

Starcher, J., Dissenting Opinion, Case No.23888 In Re: William John R., Dana R. & Sidney L., Jr.

No. 23888 - In Re: William John R., Dana R. and Sidney L., Jr.

Starcher, Justice, dissenting:

I understand the position taken by the majority in this case, but I believe we should require the circuit court to allow the improvement period to continue. I am concerned that we not too hastily sever the bonds between children and parents who, because of limited abilities, are less than ideal parents.

The majority opinion does not note that all of the parties to this case, including the guardian ad litem, asked this court on April 22, 1997 to postpone the hearing of this appeal, because they were still trying to reach an agreed settlement. (They had already requested and received one continuance, in January, 1997, for the same purpose.)

The parties' second request for a continuance included the following statements:

Although the children continue to reside in a specialized foster care home in Kanawha County, significant effort is being made by the Department to locate an appropriate foster home much closer to their mother. Currently a home study is being completed regarding a potential foster home in Wellsburg, West Virginia.

Counsel for the parties met with members of the Multi-Disciplinary Team (MDT) on March 7, 1997, and participated in discussions with Ms. W[.], her family, and representatives from the service agencies which assist both she and her children. Counsel for the Department attended the children's

Individualized Treatment Team (ITT) meeting on April 11, 1997, and all counsel have been invited to an MDT meeting to be held on May 2, 1997.

According to counsel for Evelyn Richards W[.], the respondent mother does not want to proceed with the oral arguments. Although Ms. W[.] clearly wants her children to be placed in a nearby foster home, she also appears to understand the careful attention which must be given to the placement. To the best of this writer's knowledge, visitation with the children in the Moundsville area is scheduled for the weekend of April 25, 1997 or May 2, 1997.

Additionally, it is possible that the foster parents may transport the children and remain in the Moundsville area during the visitation. This was discussed at the ITT meeting as a means to reduce the amount of disruption to the children's lives. There is some evidence that Dana R[.] (seven years old) exhibits regressive behaviors when her routine and expectations are altered.

A new family case plan is being developed through the MDT process. During the meeting on March 7, 1997, . . . Ms. W[.]'s therapist, noted the respondent mother's increased understanding and responsibility. The children's therapist . . . commented that during a recent visit with her children, Ms. W[.] had attempted to explain to them the court system and its role in their lives. Both Ms. W[.] and her husband, Harold "Frank" W[.] agreed to cooperate in all efforts which address the best interests of the children. Additionally, Ms. W[.] is being encouraged to continue her increased commitment to programs of community integration, socialization, and individual therapy.

This Court denied the request for a second continuance -- feeling, I believe, that we needed to hear exactly what was happening, and first-hand.

In its brief before this Court, the DHHR acknowledged that it was fair to say that equity favored allowing the improvement period to continue. I can't improve on the eloquence and sincerity of the statements made to this Court by the agency that has the most intimate knowledge of the situation:

As noted in the statement of facts, counsel for the parties hereto attempted to resolve this matter. At the time it appeared as if the circuit court's statements regarding the Department's "winning" and its clear frustration with the inability of the foster care system to accommodate Billy and Dana would result in a favorable decision for the Petitioner. The undersigned believed such a favorable decision would order the Department to find a more local specialized foster care home and develop a "pragmatic" family case plan. Although the oral argument on May 6, 1997, cast a different light upon the appeal and its outcome, the Department believes it would be ingenuous to ignore the expectations and efforts of Evelyn and her family.

My colleagues in this matter would no doubt agree that we learned more about the complexities and inadequacies of the system of care for special children than we perhaps wanted to know. The "specialness" of Billy and Dana and their need for appropriate nurturing, understanding, and patience was the primary and guiding factor. Evelyn also has very special needs and, sadly, she may not be blessed with the capacity to meet her children's needs.

