No. 24580 -- State v. Julie G. and John F.

Workman, Chief Justice, dissenting:

I take issue with the majority's conclusion that evidence relating to a pre-adjudicatory improvement period is only "proper"(whatever that means)[1] for a circuit court's consideration if it relates back to conditions that existed at the time of the filing of the petition and that were actually alleged in the petition. The majority takes a far too narrow and technocratical view of what evidence can properly be considered by the circuit court in an abuse and neglect proceeding. While the source of the majority's reasoning is clearly West Virginia Code § 49-6-2(c) (1995), that same statute also provides that the rules of evidence are applicable to abuse and neglect proceedings. Thus, any determination as to the admissibility of evidence in an abuse and neglect petition is governed by Rule 401 of the West Virginia Rules of Evidence.[2] Clearly, even the statutory

[1]The meaning of the term "proper" in this context is unclear, but I take it to mean admissible. Evidence is admissible when it is authentic, relevant and competent. See 1 Franklin D. Cleckley, Handbook of Evidence for West Virginia Lawyers § 1-5(B) at 22 (3rd ed. 1994).

[2]West Virginia Rule of Evidence 401 provides that "'Relevant evidence' means evidence having any tendency to make the existence of any fact that

language at issue which states that the circuit court's "findings must be based upon conditions existing at the time of the filing of the petition" does not preclude a circuit court's consideration of other relevant evidence concerning a parent's performance during a court-ordered improvement period, especially in light of the clear language and substantive tenor of abuse and neglect law the last ten years.

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is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

While I am not suggesting that evidence concerning matters not alleged in the original petition could alone support an adjudication of abuse and neglect absent an amendment, such evidence is clearly relevant insofar as it would "tend[] to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." W. Va. R. Evid. 401. Moreover, as we recognized in Teter v. Old Colony Co., 190 W. Va. 711, 441 S.E.2d 728 (1994), "it is clear that a legislative enactment which is substantially contrary to provisions in our Rules of Evidence would be invalid." Id. at 726, 441 S.E.2d at 743. Thus, if a conflict arises between a statute and a rule relating to evidence, then the rule of evidence prevails. See id. Furthermore, whenever a child appears in court, he is a ward of that court. W. Va. Code § 49-5-4 (1996); Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992). Courts are thus statutorily reposed with a strong obligation to oversee and protect each child who comes before them. As Justices Cleckley and Albright stated in West Virginia Department of Health and Human Resources ex. rel. Wright v. Brenda C., 197 W. Va. 468, 475 S.E.2d 560 (1996), "[a]bove all else, child abuse and neglect proceedings relate to the rights

of an infant. Id. at 477, 475 S.E.2d at 569. We have also recognized on more than one occasion that a circuit court should have before it all relevant evidence, which would clearly include evidence adduced after the petition's filing concerning any court-ordered improvement period. See In re Carlita B., 185 W. Va. 613, 626, 408 S.E.2d 365, 378 (1991) (recognizing that court's determination at the conclusion of the improvement period in an abuse/neglect case involves a decision regarding "whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child") (emphasis supplied). Moreover, this approach is consistent with the whole tenor of the case law as enunciated by this Court over the last ten years. See Carlita B., 185 W. Va. at 625, 408 S.E.2d at 377. Otherwise, we are asking judges to be like ostriches with their heads in the sand.[3]

[3]This ostrich-like stance is reflected by the dramatic inconsistency in the circuit court's finding in its order of November 7, 1996, "that no substantial improvement in the said respondent's [Julie G.'s] circumstances has occurred under the pre-adjudicatory improvement period" as the predicate to its termination of the improvement period, and the court's almost simultaneous finding during the January 17, 1997, adjudicatory proceeding that Emily G. was not an abused or neglected child.

The majority opinion faults the circuit court for its failure to consider all the relevant evidence, while at the same time holding that such evidence is not "proper" unless it relates back to the allegations set forth in the petition. Further, the majority (which should be functioning as an appellate body, not a fact-finder) actually makes its own determination of abuse and neglect sufficient to terminate the parental rights of Julie G[4] essentially on the basis of a cold and dirty trailer and on the mother's inability to manage her money well. Despite the fact that I have historically been rather rabid about the protection of abused and neglected children, I hope we have not reached the Orwellian day where parental rights are terminated for dirty housekeeping and lack of judgment with money. These problems can be corrected with educational intervention and homemaker services. But evidence of a truly significant parental deficit arose when it became clear that Julie G. was unwilling or unable to comport with the clear objectives of her improvement period by affording her child protection from a man with a record of violence and child molestation.

[4]The majority remands for further proceedings, but does not specify

what sort of proceedings remain under this holding.

The primary purpose of the statutory requirement of West Virginia Code § 49-6-2(c) that the court's "findings must be based upon conditions existing at the time of the filing of the petition" is to assure that one whose parental rights are on the line has adequate notice of the allegations and to provide him/her with an adequate opportunity to meet those charges. Once a parent, fully represented by legal counsel, is placed on an improvement period by court order, they are clearly on notice with respect to what is expected of them. Their level of compliance is clearly relevant, at a minimum to circumstantially show the degree of willingness to remedy the circumstances leading to the abuse and neglect changes.

Lastly, this case points out that it is absolutely incumbent upon petitioners and guardian ad litems in abuse and neglect proceedings to formally amend the petition when additional facts evidencing abuse or neglect which are substantial in nature arise subsequent to the filing of the initial petition. The instant case should have been remanded to the circuit court with directions that it consider evidence relating to the mother's compliance (or lack thereof) with the improvement period, and that

the court make competent findings of fact and conclusions of law with regard thereto.

For the foregoing reasons, I respectfully dissent.