No. 11-0755 - *In re Ashton M.*

FILED
February 28, 2012
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, concurring, in part, and dissenting, in part:

I dissent to the majority's conclusion that the lower court failed to consider the wishes of the child, Ashton M., pursuant to West Virginia Code § 49-6-5(a)(6)(C)(2009 & Supp. 2011)[1] regarding disposition, and to their finding that the circuit court did not comply with the requirements of Rule 34 of the Rules of Procedure for Child Abuse and Neglect. I concur with the majority regarding the determination "that the prosecuting attorney did not act inappropriately during the dispositional hearing[,]" when the prosecutor recognized that the circuit court had the legal authority to terminate the Petitioner mother's parental rights despite the DHHR's recommendation that only her custodial rights be terminated.

I.

The majority looks almost silly in reaching the conclusion that the circuit court failed to consider Ashton's wishes, because an examination of the record of the dispositional

[1]West Virginia Code § 49-6-5(a)(6)(C) requires the court to "give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." *Id.*

hearing makes it abundantly clear that the circuit court gave careful consideration to the child's wishes and fashioned a disposition that would protect her from further abuse, but still honored her wishes to have continued contact with her mother. At the dispositional hearing, the guardian ad litem argued to the circuit court that as long as Ashton could maintain contact and a relationship with her mother, she would be "*happy*" with the circuit court's decision. (Emphasis added). Specifically, after the circuit court brought up the possibility that it would terminate the Respondent mother's rights, the guardian ad litem argued as follows:

MS. MORTON: Your Honor, perhaps there's a distinction without a difference. Ashton does want to maintain a relationship and contact with her mother. *The reason I did call her in here to discuss this matter of legal verus parental rights is that she is 16.* What she wants to accomplish is the continued contact with her mother.

Now, the way I understood termination of custodial rights was that Michelle would be forever barred from having physical custody of Ashton. Now if her parental rights were terminated, parental legal rights were terminated, that would also bar any inheritance by Ashton from her mother or –

THE COURT: I don't know where that comes from. As a matter of fact, I don't know any case that addresses that issue. With regard to that, certainly the issue of support is not terminated by the termination of parental rights.

But again, my question is the Supreme Court has said that with a person of teenage years if it causes some emotional impact upon the child, that termination of parental rights, *the Court should consider the wishes of the child in that regard.*

Now that may be in some way the distinction without a difference, if I understand what you're saying; *that I can terminate parental rights if it doesn't have any adverse impact upon the child but still meets the desires of the child by permitting post-termination visitation*. Where I can designate that visitation is that when you look to the decision by the Supreme Court that indicates that in terms of the parental rights that have been terminated up to [sic] adoption, any party can file a motion for modification.

It clearly says in that case that if the parental rights have been terminated, then the parents don't have the right to do that. But if the parental rights have not been terminated then that would give the mother the right to come in and seek a modification prior to disposition subject to termination of parental rights. So I think there is a significant legal difference. I just don't know what the desires of the child are.

MS. MORTON: It would be significant for Ashton, not 18.

THE COURT: She's not 18, she's 16.

MS. MORTON: I mean she's 16, which means she's very close. If she were a child of 2 or 6 – Your Honor, she's out in the hall and I could bring her in. It's just very difficult for her to come into these proceedings. It's hard. *What I'm saying to you is this; I don't know that she would understand the legal distinction that the Court just made and obviously I didn't understand it all either because I misspoke. However, as long as the maintenance of contact and visitation continues with her mother, however that is accomplished, is intact I think the child will be happy.*

* * *

MS. MORTON: Like I said, *I think so long as that means is accomplished and maintained I think she's going to be happy. As far as the child is concerned it's*

the end that is important, not the means or way which we get there.

* * *

THE COURT: The Court finds that the Respondent Mother has failed to adequately protect the child; that she failed to take reasonable action to protect the child in light of clear and convincing evidence to the contrary. *The Court is further of the opinion that she desires to maintain contact and a relationship with Mr. H[][.] [the Respondent's boyfriend] over maintaining custodial rights of the child.*

The Court finds there is no reasonable grounds to believe that the conditions of the abuse and neglect that have arisen can be reasonably corrected within the foreseeable future**.** *There is absolutely no evidence before this Court that the termination of the Respondent Mother's parental rights will adversely affect the child. In fact, the desires of the child set forth in the record in this case indicates that the child's interests can be adequately protected by the Court granting the Respondent Mother supervised post-termination visitation with the child in accordance with the child's desires.*

Therefore, the parental rights of the Respondent Mother are hereby permanently terminated and the Court will grant supervised post-termination visitation with the child to be supervised by the grandmother at a reasonable time provided the child will never be out of the presence of the grandmother with the mother and pursuant to the desires of the infant child.

(Emphasis added).