Perhaps the guardian ad litem is correct in his analysis that "a reluctance to visit such a fate upon a woman who will never understand why it happened resulted in the granting of more opportunities for improvement than were warranted by the evidence." (Guardian's brief, p. 19). We are justifiably outraged and punitive when abuse and neglect is visited upon children out of malice or angry illness; however, the response is not so definitive when the parent suffers from mental retardation and "neurotic dysfunction." Children must be assured safety in either situation, but an intellectual capacity which will not allow for that protection does not always signify a lack of love. It is prudent as well as humane to exercise greater caution when the respondent parents are mentally challenged, if only because of the realization that only a matter of "grace" separates any of us from Evelyn, Billy, or Dana.

There have been months of intensive effort directed toward the location of an appropriate placement for Billy and Dana in a foster home closer to their

mother. Evelyn and her husband, Frank, as well as the children's maternal grandmother, have fully cooperated with any suggestions made by the MDT members. [T]he Department's caseworker, has invested innumerable hours in the quest for a home and in the formulation of the framework of a family case plan. The Department is steadfast in its belief that all children must be safe and protected from inadvertent as well as intentional harm, but the obvious complexities of this case are further complicated by the reality of Evelyn's love for her children. Hence, the greater willingness to allow her an opportunity for improvement.

Furthermore, there is an acute awareness that if Evelyn had lived in Kanawha County instead of Marshall County, her children would most likely have been placed close by and her compliance with a plan of improvement much more easily evaluated. The Department recognizes the Court's frustration with the length of time these children have been in care, but the Court is no more frustrated than the Department with the dearth of foster homes for children with special needs in Marshall and the surrounding counties. The circuit court noted its ascent from "denial" regarding the availability of a local home. . . . And although it is easy to attribute this lack to some insufficiency on the Department's part, the problem is systemic. Consequently, the issue becomes one of fairness -- the respondent's mother's essential argument.

It is out of this sense of fairness that the Department remains committed to finding a more local placement for Billy or Dana. Not only for Evelyn and the meaningfulness of an improvement period, but because the record is not consistent regarding the effects upon the children of separation from her. Dr. H[.] reported "significant bonding if not the best of bonding," and he testified that the children should have continued contact with their mother because of the amount of bonding which exists between them. . . .

No one is more aware than the Department of the length of time Billy and Dana have been in their current placement. However, the record is clear that the Department has, from the beginning, attempted to comply with the orders of the circuit court. Intimate contact with this case reinforces the knowledge that assessing blame is futile and misplaced. It is imperative that children in the Department's custody be assured safety and nurturing care; therefore, not everyone can or should be a foster parent. And to successfully parent a special needs child the foster parents must be willing to undergo training and education as well as facilitate the necessary medical or mental health care and attention.

Because Billy and Dana have been out of their mother's care for over three years and out of her geographic locale for much of that time, it is difficult to know exactly what the best interests of the children are. Similarly, although the professionals seem to agree that Evelyn cannot parent independently, that too is an unknown. During the pendency of this appeal the Department has had indications that Evelyn is not wholly dissatisfied with the placement of Billy and Dana into foster care. This is understandable in light of her limitations and may reflect Evelyn's recognition of those limitations. However, Evelyn and her family consistently express a desire to see Billy and Dana and have gone to extraordinary lengths to do so.

This Court in its holdings and in its comments from the bench has recognized that if in the best interests of the children, visitation with the natural parents may continue even after the termination of parental rights. *In re Christina L.*, 460 S.E.2d 692 (W.Va. 1995). However, just as my colleagues and I learned much about the placement of special children, the undersigned was enlightened as to the sheer logistics of visitation between parents and children at distant points. Clearly, this Court is committed to maintaining visitation when there is significant bonding; however, it is imperative to recognize the realities of visitation - transportation, expense, time, and a setting within which to visit.

There is ample legal and factual evidence of record to support an affirmation of the circuit court's order of June 25, 1996. There are also equitable and good faith reasons to restore Evelyn R.'s improvement period, or in the alternative, provide for meaningful visitation by the placement of Billy and Dana in a more local but abundantly appropriate foster home.

Because I agree with this reading of the fairness issue, I would restore the improvement period.