

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

FILED

April 16, 2012

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

In Re: R.D. and D.D.:

No. 11-1467 (Logan County 11-JA-58 and 59)

MEMORANDUM DECISION

Petitioner Mother, by counsel Kevin Hughart, appeals the Logan County Circuit Court's order entered August 10, 2011, dismissing an abuse and neglect petition filed against Respondent Father. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem, Donald C. Wandling, has filed his response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William Bands, has filed its response joining in the response of the guardian ad litem. Respondent Father, by counsel Robert Ilderton, has filed a response. Petitioner Mother has filed a reply to the responses.

Having reviewed the appendix and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. As more fully explained herein, the Court is of the opinion that the circuit court erred in dismissing the petition. Accordingly, this case satisfies the "limited circumstances" requirement of Rule 21(d) and it is appropriate for the Court to issue a memorandum decision rather than an opinion.

"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." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

In the present case, Petitioner Mother and Respondent Father were divorced in Logan County via a final order dated May 16, 2008. Pursuant to the custody order, the parents had shared custody of the children. The children remained in the former marital home in Logan County, while the parents enjoyed a week on/week off custody arrangement. Petitioner Mother alleges that in April of 2008, an unknown individual took several pictures of R.D., then eight years old, portraying his buttocks and genitalia. However, Petitioner Mother did not discover these photographs until

December of 2008. At that time, she took the photographs to the State Police in Kanawha County, West Virginia, who sent the case to Logan County for investigation. Petitioner Mother then filed for a protective order in Kanawha County, which was granted. The DHHR investigated the photographs, as did the State Police. Both determined that the photographs were not taken by Respondent Father and closed their respective cases. Petitioner Mother filed an abuse and neglect petition in Kanawha County, alleging that Respondent Father abused R.D. by taking the photographs. Prior to any hearings on the matter, the Kanawha County Circuit Court ordered the case transferred to Logan County. However, the case was not transferred for approximately eighteen months, as Petitioner Mother was not pursuing the matter. Respondent Father moved for an emergency modification of the parenting plan and custody due to not being allowed to see his children for two years, and only then did the case get transferred to Logan County. Once the case was filed in Logan County, the circuit court held several hearings, appointed a guardian ad litem to investigate, and ordered an examination of R.D. However, the circuit court never allowed the petitioner to present witnesses or evidence, and dismissed the case as the DHHR and the State Police both indicated that they did not have sufficient evidence to proceed in this matter. Petitioner appeals from the dismissal of this action.

Petitioner Mother's first four assignments of error all concern the circuit court's failure to allow her to present evidence pursuant to West Virginia Code § 49-6-2(c), which states that petitioner, as a custodial parent, is entitled to "a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses." In the present matter, Petitioner Mother indicates that she had subpoenaed several witnesses, but at no time could she or her witnesses testify. Therefore, pursuant to this code provision, this Court remands the case back to the circuit court for further proceedings.

Petitioner Mother next argues that the Kanawha County Circuit Court erred in ordering the abuse and neglect case be transferred to Logan County on the grounds that the alleged abuse occurred in Logan County, when the children were residents of Kanawha County at the time the petition was filed. Petitioner argues that she relied on Rule 4a of the Rules of Procedure for Abuse and Neglect Proceedings, which allowed for the case to be filed in Kanawha County, and she was surprised at the transfer.

Respondent Father argues that the transfer was not in error, as the case can be filed in the county where the child resides, where the alleged abuse and/or neglect occurs, where the custodial respondent resides or where any other named party resides. Further, when the case was transferred, there was no objection by the petitioner, and the petitioner failed to object to the transfer once the case came before the Logan County Circuit Court.

Rule 4a of the Rules of Procedure for Child Abuse and Neglect Proceedings (2000)¹ states:

The civil protection proceeding should be brought in the circuit court of any county in the following order of preference:

- (1) wherein the child normally resides;
- (2) wherein the alleged abuse and/or neglect occurred;
- (3) wherein the custodial respondent resides; or
- (4) wherein any other named party resides.

In the present matter, the children were living in a home in Logan County when the alleged abuse occurred. Only later did the children move to Kanawha County. Moreover, as pointed out by Respondent Father, no objection to the transfer was made in 2009 when the Kanawha County Circuit Court ordered the case transferred to Logan County. Thus, this Court finds no error in the transfer of this case to Logan County.

As to petitioner's final two assignments of error, this Court does not need to address the same at this time.

For the foregoing reasons, we affirm the decision to transfer the case to Logan County, but reverse the dismissal of the petition and remand the case for further proceedings consistent with this memorandum decision.

Affirmed in part; reversed and remanded in part.

ISSUED: April 16, 2012

CONCURRED IN BY:

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

¹This Court notes that Rule 4a has changed; however, the rule cited is the version in effect at the time of the filing of the underlying petition.