

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1994 Term

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NO. 21908

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IN RE: ELIZABETH JO "BETH,"  
DEBRA KAY "DEBBIE" AND ROBERT LEE "ROBBIE" H.,

WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,  
Petitioner Below, Appellant

BENITA K.H.,  
Respondent Below, Appellee

ROBERT L.H.,  
Respondent Below, Appellee

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Appeal from the Circuit Court of Wood County  
Honorable George W. Hill, Judge  
Civil Action No. 93-J-106

REVERSED AND REMANDED

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Submitted: September 20, 1994  
Filed: December 15, 1994

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Lee "Robbie" H.

The Opinion of the Court was delivered PER CURIAM.  
CHIEF JUSTICE BROTHERTON did not participate.  
RETIRED JUSTICE MILLER sitting by temporary assignment.  
JUSTICE WORKMAN concurs and reserves the right to file a concurring  
opinion.  
JUSTICE CLECKLEY dissents and reserves the right to file a dissenting  
opinion.

## SYLLABUS BY THE COURT

1. "'W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syllabus Point 1, In Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981)." Syllabus Point 1, West Virginia Department of Human Services v. Peggy F., 184 W. Va. 60, 399 S.E.2d 460 (1990).

2. "'Under W. Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W. Va. Code, 49-6D-3 (1984).' Syl. Pt. 3, State ex rel. West Virginia Dept. of Human Serv. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987)." Syllabus Point 3, In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

3. "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family." Syllabus Point 4, In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

Per Curiam:

The West Virginia Department of Health and Human Resources (Department), the petitioner below and appellant, appeals a final order entered August 2, 1993, by the Circuit Court of Wood County.

The circuit court dismissed the Department's petition which alleged that Elizabeth Jo "Beth," Debra Kay "Debbie," and Robert Lee "Robbie" H. were neglected and/or abused children. The Department asserts on appeal that the circuit court erred because the evidence established that the children were emotionally and physically abused by their parents and neglected by their parents' failure to provide them with necessary shelter and supervision.

In June of 1993, Joan George, a Child Protective Services worker with the Department, filed a petition pursuant to W. Va. Code, 49-6-1 (1992), alleging that nine-year-old Elizabeth,

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<sup>1</sup>We follow our traditional practice in domestic relations and other cases involving sensitive matters and do not use the last names of the parties. See, e.g., Matter of Scottie D., 185 W.ⒸVa. 191, 406 S.E.2d 214 (1991); State ex rel. Div. of Human Serv. by Marcy C.M. v. Benjamin P.B., 183 W.ⒸVa. 220, 395 S.E.2d 220 (1990).

<sup>2</sup>W. Va. Code, 49-6-1(a), states, in part:

eight-year-old Debra, and six-year-old Robert were neglected and/or abused children according to W. Va. Code, 49-1-3 (1992). More

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"If the state department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or to the judge of such court in vacation. The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the state department to remedy the alleged circumstances and the relief sought. Upon filing of the petition, the court shall set a time and place for a hearing and shall appoint counsel for the child."

<sup>3</sup>W. Va. Code, 49-1-3(a), defines an "abused child":

"(a) 'Abused child' means a child whose health or welfare is harmed or threatened by:

"(1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury, or mental or emotional injury, upon the child or another child in the home; or

"(2) Sexual abuse or sexual exploitation; or

"(3) The sale or attempted sale of a child by a parent, guardian, or custodian[.]"

W. Va. Code, 49-1-3(g) (1), defines a "neglected child":

specifically, the petition alleged that their parents, Benita K.H. and Robert L.H., did not adequately supervise the children and abused the children emotionally and physically. Furthermore, it was alleged that their living conditions were unfit.

After receipt of the petition, the circuit court determined that the children were in imminent danger and ordered that the children be placed with their maternal grandmother.

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"(g) (1) 'Neglected child' means a child:

"(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or

"(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian[.]"

The statute was amended in 1994. The minor changes do not affect our determination of this case.

<sup>4</sup>See W. Va. Code, 49-6-3 (1992), which states, in part:

"(a) Upon the filing of a petition, the court may order that the child alleged to

At the adjudicatory hearing held on July 30, 1993, the Department called the following persons to testify: two counselors employed by the Western District Guidance Center, a counselor from Action Youth Care, Elizabeth's teacher, and Joan George. The parents did not testify nor did they call witnesses on their behalf.

The uncontroverted evidence showed that this family had been long-time recipients of social services and outside intervention, in part, to help them deal with Elizabeth's medical problems. The parents sporadically complied with the instructions from the various

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be an abused or neglected child be delivered for not more than ten days into the custody of the state department or a responsible relative, which may include any parent, guardian or other custodian pending a preliminary hearing, if it finds that: (1) There exists imminent danger to the physical well-being of the child, and (2) there are no reasonably available alternatives to removal of the child[.]"

<sup>5</sup>The parents waived the preliminary hearing.

