

No. 32847

State of West Virginia ex rel. The West Virginia Department of Health and Human Resources v. The Honorable Fred Fox, Judge of the Circuit Court of Marion County; and Miranda M. and Charles M.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., concurring:

I commend my fellow justices for their effort and care in the thorough review of the record in this difficult case and their dedication to justice for this family. That there may be disagreement in the outcome of this case is, in my opinion, less a matter of legal dissension than it is an endeavor by each justice to provide for Sean M.'s best interests.

I concur with the majority opinion not only because it is legally sound, but also because I believe that the result reached below, and affirmed by this Court, was necessitated by the particular facts of this case. While I appreciate and agree with the dissent's concerns, I write separately to express my disagreement with the view set out in the dissenting opinion. The dissent reasons that the medical evidence proved that Dominic M. suffered from shaken baby syndrome, and that his father, Charles M., entered a guilty plea to the charge of involuntary manslaughter for Dominic's death. Based on these two factors, the dissent avers that it was error to reunite Sean M. with his family because he is in danger in the presence of his father. Based upon a complete review of the unique and specific facts of this case, especially the ultimate medical conclusions regarding the probable circumstances of

Dominic's death, I must disagree.

First, the trial court looked closely at all of the medical record, not just preliminary medical records. This complete medical record is, I believe, of great importance to the determination of whether this family should be reunited or should remain separated. It is understandable why the dissent, as well as many of the initial care givers involved in this case, felt that Dominic died from shaken baby syndrome. When Dominic first presented for treatment, shaken baby syndrome was the only practical option considered as a possible diagnosis. However, as the case progressed and further medical evidence was produced which contradicted the previous diagnosis, it soon became apparent that everyone involved needed to take a very close look at the entirety of the medical facts. When Dominic arrived at the hospital, he suffered from a "large brain bleed" caused from head trauma. His parents, Charles and Miranda, were questioned and were unable to explain their son's injuries. Because of their lack of an explanation, it was assumed that the child had been physically abused and the West Virginia Department of Health and Human Resources ("WVDHHR") was contacted. To be clear, I do not fault the hospital's decision to contact the agency, nor do I fault the WVDHHR's vigorous prosecution of the child abuse and neglect proceedings.

As the investigation continued and a guardian *ad litem* became involved on Sean's behalf, and the corollary criminal trial of Charles ensued, more evidence was developed and a different explanation for Dominic's injuries began to emerge. It became

apparent that Dominic did not suffer from shaken baby syndrome. Not only were the normal signs of shaken baby syndrome absent, but it also became apparent that Dominic suffered from a subdural hematoma and that there was evidence of an “old bleed” in his brain. Much of this evidence was learned after the autopsy, which is significant because it is critical evidence that the initial treating doctors did not have available to them before making a diagnosis of shaken baby syndrome. The experts’ testimony regarding the timing of this bleed correlated with the timing of a fall off of a bed at the home of Dominic’s grandparents three weeks prior to his death. There was also evidence presented regarding the possibility of Dominic having a clotting disorder. Again, this information was learned post-autopsy and was not available to the treating physicians prior to their provisional diagnosis.

Once all of the evidence was gathered and the experts convened, a very different picture appeared from what was initially thought at the outset of the case. The trial judge initially found that “Dominic . . . suffered from symptoms consistent with Shaken Baby Impact Syndrome,” and found that “[t]he infant, Sean . . . should not be returned to the custody of his parents[.]” However, after hearing all of the evidence and hearing the experts’ explanation, this same trial judge changed his mind and found that there was no evidence that Sean had ever been the victim of abuse. Sean was ordered returned to the custody of his parents. I am also impressed by the fact that the experts on the behalf of the father felt so strongly about the plight of the father that they refused any payment for their time or travel associated with their review of this case. Also, the Court-Appointed Special Advocate,

whose job it is to advocate on behalf of children, supported the position of the parents in this case, and even drove to Charleston, West Virginia, to be present in person to show that support when this case was argued before us. In summary, the overall picture revealed a very different portrayal of Dominic's death than what was initially suggested.

I also cannot agree with the dissent's reliance on the father's entry of an *Alford* plea to bolster the belief that Sean should not be returned to the custody of his parents. At oral argument before this Court, counsel for the father made it very clear why Charles entered an *Alford* plea. The family was already deeply in debt from the first criminal trial that was set aside due to juror misconduct. Subsequent to this first trial, new evidence and new experts were found who explained the reality of what happened to Dominic. Counsel for Charles stated at oral argument that the family was facing at least another \$100,000.00 in trial expenses to proceed with a second trial, on top of the debt accumulated from the first trial. We were also informed that other family members were putting themselves in debt to support Charles and Miranda in their legal battle. Tragically, Sean has already lost his brother. Then, he was separated from his parents. In the absence of evidence proving that Dominic suffered from shaken baby impact syndrome and the compelling evidence that shows he died of an accidental fall, I cannot fault the circuit court's decision to reunite Sean with his family.

In view of the foregoing, I concur.

