

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In the Interest of Robert H.

No. 101469 (Nicholas County 09-CIG-8)

FILED

April 1, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Robert H., appeals the circuit court's order granting guardianship of his son, Robert H., to the child's maternal great-aunt and great-uncle, Beverly and Billy J.¹ Petitioner was granted unsupervised visitation. Mr. and Mrs. J. and the child's guardian ad litem have filed response briefs.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

R.H. was born on November 6, 2004, to Cynthia K. and petitioner. Ms. K. and petitioner lived together until sometime in 2005. Ms. K.'s aunt and uncle, Mr. and Mrs. J., were heavily involved in the care of the child. Sometime in 2006, Ms. K. developed an addiction which caused her to be unable to care for the child. Petitioner established his paternity and secured full custody in October 2006. However, because he was frequently away due to his employment as a long-haul truck driver, and because he was experiencing personal issues, petitioner chose to place R.H. with Mr. and Mrs. J. pursuant to a verbal agreement. The child has continuously lived with Mr. and Mrs. J. since December 15, 2006, when he was two-years-old.

¹ In accordance with our practice in cases involving sensitive matters, we will refer to the parties by their last initials rather than their full surnames. *See, e.g., In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005).

In December of 2009, the Department of Health and Human Resources filed an abuse and neglect petition against Ms. K. and petitioner. Ms. K. relinquished her parental rights. As to petitioner, the Department asserted that he had abandoned the child. However, by order of May 21, 2009, the circuit court found that petitioner did *not* abuse or neglect R.H. because petitioner had placed the child in a safe and suitable home with Mr. and Mrs. J.

Also on May 21, 2009, Mr. and Mrs. J. filed a petition pursuant to West Virginia Code § 44-10-3 seeking guardianship of R.H. based upon their claim that they had assumed the role of psychological parents. A court-appointed psychologist who evaluated the parties, and the child's guardian ad litem, both advised the court that a parental bond had been established between the child and Mr. and Mrs. J. They advised that severing this relationship would likely cause significant harm to the child. The circuit court found that Mr. and Mrs. J. have provided for all of the child's needs – physical, emotional, medical, educational – while petitioner has not. The court noted that pursuant to West Virginia Code § 44-10-3(a), a father shall have priority in a guardianship proceeding, but the competency and fitness of the proposed guardian and the welfare and best interests of the child shall be given precedence. The court found that the child is thriving and has developed a parental bond with Mr. and Mrs. J. that satisfies the elements for establishment of psychological parenting:

A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. . . .

Syl. Pt. 3, in part, *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005). Furthermore, although the evidence was conflicting, the circuit court made findings of fact indicating that petitioner's financial support of the child was limited and his visits with the child were sporadic.

Petitioner argues that as the child's biological parent who has been found to be fit and not abusive or neglectful, he has a fundamental constitutional right to custody of his child. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); Syl. Pt. 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973). He argues that his decision in December of 2006, to voluntarily seek help parenting for a limited period of time, is not a valid reason to unconstitutionally interfere with his custodial rights. He argues that while a child can form a bond with a psychological parent that would entitle the psychological parent to an enhanced standing in custody

proceedings, such a bond cannot operate to deprive a fit parent of custody. *See, e.g., Honaker v. Burnside*, 182 W.Va. 448, 451-52, 388 S.E.2d 322, 325 (1989) (holding that a child's strong bond with a stepfather cannot alter the rights of a natural father to custody of the child when there is no showing of unfitness or abandonment by the natural father).

When addressing this argument, the circuit court relied upon the following:

A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty or has waived such right, or by agreement or otherwise has **transferred, relinquished or surrendered such custody**, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.

Syl., *Whiteman v. Robinson*, 145 W.Va. 685, 116 S.E.2d 691 (1960) (emphasis added); Syl. Pt. 8, *In re Abigail Faye B.*, 222 W.Va. 466, 665 S.E.2d 300 (2008) (emphasis added). Mr. and Mrs. J. argue that petitioner had the right to contact the child between December 2006 and January 2009 when the Department initiated the abuse and neglect proceedings, but petitioner rarely did so. Moreover, this Court said in Syllabus Point 4, *In the Interest of Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990):

If a child has resided with an individual other than a parent for a significant period of time such that the non-parent with whom the child resides serves as the child's psychological parent, during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so, the equitable rights of the child must be considered in connection with any decision that would alter the child's custody. To protect the equitable rights of a child in this situation, the child's environment should not be disturbed without a clear showing of significant benefit to him, notwithstanding the parent's assertion of a legal right to the child.

The circuit court concluded that petitioner's actions had transferred and relinquished custody of his son to Mr. and Mrs. J. Upon a review of the record and arguments of counsel, we agree with the circuit court's conclusion. Petitioner's actions in this matter voluntarily transferred custody to Mr. and Mrs. J, they meet the criteria of psychological parents, and it would not be in the child's best interests to remove him from their custody and guardianship.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 1, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh