IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1999 Term

No. 25894

FILED
December 13, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
December 15, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WILLIAM D. A., SR.,
Petitioner Below, Appellee

v.

SHAWNA RENEE A. AND STEPHEN EVERETT A.,
Respondents Below, Appellees

RENEE A. C.,
Intervenor Below, Appellant

Appeal from the Circuit Court of Logan County
Honorable Roger L. Perry, Judge
Case No. 96-A-22-P

AFFIRMED

Submitted: September 22, 1999
Filed: December 13, 1999

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Child Place

The Opinion of the Court was delivered PER CURIAM.
JUSTICE SCOTT did not participate in the decision in this case.
JUDGE FRED RISOVICH, II, sitting by temporary assignment.
CHIEF JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.
JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

SYLLABUS

"The term 'duress,' as used in *W. Va. Code*, 48-4-1a [1965], means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child. Mere 'duress of circumstance' does not constitute duress under *W. Va. Code*, 48-4-1a [1965]." Syllabus Point 2, *Wooten v. Wallace*, 177 W. Va. 159, 351 S.E.2d 72 (1987)

Per Curiam:

In this appeal, Renee A. C., the mother of two infant children, Shawna Renee A. and Stephen Everett A., claims that a consent to adoption signed by her was obtained through the duress of the children's paternal grandfather, and that the Circuit Court of Logan County erred in recognizing the consent to adoption and in allowing the children's paternal grandfather, to adopt the children.

I.
FACTS

During the fall of 1995, differences arose between the appellant, Renee A. C., and her husband, William D. A., Jr., and they concluded that they wished to end their marriage. As a consequence, a divorce action was instituted in the Circuit Court of Logan County.

In the course of the divorce action, the appellant and her husband entered into a separation agreement which provided that the appellant was to have the care and custody of the parties' two infant children, Shawna Renee A. and Stephen Everett A., and that the appellant's husband would pay $500 per month child support. The provisions of the separation agreement relating to child custody and child support were subsequently adopted by the circuit court and were incorporated into the order granting the parties a divorce.

In the present proceeding, the appellant alleges that her former husband never made the child support payments due and that as a result of a series of disasters she became impoverished. Specifically, she claims that on May 15, 1996, a flood destroyed the premises occupied by her tanning bed business, her only source of income, and that subsequently she was involved in a disabling automobile accident. As a consequence of her improverishment, her utilities were cut off, and she was unable to buy groceries or other necessities for herself and her children.

The appellant further alleges that in the desperation growing out of her bad luck, she turned to her former father-in-law, William D. A., Sr., who, she claims, had been a father figure to her. After the flood, she entrusted her tanning beds to him for safekeeping, and when she was having difficulty in providing for her children, she allowed William D. A., Sr., to take the children on a beach vacation to Florida.

Following the return of the children from Florida, William D. A., Sr. proposed to adopt the children and later asked the appellant to sign a "Consent to Adoption." After some time, the appellant, on July 26, 1996, signed the document.

After the appellant signed the consent to adoption, William D. A., Sr. instituted an adoption proceeding in the Circuit Court of Logan County. In the course of this proceeding, in late October 1996, approximately three months after the "Consent to

Adoption" was executed, the appellant moved to intervene and took the position that she had not voluntarily signed the "Consent to Adoption" and it had been obtained by duress, fraud and other unconscionable conduct.

The Circuit Court of Logan County allowed the intervention and conducted hearings on January 30, 1998 and March 6, 1998. At the conclusion of the hearings, the judge, on August 3, 1998, entered an order which included extensive findings of fact and conclusions of law. The judge specifically found that William D. A., Sr., "did not threaten, coerce, trick, or commit any unconscionable act to induce Ida Renee C. . . into executing the consent form." The court noted that the appellant testified under oath that she understood all the words contained in the consent form and that all the statements contained in the document were true at the time she signed it. The judge also found that the minor children who had been living with William D. A., Sr., and his wife, were enrolled in school and were doing well, both academically and in terms of attendance, and that William D. A., Sr., and his wife has provided for the educational, social and health needs of both of the children. The judge concluded that the appellant had given her written consent to the adoption of the children, as required by West Virginia law and:

> That it would be in the best interests of both of the minor children to approve the requests contained in the prayer of the petition and allow the Petitioner to adopt the children in order to provide closure to this matter and to provide stability in the lives of the children.

The court went on to state that William D. A., Sr. was credible in describing how he and his wife had attempted to stay uninvolved in the domestic problems of their son and the appellant, and that the appellant's level of credibility was rather low, and that the appellant was unable to recall the details of the events which she alleged had constituted the duress, fraud, and unconscionable conduct resulting in the "Consent to Adoption." The court noted that the appellant likely suffered from emotional difficulties, but that there was no evidence that these difficulties in any way affected the voluntariness of her consent. The court, therefore, authorized the adoption of the children by William D. A., Sr. It is from that ruling that the appellant now appeals.

II.
BURDEN OF PROOF

This Court has indicated that findings and conclusions of a circuit court of the type involved in this case, should be reviewed under a two-prong standard. The underlying factual findings are reviewed under a clearly erroneous standard, and questions of law are subject to *de novo* review. *Phillips v. Fox*, 194 W. Va. 263, 460 S.E.2d 264 (1995). Further, in Syllabus Point 1 of *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996), the Court indicated that a finding is:

> [C]learly 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.

III.
DISCUSSION

It appears that the principal question which confronted the trial judge in this case was whether the "Consent to Adoption" executed by the appellant obtained through duress on the part of William D. A., Sr. A secondary question is whether William D. A., Sr., used fraud or other unconscionable conduct to procure the "Consent to Adoption."

In *Wooten v. Wallace*, 177 W. Va. 159, 351 S.E.2d 72 (1987), the Court examined the type of conduct which would constitute duress sufficient to overturn a consent to adoption. We concluded that something more than difficulty inherent in a natural parent's personal circumstances, or "duress of circumstance," had to be present for these to constitute duress sufficient to justify the overturning of a consent to adoption. This conclusion was summarized in Syllabus Point 2 of *Wooten v. Wallace, id.*, as follows:

> The term "duress," as used in *W. Va. Code*, 48-4-1a [1965], means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child. Mere "duress of circumstance" does not constitute duress under *W. Va. Code*, 48-4-1a [1965].[1]

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[1]West Virginia's adoption law has been amended since the decision in *Wooten v. Wallace*. The new law provides that an adoption may be set aside upon duress or fraud being established by clear and convincing evidence, but it in no way alters the definition of duress (continued...)

In *Wooten v. Wallace, id.*, the Court indicated that there had to be an act on the part of the person adopting or some other third party that was so egregious as to be unconscionable for a finding of duress sufficient to justify the overturning of a consent. We noted that: "It is difficult to conceive of circumstances in which a natural parent would place a child up for adoption unless the parent's personal circumstances were in some way incompatible with taking care of the child." *Wooten v. Wallace, id.*, at 161, 351 S.E.2d at 74. We also noted if we allowed difficulty inherent in a natural parent's circumstances to constitute duress, it would be difficult to see how any adoption based on consent could ever stand. In the later case of *Baby Boy R. v. Vellas*, 182 W. Va. 182, 386 S.E.2d 839 (1989), the Court stressed that duress in the adoption context:

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[1](...continued)
or fraud. The relevant portion of the new statute states:

> (a) Parental consent or relinquishment, whether given by an adult or minor, may be revoked only if:
>
> * * *
>
> (2) The person who executed the consent or relinquishment proves by clear and convincing evidence, in an action filed either within six months of the date of the execution of the consent or relinquishment or prior to the date an adoption order is final, whichever date is later, that the consent or relinquishment was obtained by fraud or duress.

W. Va. Code 48-4-5(a)(2).

> [M]eans a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child.

Baby Boy R. v. Vellas, id. at 185, 386 S.E.2d at 842.

In a number of prior cases, this Court has also discussed what constitutes fraud or duress. In Syllabus Point 3 of *Cordial v. Ernst & Young*, 199 W. Va. 119, 483 S.E.2d 248 (1996), the Court indicated that the essential elements of fraud are:

> (1) [T]hat the act claimed to be fraudulent was the act of the defendant or induced by him;
> (2) [T]hat it was material and false; that the plaintiff relief upon it and was justified under the circumstances in relying upon it; and
> (3) [T]hat he was damaged because he relied upon it.

In the present case, a substantial portion of what the appellant asserts induced her to sign the "Consent to Adoption" consisted of evidence that she was poverty stricken. She did claim that her former husband had failed to make child support payments, but there is no indication that his motivation in failing to make the payments was to coerce her into signing the "Consent to Adoption."

Of greater significance is a claim that William D. A., Sr., held her tanning beds "hostage" to coerce her into entering into the "Consent to Adoption." As has previously been stated, William D. A., Sr., clearly did take possession of the tanning beds, after the

appellant's tanning salon was destroyed by flood waters. It appears that William D. A., Sr., was storing the tanning beds as an accommodation to the appellant. The appellant claimed that William D. A., Sr., issued ultimatums and demands which led to her signing the "Consent to Adoption" to which she was required to agree before he would release her tanning beds. William D. A., Sr., specifically denied that he had made any ultimatums or demands relating to the tanning beds or that he held them "hostage." Further, there is evidence that the appellant and William D. A., Sr. did not discuss the tanning bed business after October 25, 1995, some two months prior to July 26, 1996, when she executed the "Consent to Adoption."

The records available to the Court in this case show that the "Consent for Adoption" was prepared and provided to the appellant sometime before its execution on July 26, 1988. The appellant had an opportunity to examine and consider it out of the presence of William D. A., Sr. She also had an opportunity to obtain independent advice concerning it. The documents filed indicate that the appellant, after receiving the "Consent to Adoption," and after having an opportunity to examine it, carried the consent form to William D. A., Sr.'s work office in Danville, West Virginia, at which time William D. A., Sr. procured a notary to acknowledge the appellant's signature. The appellant executed the consent in the presence of the notary and turned it over to William D. A., Sr.

After reviewing the record before the Court, we cannot conclude that the trial court committed reversible error in concluding that William D. A., Sr. did not procure the consent to adoption through duress. Further, although the appellant took the position during a portion of the time prior to the execution of the "Consent to Adoption" trusted in William D. A., Sr. and held him in high esteem, there was a factual basis for the court to conclude that she executed the "Consent to Adoption" through her own volition and that William D. A., Sr. did not make material and false representations upon which the appellant relied in executing the "Consent to Adoption" suggesting that he did not commit fraud and indicating that the trial court did not err in refusing to hold that the "Consent to Adoption" was procured through fraud or other unconscionable conduct.

The judgment of the Circuit Court of Logan County is, therefore, affirmed.

Affirmed.