No. 30411 - *Rebecca Lynn C. v. Michael Joseph B.*

Albright, Justice, dissenting:

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I dissent because the first sentence of syllabus point three is an unnecessary, inappropriate and heretofore incorrect statement of the law. The first sentence of syllabus point three, as propounded by Chief Justice Davis, reads as follows:

> A final order terminating parental rights completely severs the parent-child relationship, and deprives the court of the authority to impose a post-termination award of child support on the parent whose rights have been terminated.

Because the majority makes this new law without a proper evidentiary basis, the necessary result is to inject confusion and a lack of clarity into this state's laws governing paternity, abuse and neglect, inheritance rights, parental responsibility, and adoption.

The underlying action involved a child support order entered on June 7, 1990, as a result of a paternity action in which it was determined that the defendant was the biological father of the child in question. The initial order of support required the father to pay child support in the amount of $300 per month, from June 1, 1988, until the child reached the age of majority on May 27, 2006, together with one-half of all future medical expenses, as well as all of the previously incurred birth expenses. By order entered November 14, 1990, the original support order was modified. After finding the modification "fair and reasonable, and

in the best interest of the plaintiff" and the child, the trial court entered a judgment for $35,000, in lieu of the monthly child support payments and in lieu of future medical expenses. This judgment was payable, without interest, in four installments with the final installment due on March 1, 1992. The order entering the judgment contains no explanation of why the child support formula then in effect was to be disregarded other than the bare assertion that the order was in the supposed "best interests" of the child.

That order of November 14, 1990, further purported to find that the father had by a letter agreement "relinquished any and all custodial and parental rights to the child" and recited further that the said order "may be utilized... in any future adoption proceedings as a complete relinquishment by the natural father . . . of any parental rights . . . . " and that any such adoption proceedings may occur without future notice to the father.[1] A review of the November 14, 1990, order discloses that neither the natural father or mother, nor any guardian ad litem or child advocate was present before the court when the letter agreement was approved by the court. Apparently, the father's lawyer and the judge were the only individuals present when the final order was approved for entry.

That order of November 14, 1990, and the "letter agreement" upon which the order is based, are deficient for a number of reasons:

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[1]Although it appears that a possible adoption was contemplated at the time of the entry of the final order, no adoption ever occurred.

1. The applicable statute relating to the conduct of paternity proceedings at the time, expressly required that the children's advocate for the county "shall represent the state of West Virginia and shall litigate the action in the best interests of the child . . ." W. Va. Code § 48A-6-5 (1989) (repealed by 2001 W.Va. Acts, ch. 91). The absence of the child advocate from the negotiations and from the presentation of the order suggests that the interests of the State of West Virginia were not represented or considered and the best interests of the child received short shrift in the hearing and entry of the order.

2. The sole remedy authorized by the paternity statute, once paternity is established, was the fixing of an order of support. *See* W. Va. Code § 48A-6-4 (1989) (repealed by 2001 W.Va. Acts, ch. 91). The identification of conditions for a possible future adoption of the child simply was not and is not a part of the paternity proceedings.

3. The letter agreement expressing the natural father's intent to relinquish and terminate his parental rights was not acknowledged, although West Virginia Code § 49-6-7 (1977) (Repl. Vol. 2001) has provided for the acknowledgment of written voluntary terminations since at least 1977.

4. The letter agreement expressing the natural father's willingness to consent to adoption was not, as required by statute, "acknowledged as in the case of deeds," although the agreement was filed with the trial court below prior to when the court entertained the motion for modification of its prior support order. *See* W. Va. Code § 48-4-3 (1985).[2]

[2]The current statute that sets forth the requirements for a consent to adoption is located at West Virginia Code § 48-22-303 (2001); this statute sets forth, in lengthy detail, what must be contained in a document prepared for the purpose of expressing consent to or relinquishment for adoption of a minor child.

Even if it might be properly said that the natural father "relinquished" his rights and that those rights were "terminated," it simply is not and never has been the law in West Virginia that a relinquishment or termination of parental *rights* completely severs the parent/child relationship. Despite the impressive string cite of authority from other jurisdictions that the majority relies upon to support this proposition, numerous laws arising under both statutes and the common law prevent such a holding from being valid in this state.

One area of the law that demonstrates the improper reach of the majority's new holding concerns the specific recognition this Court has accorded to post-termination visitation rights. Based on our clear recognition of the possibility of post-termination visitation rights, which is grounded on a child's right "to continued association with those with whom he or she shares an emotional bond,"[3] the new syllabus point squarely conflicts with our

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[3]While I recognize that the issue of post-termination visitation is inapplicable to this case based on the lack of any relationship between the child and her father, the fact that our law expressly recognizes and encourages continuity of the parent-child relationship where evidence of an emotional bond exists demonstrates the fallacy of the new point of law in the majority opinion which indicates that the parent-child relationship is necessarily extinguished as a matter of law concurrent with the termination of parental rights. This is simply not the case. While certain financial obligations may be terminated, the parent-child relationship is not *per se* eradicated upon the entry of a termination of rights order.