<sup>6</sup>Elizabeth has been diagnosed as suffering from enuresis (bedwetting), attention deficit hyperactivity disorder, oppositional defiant disorder, parent child problems, a seizure disorder, and organic mental disturbance. It is undisputed that due to her health problems, she is a difficult child to deal with and requires special attention. In May of 1993, Elizabeth attempted suicide.



services, and the condition of the home and their attitude and approach to parenting did not improve.

Elizabeth would frequently run away from home and wander around Parkersburg. On several occasions, the police returned her to the home. Likewise, Robert ran away from home and was returned by the police. When Debra ran away from home, her parents did not know of her whereabouts for an entire weekend. The record reflects that the mother suspected that Debra was sexually abused during that weekend.

The Department also established that the lack of supervision had resulted in injury to the children. Debra was burned by the stove when she was cooking dinner while her mother was sleeping. When Robert climbed into the family's truck and knocked it out of gear, the truck rolled over Elizabeth, causing a head injury which required stitches. Elizabeth and Robert had been known to consume beer while being unsupervised for several hours. Elizabeth told a counselor, in explicit detail, that she had had sexual relations with a boy.

The Department described the family home as "deplorable."

The family had several cats and dogs, and feces were found throughout the house. The children slept on urine-stained mattresses. Elizabeth reported that a rat was found in her bed. All three children bathed in the same water. Generally, the house was unkept and had a foul odor.

There was some evidence that Elizabeth had been physically abused. She went to school on one occasion with a bloody nose and claimed that her father hit her. There was also some evidence of sexual abuse. During a family counseling session, Elizabeth kissed her father with an open mouth. At another session, she rubbed the upper part of his thigh in an inappropriate manner. On at least one occasion, Elizabeth washed her father's back while he was in the bathtub.

After hearing the foregoing evidence, the circuit court found that the Department failed to meet its burden of proof and dismissed the case. Furthermore, the Department's motion for a stay

of the proceeding pending appeal was denied. However, this Court granted a stay of the proceedings. Therefore, the children remain in the custody of their grandmother.

The issue on appeal concerns the circuit court's dismissal of this action in light of the foregoing evidence. In Syllabus Point 1 of West Virginia Department of Human Services v. Peggy F., 184 W. Va. 60, 399 S.E.2d 460 (1990), we set forth the Department's burden of proof in these matters:

"W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syllabus Point 1, In Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981)."

Consistent with our cases in other areas, we give appropriate deference to findings of the circuit court. In this regard, the circuit court has a superior sense of what actually transpired during an incident, by virtue of its ability to see and

hear the witnesses who have firsthand knowledge of the events. Appellate oversight is therefore deferential, and we should review the circuit court's findings of fact following an evidentiary hearing under the clearly erroneous standard. If the circuit court makes no findings or applies the wrong legal standard, however, no deference attaches to such an application. Of course, if the circuit court's findings of fact are not clearly erroneous and the correct legal standard is applied, the circuit court's ultimate ruling will be affirmed as a matter of law.

In this case, the circuit court entered a fairly cursory order, concluding as a matter of law that the State failed to sustain its burden of proof. A review of the circuit court's remarks at the time it made its ruling indicates that it found the petition "frivolous" and found there to be no evidence of abuse or neglect.

After reviewing the record, we find that the Department presented sufficient evidence to prove, by clear and convincing evidence, that Elizabeth, Debra, and Robert H. are neglected children as defined by W. Va. Code, 49-1-3(g) (1).

The unsanitary condition of the home, as described by the Department's witnesses, was similar to the conditions described in State v. Carl B., 171 W. Va. 774, 301 S.E.2d 864 (1983). In Carl B., the house was very filthy with dirty dishes, roaches, no sheets or blankets on the beds, and dog feces on the floor. We found the evidence sufficient to establish by clear and convincing evidence that Carl B. was neglected. Similarly, the Department in this case attempted to work with Benita K.H. and Robert L.H., but the condition of the home did not consistently improve. In Carl B., the additional factor of a lack of food at the end of the month existed, which was not in the record in the case at bar. However, in this case the additional factor of the lack of supervision of the children exists.

Far more significant than the filth, however, is the fact that at least one of these children is deeply emotionally disturbed and in desperate need of consistent, caring parenting.

All the children have run away from home for significant periods of time while being unsupervised. Obviously, the parents failed to provide the necessary supervision to keep these children

safely at home and off the streets of Parkersburg. We understand that Elizabeth's emotional problems may have contributed to her habit of running away. However, the lack of any meaningful supervision would have to be considered as a causative, as well as aggravating, factor with regard to emotional problems so severe that a young child would attempt suicide.

We, therefore, reverse the decision of the circuit court and remand this case for further proceedings. We specifically direct the circuit court to allow the parents the opportunity to move for an improvement period pursuant to W. Va. Code, 49-6-2(b) (1992). Syllabus Points 3 and 4 of In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991), state:

"3. 'Under W. Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W. Va. Code, 49-6D-3 (1984).' Syl. Pt. 3, State ex rel. West Virginia Dept. of Human Serv. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987).

"4. In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family

problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family."

For the foregoing reasons, the order of the Circuit Court of Wood County dismissing the petition is reversed and this case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.