

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED

June 17, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Nos. 30511 and 30512

RELEASED

June 17, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: DESTINY ASIA H.

Appeal from the Circuit Court of Cabell County
Honorable John Cummings, Judge
Civil Action No. 01-JA-129

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: June 11, 2002

Filed: June 17, 2002

Amy C. Crossan, Esq.
Bouchillon, Crossan & Colburn, L.C.
Huntington, West Virginia
Guardian ad Litem

D. Scott Bellomy, Esq.
Bellomy & Turner
Huntington, West Virginia
Attorney for Appellee, Shacara H.

Steven T. Cook, Esq.
Huntington, West Virginia
Attorney for Appellee, Kimberly T.

Darrell V. McGraw, Jr.
Attorney General
Teresa Brown
Assistant Attorney General
Charleston, West Virginia

The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE DAVIS concurs and reserves the right to file
a concurring opinion.
JUSTICE STARCHER dissents and reserves the right
to file a dissenting opinion.
JUSTICE ALBRIGHT concurs, in part, and dissents, in part,
and reserves the right to file a separate opinion.

SYLLABUS

“When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard.” Syllabus Point 1, *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996).

Per Curiam:

This is an appeal by the guardian ad litem for Destiny Asia H., an infant child, from a decision of the Circuit Court of Cabell County holding that Destiny Asia H. was not a neglected and abandoned child and holding that she should be returned to the custody of her natural mother, Shacara H.¹ The guardian ad litem, on appeal, claims that the evidence shows that Destiny Asia H. was neglected and abandoned and that the circuit court erred in ruling that she was not.

I. FACTS

The child whose custody is in issue in this case, Destiny Asia H., was born in Florida on February 13, 2001. Shortly after her birth, Destiny's mother, Shacara H., met a lady in Florida named K. T. K. T. was a resident of Huntington, West Virginia, but was visiting her son at the time.

At a certain point, K. T. decided to return to West Virginia and invited Shacara H. and Destiny Asia H. to accompany her.

¹Actually two petitions for appeal were filed in this matter, one by the guardian ad litem, and one by K. T., the individual who had actual custody of the child at the time of the institution of the original neglect and abandonment proceeding. Since the issues and facts are the same, the Court has treated the two petitions as a single appeal.

Upon arriving in West Virginia, Shacara H. and Destiny Asia H. originally lived with K. T. in K. T.'s home. Eventually, however, they moved out and moved into an apartment. In June 2001, Shacara H. decided to return to Florida. At the time, she told K. T. that she intended to return in about a week and asked if K. T. would care for Destiny Asia H. during her absence. K. T. agreed.²

Shacara H. did not return in one week, and, in fact, did not return during the following four months. Over that period of time, although she called K. T. approximately six times, she provided no financial support for Destiny Asia H., and she provided K. T. with no information regarding her whereabouts.

In October 2001, K. T. approached the West Virginia Department of Health of Human Resources to request financial assistance for Destiny Asia H. At the time, she indicated that it would be difficult for her to continue to care for Destiny Asia H. without such assistance.

Based on the information that the whereabouts of Shacara H. were at the time unknown, as well as the fact that she had been absent for approximately four months and had

²Before leaving, Shacara H. provided K. T. with a Power of Attorney authorizing her to act *in loco parentis*. Although the Power of Attorney extended from June 26, 2001, to June 26, 2005, it is clear from the record that the understanding between Shacara H. and K. T. was that Shacara would return in about a week.

failed to provide K. T. with the means of contacting her, the Department of Health and Human Resources on October 29, 2001, filed an abuse and neglect petition alleging that Destiny Asia H. had been neglected and abandoned.

A preliminary hearing was held in the matter on November 5, 2001, and at that hearing, the circuit court ruled that there was probable cause for the taking of Destiny Asia H. The court also scheduled an adjudicatory hearing in the matter for January 14, 2002.

By the time of the adjudicatory hearing, some information regarding the whereabouts of Destiny's mother, Shacara H., had been developed and counsel for Shacara H. moved for a continuance to allow time for Shacara H. to travel from Florida to West Virginia so that she could be heard. The circuit court granted the motion, and the adjudicatory hearing was reset for January 28, 2002.

Shacara H. returned to West Virginia and attended the adjudicatory hearing on January 28, 2002. This was the first time she had returned to West Virginia since leaving in late June 2001. At the hearing, evidence was adduced describing how Shacara H. had met K. T., and how she and Destiny Asia H. had accompanied K. T. to West Virginia.

