

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

FILED

July 14, 2005

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

Starcher, J., concurring:

I concur with the majority opinion in this case and write separately only to emphasize that four of the five members of this Court, based upon the entire record, have determined that adoptive placement with Tyler's paternal grandparents is in Tyler's best interests. The single dissenter has questioned the credibility of the grandparents with regard to their willingness to protect Tyler from his biological father. A comprehensive review of the record, however, discloses the grandparents' uncompromising commitment to Tyler and his safety. It is evident that the grandparents have maintained a vigorous effort to adopt Tyler and have repeatedly asserted their dedication to his security and well-being. While these individuals may have initially found it extremely difficult to accept the well-documented fact that their son committed a heinous act of child abuse upon Tyler, their commitment to Tyler's safety has been unfaltering, and they have consistently maintained that they will adhere to the requirements of any order regarding contact between their son and Tyler. The majority opinion firmly states that the lower court is directed to fashion an order which explicitly prohibits contact between Tyler and his biological father.

The single dissenter also suggests that reliance upon the post-argument affidavits was inappropriate. While the acceptance of such affidavits is a practice rarely employed by this Court, we have permitted post-argument affidavits in exceptional

circumstances. In this case, the potential for grandparent adoption had not been favored by the DHHR, and questions had been raised regarding the willingness of the grandparents to permit contact between their son and Tyler. Because this was a pivotal and dispositive issue in this case, affidavits regarding the grandparents' intent provided additional explanation of assistance to this Court in ascertaining the resolution which most effectively promoted Tyler's best interests. The affidavits, in fact, only reiterated the commitments the grandparents had previously articulated.

As the majority opinion noted, for instance, the home study report contained in the record explained that the grandparents are "very serious about protecting Tyler and would never let anything happen to him." Further, the home study stated that the grandparents "would abide by any court orders that they need to." Additionally, the underlying record revealed, as the majority noted, that psychological evaluations indicated that the grandparents were willing to accept the requirement that Tyler could have no contact with his biological father.

Thus, while the affidavits provided further explanation of the grandparents' intent, the position asserted by the grandparents in the affidavits with regard to the protection of Tyler was not inconsistent with the position previously asserted and fully evidenced in the record.

Child placement and custody decisions, particularly subsequent to an appalling instance of child abuse, are fraught with emotional complication and are particularly

frustrating because there are no certainties or guarantees. Tyler has experienced a very difficult start to life. By placing him with loving, committed grandparents, intent on protecting him from further harm, we have attempted to insure that Tyler's future will be bright. To that end, I concur with the majority opinion.