

No. 25427: In re: Samanatha M.

Workman, J., concurring, in part, and dissenting, in part:

I am disheartened by this case. It is fairly amazing that there was a prosecuting attorney charged with the responsibility of representing the Department of Health and Human Resources (whose duty it is to protect children from abuse and neglect) and a guardian ad litem, a lawyer whose function it is to protect the rights of the child. Yet even after the father is alleged to have acknowledged that he has a problem with respect to being sexually attracted to girls age three to six years of age (and, by the way, his daughter is approaching that age group), and even though the father is alleged to have acknowledged that his daughter would be at risk of sexual abuse in his custody, no one (repeat, no one!!) moves to amend the petition or file a new petition to have this issue addressed. Did the DHHR, the prosecuting attorney, and the guardian ad litem feel their job was to advocate for the father or one of the grandparents? Their job was to protect the child! Do they all just feel you have to wait and let the sexual abuse happen, and then deal with it? Why didn't someone make a motion to amend, or even file a new petition to get this issue addressed? For instance, Rule 19 of the Rules of Procedure for Child Abuse and Neglect provides that "[t]he court may allow the petition to be amended at any time until the final adjudicatory hearing begins, provided that an adverse party is granted sufficient time to respond to the amendment. After the final adjudicatory hearing begins, a petition may be amended if the amendment does not prejudice the adverse party." See

Syl. Pt. 4, State v. Julie G., 201 W. Va. 264, 500 S.E.2d 877 (1997) (stating that “intent underlying Rule 19 [is] to permit liberal amendment of abuse/neglect petitions”).

The judge, to his credit, tried to establish some protection for the child by removing her from the father’s physical custody and giving him supervised visitation rights. Unfortunately, since the lawyers who should have been protecting Samantha sat on their duffs on this issue, there was a better way for the judge to have handled it. Although certainly the court was correct in its determination that, once the child was adjudicated neglected or abused, as she was, that the court has a number of dispositional alternatives, a better record was needed to support the decision to place the child with a grandparent and give the father supervised visitation only. See W. Va. Code § 49-6-5 (1998) (concerning types of dispositional alternatives). In an attempt to protect Samantha, the court attempted to craft a plan that would not deprive the father of his parental rights, but would require supervision (by the paternal grandmother) while he was visiting with the child. The better course, upon receipt of information concerning the father’s sexual propensities toward children, in the absence of the child’s advocates doing anything, was to have either (1) directed the DHHR to make a full inquiry and ordered a psychological examination on the father; and (2) invited the amendment; or (3) given the father notice that a hearing would be

set on these allegations, while at the same time requiring that the allegations be placed in

writing so that the father would be fully informed of them.

After eighteen and one-half years as a judge, I continue to be amazed at the seeming ineptitude of the social services and legal systems on frequent occasions to truly protect children from abuse and neglect. I previously expressed this concern in State ex rel. Diva P. v. Kaufman, 200 W. Va. 555, 490 S.E.2d 642 (1997) (Workman, J., concurring) where I stated that

I have seen the department fail to protect children and fail to advocate vociferously for them on many occasions. In addition, although guardians ad litem are appointed to represent children, most of them until relatively recently, did not do much aggressive advocacy either, frequently not even appearing on appeal on behalf of the children.

Id. at 569, 490 S.E.2d at 656.

If a correctional officer indicated that he had a propensity to sexually assault or abuse inmates, or otherwise to mistreat them, and that inmates in his charge might be at risk, the system would jump pronto to see to it that persons confined in our jails and penitentiaries are not mistreated by such an individual. Yet the DHHR in its brief on appeal expresses great concern for the constitutional due process rights of the father and concern for his legal right to custody of his daughter. The father had a lawyer who more than adequately took care to protect his rights. But who was there to protect Samantha's rights? It would be interesting to learn whether the DHHR has done

anything since the proceedings below to seek to have her protected, or at least to conduct further inquiry into the potential danger she may be exposed.

Thus, I suggest that the majority erred in not affirmatively directing the lower court to make inquiry into this matter on remand, and to require that the information gained by the Court Appointed Special Advocate concerning the risk to the child be the subject of a formal petition and a hearing thereon.* Our statutes are clear that whenever a child appears in court, that child is a ward of that court. That court has both a right and a responsibility to see to it that the child is protected. See Julie G., 201 W. Va. at 776, 500 S.E.2d at 889 (Workman, J., dissenting) (“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.”).

Judge Hill tried to fulfill this duty, but got no help from the DHHR, the prosecuting attorney, or the child’s guardian ad litem. The majority knocks itself out protecting the father’s rights without recognizing this Court’s duty to also protect the child.

*Although the majority points out that such inquiry may be done on remand, they are rather blasé with respect to whether this should occur.