Additional evidence showed that Shacara H. had only rarely called to check on Destiny Asia H. between June 26 when she left West Virginia, and October 2001, when the

neglect petition was filed, and that thereafter she had not called at all. Evidence was also introduced showing that she had not provided any financial support for Destiny Asia H. during the time of Destiny's stay with K. T. The evidence also showed that Destiny Asia H. was four and one-half months old when Shacara H. left for Florida, and that Shacara H. had not seen her for a full seven-month period thereafter.

After reviewing the evidence, the circuit court, while recognizing that Shacara H. had physically left West Virginia and Destiny Asia H., also noted that the child had been left in the care of K. T. who appropriately cared for her and had not neglected or abused her. The court stated: "The evidence before the Court is not sufficient to prove abandonment to any extent. Instead, what happened was a transfer of guardianship." The Court also found that the Department of Health and Human Resources had acted properly in taking custody of Destiny Asia H., but that its actions had been based on miscommunications.

Subsequent to the entry of the final order in the case, information was produced by the State of Florida relating to Shacara H. and her care of Destiny Asia H. in Florida. That information showed that Shacara H. suffers from a mental disability. The information also showed that in May 2001, Destiny Asia H. was hospitalized in Florida due to weight loss, apparently due to malnutrition, and that at that time she had not receive the appropriate shots. Additionally, there is also some suggestion that Shacara H. had been attending, but stopped attending, parenting classes.

In the present proceeding, the guardian ad litem and K. T. claim that the circuit court erred in failing to find Destiny Asia H. neglected and abandoned.

II. STANDARD OF REVIEW

In *In Re: Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998), this Court indicated that in a child abuse and neglect case the Court employs the two-pronged standard of review set forth in Syllabus Point 1 of *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996):

When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

III. DISCUSSION

For the purposes of child abuse and neglect proceedings, the West Virginia Code defines as neglected child as a child:

Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian. . . .

W. Va. Code 49-1-3(h)(1)(A).

The facts in the present case show that Shacara H. left Destiny Asia H. temporarily in the custody of K. T. with the understanding that Shacara H. would return in about a week. She failed to return during that time, and, in fact, had not returned some four months later. Thus, the length of her absence before the bringing of the present proceeding was some fifteen to sixteen times what was contemplated when K. T. initially undertook to care for the child.

During the absence, Shacara H. maintained some sporadic contact with K. T. but provided nothing toward the support or care of the child. Eventually, the sporadic contact ceased, and Shacara H. failed to provide K. T. with information as to her whereabouts or as to how she could be contacted.

The circuit court, as has previously been stated, found that Shacara H. did not abandon Destiny Asia H. but transferred her “guardianship.” In reviewing the facts presented, the Court believes that those facts show clearly and convincingly that initially Shacara H. did temporarily transfer custody to K. T. who, it appears from the evidence, adequately cared for the child. Thus, the evidence, in this Court’s view, supports a finding that in June 2001, when Shacara H. initially returned to Florida, she did not abandon, or neglect, Destiny Asia H., as contemplated by W. Va. Code 49-1-3(h)(1)(A).

The facts also show clearly and convincingly that it was contemplated that the initial transfer was to be for a limited time only, and Shacara's absence extended far beyond her initially anticipated return date. If she had not returned precisely upon the date fixed for her return, but within a reasonable time thereafter, in the Court's view, there would be a factual question as to whether she had abandoned or neglected Destiny Asia H. However, Shacara's lengthy absence in the present case, in this Court's view, extended so far beyond the originally contemplated period as to throw into question her intent to return, her motivation to provide for the care of Destiny Asia H., and Destiny's actual future.

While there may have been an initial custodial arrangement, the evidence shows that that arrangement was to be of limited duration, and after the expiration of the limited period of time, there is no evidence that Shacara H. made any additional arrangement or showed any substantial interest in the welfare of the child. Eventually, she even ceased to contact K. T. or keep K. T. informed of her whereabouts.

Overall, this Court believes that the facts as developed show that Destiny Asia H. was abandoned and neglected, not when Shacara H. initially left for Florida, but when her stay exceeded what was contemplated and when she allowed the thread of potential contact between her and the child's actual care giver to break. Under the circumstances, this Court believes that the circuit court erred in failing to hold that Destiny Asia H. was an abused and neglected child within the meaning of the statute.

For the reasons stated, the judgment of the Circuit Court of Cabell County is reversed, and this case is remanded with directions that the circuit court enter an order granting the petition of the West Virginia Department of Health and Human Resources.

Reversed and remanded
with directions.