No. 32046 – Napoleon S. and Linda S. v. Martha Yeager Walker, Secretary of West Virginia Department of Health and Human Resources

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

Maynard, Justice, dissenting:

By reversing the decisions of the adoption review committee, the DHHR hearing officer, and the Circuit Court of Kanawha County, and by requiring that Tyler be placed with his paternal grandparents for adoption, the majority has unintentionally disregarded Tyler's best interests by placing him back in dangerous and life-threatening circumstances.

Two-month-old Tyler was viciously beaten and injured by his biological father, Ryan S. Specifically, Tyler suffered a broken leg (spiral fracture of the left femur) and more than twenty bruises on his body. At two months of age! It was found by the Circuit Court of Harrison County that Ryan S. inflicted the spiral fracture to Tyler's left femur after becoming frustrated with Tyler while attempting to give him a bath. Ryan and Nicole S.'s parental rights were rightly terminated because all would agree that Tyler's future safety depends upon his having absolutely no contact with Ryan S.

Yet, the majority now places Tyler back into a situation where he again could easily have contact with his abuser. I truly believe that this child is in harm's way and his personal safety is at great risk. The record is crystal clear that Appellants simply do not

believe that their son, Ryan S., injured Tyler. This is indicated by the findings of both the Florida home study and Dr. Fremouw. For this very reason, the adoption review committee, made up of DHHR officials, Tyler's guardian ad litem, and a CASA representative, concluded that it was not in Tyler's best interests to be adopted by Appellants because Appellants could not ensure Tyler a safe home.

Also troublesome is the fact that the majority's decision is based, at least in part, on affidavits submitted by Appellants to this Court on appeal. Astonishingly, the affidavits were filed *after* oral argument in this case and after being solicited by one or more Justices of this Court. To solicit the affidavits during oral argument; to permit them to be filed post-argument without any stipulation from the opposing party[1] (talk about trial by ambush!); to consider them; and to rely on them in deciding this case is a fugitive procedure

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[1]This Court has stated,

> [T]he law is clear in West Virginia that an appellate exhibit has no evidentiary value on appeal unless it was introduced in the circuit court or it is subject to judicial notice under Rule 201 of the West Virginia Rules of Evidence. Our rule remains steadfast that the record may not be enhanced or broadened on appeal except by the methods discussed or by the stipulation of the parties. *See O'Neal v. Peake Operating Co.*, 185 W.Va. 28, 404 S.E.2d 420 (1991) (this Court may only consider matters appearing in the trial record).

Powderidge Unit Owners v. Highland Prop., 196 W.Va. 692, 703 n. 16, 474 S.E.2d 872, 883 n. 16 (1996).

unknown to our law, one that outrageously violates our rules of evidence and appellate procedure, and one that is grossly unfair to the losing litigants. This is third-world justice and no other Supreme Court in the United States would allow such a brutally unjust procedure. However, even if these affidavits were properly submitted, it is clear to me, and it should be clear to the majority, that they have absolutely no evidentiary value.

Appellants' sudden change in thinking is too little too late. Below, Appellants were always consistent and adamant in their conviction that their son could not have intentionally injured Tyler. This firm conviction softened only after Appellants lost before the hearing examiner and the circuit court whose decisions were based, in part, on Appellant's refusal to accept their son's actions. Further, their change in thinking can only be described as lukewarm. They now "accept our son's admission of responsibility for all of Tyler's injury or injuries." Notably, they do not accept that their son is responsible for Tyler's injuries, but only that he has admitted that he is responsible. It does not take a genius to see what is going on here. Appellants simply are saying what they think this Court wants to hear in order to get what they want.

In light of the fact that Appellants do not really accept the fact that their son viciously injured their two-month-old grandson, once Appellants adopt Tyler, what possible reason do they have for keeping their son away from Tyler? Without a doubt, due to the majority opinion, Tyler *will* have continued contact with Ryan S., the man who fractured his

left femur and battered his body with bruises merely because Tyler was a little too rambunctious in the bathtub.

It is simply reckless to accept Appellants' affidavits at face value. By placing Tyler in a position where he can easily and will likely come into contact with his abuser, the majority has unintentionally placed Tyler in a dangerous situation and ignored his best interests. Infants and children who have been physically abused, had bones broken and are bruised all over should never be placed in a home where there is any reasonable chance that the same abuser will have another opportunity to beat and maim them.

Finally, in light of my grave fear of the imminent danger and grievous bodily harm or death of this child, and because the West Virginia DHHR cannot monitor this child's welfare in Florida, I intend to send a copy of this dissenting opinion to the West Virginia DHHR and have it serve as a formal request that it contact the analogous Florida agency and request and encourage that agency to open a case file on Tyler. Hopefully the Florida agency will monitor the home to ensure that Tyler has absolutely no contact with his abuser. I realize that this is extremely unusual, but I believe that the circumstances demand it.

For the reasons set forth above, I dissent.