

No. 110203 - In re: Kasey M., Kristina M., Kaleb M., Robert M.C., Christopher C.,
Nicholas C. and Noah C.

FILED

November 15, 2011

Workman, Chief Justice, concurring:

released at 3:00 p.m.

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

I concur with the majority's decision because it reaches the proper legal conclusion in that W. Va. Code § 49-6-5(a) (2006) (Repl. Vol. 2009), governing abuse and neglect proceedings, precludes a transfer of custody absent a finding of abuse or neglect. While I agree with the circuit court that there were a number of factors in this case that indicated that it would be in C.C.'s best interests to be placed with his mother, the court did not have authority to order a transfer of custody without a finding of abuse or neglect.

The proper means of seeking the change of custody would be a petition for modification. It is important to note that during oral argument in this case, this Court was advised that Christine L. had filed a petition for modification in the family court seeking custody of C.C. This Court also learned that after the circuit court entered its order in the abuse and neglect case transferring custody of C.C. to Christine L., the family court entered a modification order adopting the findings and conclusions in the circuit court's order relating to the placement of C.C. in his mother's custody. However, the family court also made its ultimate decision on the requested modification contingent upon the outcome of this appeal. In that regard, the family court included a provision in its modification order stating

that if the circuit court's order "is modified pursuant to appeal, the resulting Order will be considered the Order of this Court." I am troubled by this order for two reasons.

First, the modification order purports to be a final appealable order, but it clearly is not because the family court's decision was made contingent upon the outcome of this case. How could either party have filed an appeal within the 30-day time limit prescribed by law when the appeal of the circuit court's decision was still pending at that time? Neither party would have been able to ascertain whether the family court order was adverse to him or her in the time frame required for appeal. Second, and even more troubling, is the fact that the family court allowed its decision on Christina L.'s motion for modification to be dictated by the outcome of the abuse and neglect proceedings. Pursuant to W. Va. Code § 48-9-401 (2001) (Repl. Vol 2009), a decision on a motion for modification of custody requires a determination of whether there has been a substantial change in the circumstances of the child or of one or both parents and whether a modification is necessary to serve the best interests of the child, obviously a completely different standard than a finding of abuse and neglect. The allegations of abuse and neglect certainly constituted a change in circumstances, and there were several other factors that indicated that it would be in C.C.'s best interests to be placed in the custody of his mother. Therefore, regardless of the outcome of the abuse and neglect case, it seems that the circumstances probably warranted a modification of custody pursuant to W. Va. Code § 48-9-401.

However, our review in this appeal was limited to the circuit court's disposition of the abuse and neglect petition. Accordingly, for the reasons previously stated, I concur with the majority's decision in this case. However, the family court order has left these parties (and even more importantly, this child) in legal limbo.