We note additionally that the Legislature has similarly seen fit to recognize the need for a child to have "continuity of care and caretakers" and has expressly authorized the trial courts in disposing of abuse and/or neglect matters to consider this need. W.Va. Code § 49-6-5(a)(6) (1998) (Repl. Vol. 2001). *See* Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995) (holding that trial courts have discretion to grant visitation to parents despite termination of rights based on abuse or neglect in appropriate cases);

(continued...)

established precedent in this area. *In re Christina L.*, 194 W.Va. 446, 455, n.9, 460 S.E.2d 692, 701 n. 9 (1995); *see Honnaker v. Burnside*, 182 W.Va. 448, 388 S.E.2d 322 (1989).

Even when parental rights are terminated in abuse and neglect cases, our law expressly permits applications by the child or the child's parents for the modification of dispositional orders by reason of changed circumstances at any time up to the date of the entry of an order of adoption. *See* W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2001). Similarly, a parent whose rights have been terminated, but whose child has not yet been adopted may participate in the formulation and execution of the child's case plans.

Further evidence of the majority's erroneous conclusion that a "complete[] sever[ance] [of] the parent-child relationship" results upon the entry of a termination of rights order is demonstrated by looking to the issue of inheritance rights. Under the laws of descent and distribution, a natural child has the right to inherit from his biological parents. By law, this right is extinguished only upon the entry of an order of adoption. *See* W.Va. Code § 48-22-703 (2001).[4] Thus, until an adoption takes place, a child whose parental rights have been terminated would still be entitled to inherit from or through that parent. However, the

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[3](...continued)
W.Va.R.Proc.Abuse & Neglect 15 (recognizing that orders terminating parental rights may provide for continued visitation between the parent and child).

[4]This result obtains out of the legislative objective of treating adopted children for purposes of inheritance laws on par with natural children. *See Wheeling Dollar Sav. & Trust Co. v. Hanes*, 160 W.Va. 711, 716, 237 S.E.2d 499, 502 (1977).

majority's new syllabus point purportedly requires that our inheritance laws would not be operable in instances following a termination but before an adoption takes place. Thus, if we assume the death of a well-heeled grandparent and probate of a will providing for distribution to the deceased grandparent's grandchildren at some time after the entry of an order terminating parental rights, but before entry of a final order of adoption, the majority, through its ill-conceived syllabus point, would void that child's rights of inheritance by terminating *in toto* the parent/child relationship. That the majority is just plain wrong in its reach to terminate all rights in one fell swoop is demonstrated through this clear conflict with our adoption laws. Until an order of adoption is entered, the child retains the clear right of inheritance from and through its natural parents.

Likewise, we have recognized that the execution of a consent to adoption (in this case for adoption by a custodial parent and that parent's current spouse) "is alone insufficient to terminate a noncustodial parent's decretal obligation to make child support payments." Syl. Pt. 1, *Kimble v. Kimble,* 176 W. Va. 45, 341 S. E.2d 420 (1986); *Stevens v. Stevens,* 186 W. Va. 259, 412 S. E.2d 257 (1991). This holding further demonstrates the significance of an actual adoption on the issue of terminating parental rights. The reality is that until adoption is in fact ordered, the relationship of parent and child continues, even if a parent's *rights* regarding that child have been modified or attenuated by law.

In its rush to resolve this matter based on procedural deficiencies, the majority incorrectly adopts the position of Appellee as that of the trial court. While the trial court disposed of Appellant's request for relief essentially on "benefit of the bargain"[5] grounds, the majority attributes lack of continuing jurisdiction as the ground relied upon by the trial court to deny her relief. Instead, the lower court based its decision on the fact that it had approved Appellee's voluntary relinquishment of his parental rights after finding "that the agreement was in her [Appellant's] and her child's best interests."

Without giving any real discussion to the issue of whether the relinquishment of parental rights was in the child's best interests,[6] the majority overlooks the primary argument raised by Appellant: Public policy dictates that a court approved revocation of parental rights with an accompanying lump sum payment of child support should not be viewed as barring an award of additional support when the child is later diagnosed with a previously unknown and uncontemplated medical condition that will require continuing long-term

[5]The trial court opined that Appellant "wanted the Respondent [Appellee] to be out of her and her daughter's lives forever" and "[t]his is exactly what she bargained for and got."

[6]The majority strains logic to suggest that best interests of the child were repeatedly considered by three different judges. While the trial judge did make a finding on best interests, no evidentiary hearing was held on this issue. To suggest, as does the majority, that the finding of the initial judge combined with the subsequent review by a family law master and a circuit court's review of the family law master's recommendation is quantitatively significant is specious. This is especially true upon consideration of the limited scope of review by the second and third judges: the issue was necessarily limited to whether the final order approving the revocation of parental rights should be set aside and was not a specific review of the "best interests" finding.

treatment.[7] Closely linked with this argument is the lack of any representation of the child's interests during the paternity and revocation proceedings.[8] The ultimate principle at stake here is that, while parents of a child may bargain and formulate agreements allocating their respective duties of support for that child in a paternity proceeding, the right to support belongs to the child and is to be protected by the state–in this case by the child advocate. Where, as is the case here, that protection was circumvented and the child and the state were simply not represented, the parents' bargain is not binding on the child or the state.