Obviously, neither the Petitioner mother's counsel nor the guardian ad litem seemed to understand that even when parental rights are terminated, visitation and contact can continue. This Court first enunciated the concept of post-termination visitation in *In re Christina L*, 194 W. Va. 446, 460 S.E.2d 692 (1995). The circuit court understood the law and fashioned thereunder a means to protect Ashton from further abuse while still permitting her continued contact with her mother in a safe setting and even made specific findings regarding the child's wishes as can be seen from this portion of the transcript in which the circuit court states:

> *Therefore, the parental rights of the Respondent Mother are hereby permanently terminated and the Court will grant supervised post-termination visitation with the child to be supervised by the grandmother at a reasonable time provided the child will never be out of the presence of the grandmother with the mother and pursuant to the desires of the infant child.*

(Emphasis added). And although the guardian ad litem did not know the correct terminology, she stated the child's wishes very clearly on the record, and the judge not only considered, but also honored them.

Exacerbating the problem with the majority turning a part of its decision on this issue is that neither the Petitioner mother nor the guardian ad litem even assigned as error the circuit court's alleged failure to consider the wishes of the child, but merely argued it within the context of the assignment of error relating to termination. Consequently, the majority has

elevated an argument to "assignment of error" status. This Court has consistently found that assignments of error nor raised on appeal are deemed waived. *See Covington v. Smith*, 213 W. Va. 309, 317 n.8, 582 S.E.2d 756, 764 n.8 (2003) (stating that casual mention of an issue in a brief is insufficient to preserve the issue on appeal); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 140 n.10, 506 S.E.2d 578, 583 n.10 (1998) (finding that "[i]ssues not raised on appeal or merely mentioned in passing are deemed waived." (citation omitted)); *State v. Lilly*, 194 W.Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995) (finding that "'casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.'" (internal quotations and citation omitted)). Nor did the guardian ad litem and mother state an objection for the record on this issue. Consequently, the majority takes an alleged error that was not preserved by any party before the circuit court or made the subject of an assignment of error here and reverses the circuit court on that basis.

Moreover, nothing in *In re Jessica G.*, 226 W. Va. 17, 697 S.E.2d 53 (2010), or in West Virginia Code § 49-6-5(a)((6), which is relied upon by the majority in reversing the circuit court on this issue, can be construed "to imply that the wishes of a child who is fourteen years or older, or who is an age of discretion as determined by the court, must control a court's decision on whether to terminate parental rights." *In re Jessica G.*, 226 W. Va. at 23, 697 S.E.2d at 59 (Workman, J., concurring). Again, West Virginia Code § 49-6-5(a)(6) only provides that "[n]otwithstanding any other provision of this article, the court

shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." *Id*. Thus, the child's only right emanating from the foregoing statute is to express his or her wishes regarding the termination of the parental rights. "The ultimate decision [concerning termination of parental rights] remains squarely within the circuit court's discretion; however, the best interests of the child remains the paramount consideration." 226 W. Va. at 23, 697 S.E.2d at 59. In the instant case, it is clear from the hearing below that the guardian ad litem expressed Ashton's desires to maintain a relationship with her mother, and that so long as permitted to do so, that was all that mattered to Ashton. The circuit court considered this desire in granting supervised post-termination visitation.

II.

Rule 34 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides:

> If objections to the child's case plan are raised at the disposition hearing, the court shall enter an order:
>
> (a) Approving the plan;
>
> (b) Ordering compliance with all or part of the plan;
>
> (c) Modifying the plan in accordance with the evidence presented at the hearing; or
>
> (d) Rejecting the plan and ordering the Department to submit a revised plan within thirty (30) days. If the court rejects the child's case plan, the court shall schedule another disposition hearing within forty-five (45) days.

Id. That rule was examined in *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001), wherein the Court held in syllabus point five that

> [w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been *substantially disregarded or frustrated*, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

Id. at 624, 558 S.E.2d at 623 (emphasis added).

The only difference in the DHHR's recommendation and the circuit court's disposition is one of semantics. Thus, the circuit court Order did not substantially disregard or frustrate the disposition process recommendation as required by *In re Edward B. Id*. Instead, after hearing argument of counsel (and providing an opportunity for evidence to be taken if any party desired to do so), the circuit court modified the plan in accordance with the hearing. *Id*.

Upon remand, the circuit court will surely once again hear the child's wishes and act as is his prerogative as the presiding circuit court judge in terminating rights and allowing post-termination visitation. This result is not only reasonable, compassionate and legally sound, it also protects this child from further abuse. It should be noted that the Petitioner mother continued to maintain her boyfriend's innocence of sexual abuse of her

child, even in light of his own admissions to sexual abuse. A mother's choice of a boyfriend over her child in this type of scenario clearly reflects a lack of basic maternal instinct and ability to protect. Absent termination of legal rights, this mother could return to court and seek to regain full legal rights to this child. The circuit court wanted to see to it that the child's wishes were honored, but also wanted to protect her from further abuse.

Perhaps the majority will yawn, and say, oh well, this is just a per curiam opinion and this child will be eighteen soon anyway. But it must be remembered that the law set forth by the majority will have precedential value[2] and may be cited as legal support in future cases where there is not the potentially imminent protection of a child reaching age eighteen.

[2]*See* Syl. Pts. 3 and 4 of *Walker v. Doe*, 210 W. Va. 490, 558 S.E.290 (2002)(holding that "[p]er curiam opinion have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions. The value of a per curiam opinion arises in part from the guidance such decisions can provide to the lower courts regarding the proper application of the syllabus points of law relied upon to reach decisions in those cases[,]" and "[a] per curiam opinion may be cited as support for a legal argument.").