child should be taken away from its mother, and you don’t do that lightly.

You want to make certain that when you do that, you’re taking that child away from a bad parent, not a parent who hasn’t had a chance to address issues that she cannot in her young age control.” App. Vol.2, p.16.

Respondent strenuously argues that these statements by the Court below are the crux of this case, and should be dispositive. A young mother has an addiction issue; she has never had the chance to adequately address that issue; a carefully monitored program to last no more than one year is to be offered to her for the first time; as this occurs, her child is placed in the stable, secure home of a relative; the chance for Respondent to prove her mettle and obtain custody of her child is absolutely in the long-term best interest of the child, not immediate termination of parental rights.

In order to terminate parental rights, West Virginia Code § 49-6-5(6) requires two findings: 1), there is no “reasonable likelihood” that parental deficiencies can be corrected in the near future, **AND**, 2), that it is necessary for the welfare of the child that parental rights be terminated.

This case is not a post-adjudicatory improvement case; the post improvement plan was terminated in April, 2014. This is, instead, a

“Disposition 5” case, subject to entirely different considerations and statutory treatment. Respondent argues that the Court’s decision to grant such a disposition, with the reasons given by the Court, is eminently sound. All of the protections and requirements of the statute have been met. To have rejected the proposal of the parties for such a disposition and instead terminate parental rights would have been unjust both to Respondent and her child.

If failure to satisfactorily complete a post-adjudicatory improvement plan left the court below with no option but to terminate parental rights, a dispositional hearing would serve no purpose; termination would occur by operation of law. Instead, West Virginia Code § 49-6-5 gives the court below dispositional options. Significantly, the statute mandates that the court “shall give precedence to dispositions in the following sequence....” Subsection 5, the choice of the court below, is accordingly preferred to subsection 6, which supports termination of parental rights. It follows that the “Disposition 5” solution should be employed, unless the court finds that “there is no reasonable likelihood” of improvement in the near future.

For the reasons spread on the record by the Court such a finding cannot be made. Respondent was given a post adjudicatory improvement plan that did not initially require in-patient treatment. Non-compliance predictably followed. On the very day it was realized that in-patient treatment was necessary, Respondent was arrested, making it impossible to implement this necessary component.

II. The Court did not err in granting Respondent a twelve month improvement plan, because the Court did **NOT** grant an improvement plan. The improvement plan herein had been terminated months earlier. Instead, the Court, rather than terminate parental rights, availed itself of an alternate solution under the auspices of West Virginia Code § 49-6-5(a)5, available to a mother not presently able to care for her child.

III. The court did not err in dictating the standard of review and scope a prospective hearing on a motion to modify disposition in contravention of West Virginia Code § 49-6-6. First, reliance on 49-6-6 is inapposite. This provision refers to a motion filed by a child, parent or custodian, or the Department, none of which is pertinent to the case *sub judice*. Second, the Court in its Order highlighted two considerations: Respondent's compliance, **AND** whether a return of the child to her mother is comfortable and non-traumatic for the child.

IV. Promoting the best interests of the child is the "polar star" of abuse/neglect cases, as established by a long series of cases in this Court. (See e.g., *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000)). Such a result is best achieved in this case by affirming the decision of the Court below to permit the carefully crafted "Disposition 5" before this Court. It is limited in time and specific in terms. Respondent's parental rights should not be sacrificed without giving her the chance to meet the terms of the Disposition.

CURRENT STATUS OF THE MINOR CHILD

The child, D.H., is living in Georgia with her maternal great-aunt and uncle, who are

approved foster parents. It is planned that they be appointed legal guardians, and would adopt if S.H.'s parental rights were terminated. Respondent is to have visitation, as long as she is free of drugs and alcohol and is behaving responsibly.

STANDARD OF REVIEW

This matter is reviewable under the aegis of *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S. E. 2d, 177 (1996). Referring to the Circuit Court's findings of fact and conclusions of law, this Court opined that "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 a 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.

ARGUMENT

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

The Circuit Court did not abuse its discretion in rejecting termination of parental rights in favor of a "Disposition 5" resolution. The gravamen of the Petitioner's case is that there was "no reasonable likelihood" that Respondent's deficiencies could be substantially corrected in the near future. Virtually every case that speaks to this issue has cited times that the parent has failed to follow appropriate treatment regimens, thus setting a track record of failure, and eroding confidence of future success. (See, for example, *In re Isaiah A.*, 228 W. Va. 176, 718 S. E. 2d 775 (2010) (*per curiam*).

But the record in this case fails to support the idea of prospective failure by Respondent.

