No. 32520 - *In re: Alyssa W. and Sierra H.*

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OF WEST VIRGINIA

Albright, Chief Justice, concurring in part and dissenting in part:

I concur with the majority's conclusion that the trial court abused its discretion by placing the burden upon Mildred H. to demonstrate why visitation should not be resumed between the Robert H. and Sierra H. There is no basis upon which the trial court may impose such a burden. It was improper.

I dissent, however, to the extent that this Court has substituted its own judgment for that of the trial court on the issue of the best interests of the child. The trial court engaged in substantial investigation of the best interests of Sierra regarding potential *supervised* visitation with her father. The trial court sought to assure that the safety of the child would be protected by ordering that the visitation be supervised.[1] This Court has consistently cautioned that substantial discretion must be vested in trial courts and that this Court should not merely substitute its own judgment for that of the trial court in such discretionary matters. That is the essence of the abuse of discretion standard, a model given lip service by the majority but then hastily cast aside when the majority chose an opposite

[1]I note with disdain that the DHHR originally permitted Robert H.'s former girlfriend to serve as the supervisor of visitation. There is absolutely no justification for such a decision.

conclusion. Whether in the context of this case or the myriad of others confronted by this Court, this Court's variable application of the abuse of discretion standard is paralyzing that standard's effectiveness. As Justice Cleckley once observed, "the abuse of discretion standard has many faces and, in our application of the standard, it can range anywhere from careful scrutiny to almost no scrutiny." *State v. Head*, 198 W.Va. 298, 305, 480 S.E.2d 507, 514 (1996) (Cleckley, J., concurring).

The question is not what this Court would have done if sitting on the trial court bench. The question is whether the trial court abused its discretion in the action it took. *See Bartles v. Hinkle*, 196 W.Va. 381, 389-90, 472 S.E.2d 827, 835-36 (1996) ("the question is not whether we would have imposed a more lenient penalty had we been the trial court, but whether the trial court abused its discretion in imposing the sanction"). In *Gribben v. Kirk*, 195 W.Va. 488, 466 S.E.2d 147 (1995), this Court explained the abuse of discretion standard as follows: "Under the abuse of discretion standard, we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." 195 W.Va. at 500, 466 S.E.2d at 159; *see also Gentry v. Mangum*, 195 W.Va. 512, 520 n.6, 466 S.E.2d 171, 179 n.6 (1995) ("In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them").

Aside from the initial use of a former girlfriend to supervise visitation, nothing in the record suggests that the trial court made a clear error of judgment in allowing such supervised visitation or that the trial court exceeded permissible choices, ignored a material factor, relied upon an improper one, or made a serious mistake in weighing the proper factors.

Accordingly, I dissent from the judgment of this Court depriving the trial judge of his discretion without cause.