Through its resolution of the issues raised on appeal, the majority completely skirts the lack of representation issue. Despite the clear language of the paternity statute in effect at the time of the proceedings, the children's advocate was not involved in the matter below. The provisions of West Virginia Code § 48A-6-5(a) (1989)[9] required that:

> The children's advocate of the county where the action under this section is brought shall represent the state of West Virginia and shall litigate the action in the best interests of the child although the action is commenced in the name of a plaintiff listed in section one [§ 48A-6-1] of this article.

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[7]By recognizing this policy argument, I am not intimating that the law should proceed in the direction suggested by Appellant.

[8]I also question the trial court's jurisdiction to entertain and rule upon a revocation of parental rights agreement in a proceeding that was instituted solely under the paternity statutes. *See* W.Va. Code § 48A-6-1 to -6 (1989) (repealed by 2001 W.Va. Acts, ch. 91).

[9]This provision, along with the article it appears in, was repealed effective March 22, 2001. *See* 2001 W.Va. Acts ch. 91.

In response to the argument raised by Appellant as to the child's lack of representation, Appellee contends that "[c]urrently and at the time the Final Order was entered [November 14, 1990], the law did not require the appointment of a guardian at litem."[10] This is simply an inaccurate statement of the law. As discussed above, the law did require representation of the child's best interests in the form of the child advocate in all paternity actions. *See* W.Va. Code § 48A-6-5. Through this Court's decision in *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 387 S.E.2d 866 (1989), we clearly had recognized the need for representation of a child's interests in a paternity proceeding. That recognition was formally adopted as a point of law by this Court in syllabus point three of *Cleo A.E. v. Rickie Gene E.*, 190 W.Va. 543, 438 S.E.2d 886 (1993). *See* note 10 *supra*.

Another ground of appeal raised by Appellant is the lack of an evidentiary hearing on the issue of whether approval of the letter agreement revoking Appellee's parental

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[10]For this proposition, Appellee cites *Kessel v. Leavitt*, 204 W.Va. 95, 125-26, n. 31, 511 S.E.2d 720, 750-51, n.31 (1998). While the law stated in that note pertains to the discretion inherent to a trial court to appoint a guardian ad litem, it specifically pertains to custody matters and *not* paternity matters. The appointment of a guardian ad litem in paternity actions was firmly established by 1993 with the holding in syllabus point three of *Cleo A.E. v. Rickie Gene E.*, 190 W.Va. 543, 438 S.E.2d 886 (1993) that: "A child has a right to an establishment of paternity and a child support obligation, and a right to independent representation on matters affecting his or her substantial rights and interests." Arguably, that right was recognized in 1989 by this Court in *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 387 S.E.2d 866 (1989): "The appointment of a guardian *ad litem* is necessary to protect the child's interests with respect to paternity." *Id.* at 406, 387 S.E.2d at 873. In *Michael K.T.*, we recognized the state's obligation to provide children who were the subjects of paternity proceedings with counsel through the former child advocacy office. *See* 182 W.Va. at 406, 387 S.E.2d at 872 (citing W.Va. Code § 48A-6-5).

rights was in the best interests of the child. We have since recognized in *Runner v. Howell*, 205 W.Va. 359, 518 S.E.2d 363 (1999), that "[s]ome evidence must be taken to determine the child's best interests when the question of termination of parental rights is posited, especially in cases where it appears the primary reason for the termination is to cease the payment of child support." *Id.* at 364, 518 S.E.2d at 368. From the record, it appears that the trial court's ruling that the letter agreement was in the best interests of the child was nothing more than a perfunctory finding as it is not supported by any specific factual evidence that would support such a conclusion.[11]

Because this Court cannot declare the effects of a termination of parental rights to be more expansive than that declared by the Legislature, I vigorously dissent to the majority's incorrect conclusion that the termination of parental rights[12] coterminously extinguishes the entirety of the parent-child relationship and the attendant rights flowing therefrom. Rather than denying relief to Appellant, I would have remanded this case with directions to review the adequacy of the child support ordered through the order entered on November 14, 1990, in light of the intervening financial situation of the parents and the current

[11]There is no suggestion that Appellee would not have continued to provide for the child under the established child support of $300 a month that was in effect at the time of the approval of the letter agreement. Appellant represents that upon calculation, the $35,000 lump sum payment of child support amounts to approximately $102 per month over the course of the child's eighteen years.

[12]In instances of adoption, in contrast to termination of parental rights, there is no question that all parental rights are forever divested. *See* W.Va. Code § 48-22-703(a) (divesting parents upon adoption of all legal rights including inheritance).

medical condition of the child, and require the full participation of a guardian ad litem on behalf of the child in that proceeding.

I am authorized to state that Justice Starcher joins me in this dissent.