Her earlier admitted failures were prior to her exposure to adequate services. For reasons cited above, the Court found that S.H. began her improvement plan without the necessary foundation of an in-patient rehabilitation program. The chances she was given were totally inadequate to meet her needs. She needed a tourniquet and was given a band-aid. Her subsequent failings were completely predictable, as seen all too often in “the trenches” of court hearings where addicted parents have not been effectively treated.

The key test for the Court below was what progress she could make after getting the help she so needed, and did not receive. This was not the fault of the Department. And when Respondent’s true condition became apparent, the Department tried to act with dispatch, but sadly Respondent was incarcerated before anyone could move forward. Ultimately, Respondent has **never** been given the chance she so desperately needs to demonstrate sober, appropriate parenting.

The Court below discerned Respondent’s needs, and seeks a “Disposition 5” to address them. To deprive Respondent of her first chance at a meaningful program to help her, and her child, would be premature, tragic, and irreversible. It would be unpalatable and totally unjustified.

On this record, there is absolutely no evidence that Respondent has demonstrated that she falls into the “no reasonable likelihood” category. She was doing what **untreated** addicts do. To permanently deprive Respondent of her parental rights in this case would be grossly unfair.

Far from abusing its discretion, the Court below acted with penetrating insight. Respondent should not lose her child without a **meaningful** chance.

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.

Respondent's position is that the Court below did **NOT** award an improvement period. The earlier improvement plan had been terminated. It is for that reason that this disposition hearing was held. The decision of the Court below to set a one year time-frame would exceed the time for a post-adjudicatory plan, but such was not the Court's disposition. As such, reference to time limitations and the lack of changed circumstances for improvement periods under W.Va. Code § 49-6-12 is not relevant to this case.

III. THE COURT ERRED AS A MATATER OF LAW IN DICTATING THE STANDARD 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 § 49-6-6.

Respondent's position is that Petitioner is again wrongfully relying on the modification provisions of W.Va. code § 49-6-6. This statute refers to modifications sought by the "child, a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition...." Nowhere does the Court's Order contemplate a request by Respondent, or any other party, to change the Order. The Order declares what will happen if Respondent meets her obligations, and what will happen if she fails. And far from favoring Respondent's interests over those of her child, the conclusion of the Court's Order specifies that re-unification is not to occur, regardless of Respondent's conduct, unless re-unification poses no trauma to the

child. In fashioning the Order as it did, the Court made the interests of the mother and child congruent, as any re-unification plan should, but the final result rests on the best interest of the child.

A more recent case has addressed many of the issues present in this case, including the deference that should be given to findings by the Circuit Court, and the affirmance of the Circuit Court's findings, unless clearly erroneous. *In re TIMBER M. and Reuben M.*, 231 W.Va. 44 (2013). And *TIMBER M.* reminds us of the great substance of Respondent's parental rights: "[i]n 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." Syllabus Point 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

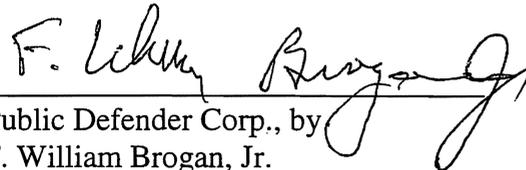
Respondent is facing the mortal danger of the permanent loss of her parental rights. She asks that she be given a chance to show that she can be a good, sober, law-abiding parent. Heretofore, she has admittedly not done so, but she has had not had the necessary help in reaching that goal. The Court below by its Order has extended to her the opportunity to take advantage of help she has never had. The loss of her parental rights without being given the chance to succeed would be abhorrent. And during the limited interim her child is in a safe, stable environment, where Respondent's family has expressed its willingness to make D.H. available to visits with Respondent, a win-win situation.

CONCLUSION

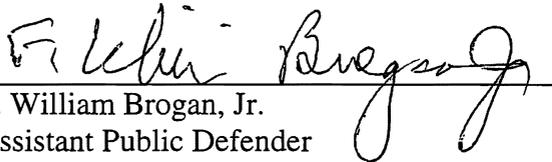
Respondent S. H. hereby prays that this Court affirm the Order of the Circuit Court of

Hancock County granting her a resolution of her case under the provisions of W.Va. Code § 49-6-5(a)5.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that I have, on this 6th day of February, 2015, served a true and accurate copy of the foregoing BRIEF OF THE RESPONDENT, S.H., NATURAL MOTHER OF D.H. on the following parties of record by sending a copy, via U.S. first-class mail, to the following addresses:

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