No. 31432 In re: Desarae M., Destiny M. and Britney M.

FILED
December 9, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

I agree with the majority's decision insofar as it concluded that family case plans are an integral and necessary part of a parent's improvement period in abuse and neglect cases. However, I dissent from the majority's ultimate conclusion that the failure to develop a formal family case plan in this case was reversible error insofar as the conditions of the appellant mother's improvement period were clearly communicated to her; she nevertheless failed to achieve those goals; and there is no evidence that, during this additional improvement period, she will be likely to successfully correct the conditions of abuse and neglect with which she has been charged.[1]

I am most troubled, however, by the potentially devastating effect that the majority's Opinion will have on the most important parties to this proceeding–the children of the appellant for whose benefit and safety the underlying abuse and neglect proceedings were initiated. Time and again we have reiterated that abuse and neglect cases must be given

[1]*See* Syl. pt. 3, in part, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993) ("Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected[.]").

the utmost attention to ensure their prompt resolution in order to provide permanency for the children involved therein. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). *Accord In re Stephen Tyler R.*, 213 W. Va. 725, 733 n.11, 584 S.E.2d 581, 589 n.11 (2003); *In re Daniel D.*, 211 W. Va. 79, 95, 562 S.E.2d 147, 163 (2002) (Davis, C.J., dissenting); *In re Edward B.*, 210 W. Va. 621, 635 n.20, 558 S.E.2d 620, 634 n.20 (2001); Syl. pt. 4, *In re Emily*, 208 W. Va. 325, 540 S.E.2d 542 (2000); Syl. pt. 2, *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999); *State v. Michael M.*, 202 W. Va. 350, 356 n.14, 504 S.E.2d 177, 183 n.14 (1998); Syl. pt. 3, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. pt. 5, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995); *State ex rel. S.C. v. Chafin*, 191 W. Va. 184, 191, 444 S.E.2d 62, 69 (1994); Syl. pt. 3, *Boarman v. Boarman*, 190 W. Va. 533, 438 S.E.2d 876 (1993); *Mary D. v. Watt*, 190 W. Va. 341, 346, 438 S.E.2d 521, 526 (1992). *See also State v. Michael M.*, 202 W. Va. at 356 n.14, 504 S.E.2d at 183 n.14 ("[W]e reemphasize that decisions about the permanent placement of a child should not be delayed unnecessarily."); Syl. pt. 5, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 ("The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.").

We have recognized this need for immediate disposition in an attempt to shield the children subject to such proceedings from the extreme trauma they face when they are first removed from their parents' home, then shuttled to numerous foster placements, and finally are placed into a permanent home or returned to their parents upon the conclusion of such proceedings. *See* Syl. pt. 3, in part, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991) ("It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians."). *See also David M. v. Margaret M.*, 182 W. Va. 57, 64, 385 S.E.2d 912, 919 (1989) (observing that "[c]hildren under six years of age are called 'children of tender years'" because "[t]hey are the most dependent on their parents").

Had there been any indication that the appellant herein was a fit and suitable mother for her children or that she could correct the conditions of abuse and neglect with which she has been charged, I would wholeheartedly agree with the majority's attempt to protect and preserve her parental rights. *See* Syl. pt. 6, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000) (""'In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody [of] his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syllabus Point 1, *In Re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).' Syllabus point 1, *In Interest of Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1998)."); Syl. pt. 6, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642

(1997) (same). *See generally Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998) (protecting biological father's parental rights through recognition of cause of action for tortious interference with parental relationship).

Sadly, though, such evidence is not before us, and the majority has even conceded that "the record of the adjudicatory hearing is totally supportive of the findings of abuse and neglect . . . . It is beyond doubt that the children who are the subject of this case are abused and neglected children." Maj. op. at 8. Despite this recognition, however, the majority has blatantly refused to acknowledge the paramount consideration at issue in this case: the best interests of the appellant's minor children. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). *See also* Syl. pt. 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 ("Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)."); *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children."); *David M. v. Margaret M.*, 182 W. Va. at 60, 385 S.E.2d at 916 ("[A]ll parental rights in child custody matters are subordinate to the interests of the innocent child.").

Mindful of the best interests of Desarae, Destiny, and Britney and the need to

provide them with the safe and secure home which they so rightfully deserve, I respectfully dissent from the majority's decision to grant the appellant an additional improvement period. Such an award can serve no purpose other than to prolong the dangerous and uncertain living conditions these three little girls have far too long already endured.

For the foregoing reasons, I respectfully concur, in part, with and dissent, in part, from the Opinion of the Court.