STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Eddie E. Anderson and Hilary D. Miller, individually and as parents and next friends of K.A., an infant, Petitioners Below, Petitioners

FILED
November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) **No. 11-1235** (Gilmer County 10-C-26)

The Board of Education of the County of Gilmer, a West Virginia corporation; Misty Pritt, Alton Skinner, II, Phyllis Starkey, Tom Ratliff, and Dorothy Rhoades, its members; Ron Blankenship, its Superintendent, and John Bennett, its former Superintendent, Respondents Below, Respondents

MEMORANDUM DECISION

Petitioners, Eddie E. Anderson and Hilary[1] D. Miller, husband and wife, individually and as parents and next friends of K.A., an infant, by their counsel, Mark McMillian, appeal from the Circuit Court of Gilmer County's order entered on August 1, 2011, denying their petition for a writ of mandamus. Petitioner sought to prohibit respondents, The Board of Education of Gilmer County ("Board of Education"), its individual members, and its Superintendent, from enforcing the Superintendent's decision that petitioners' infant children reside in a particular school attendance zone in Gilmer County and must attend school in that zone. Respondents appear by their counsel, Richard S. Boothby and Howard E. Seufer.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioners reside with their two minor children in Gilmer County, West Virginia. Petitioners own a home located on Heritage Lane in Gilmer County, which is in the Normantown school attendance zone. Petitioners also own an office building in Gilmer County located on Main Street in Glenville. This office building houses Petitioner Miller's family medical practice,

[1] Petitioner Miller's first name is sometimes spelled "Hillary" in the appendix record.

in addition to having living quarters in its basement, and is situated in the Glenville school attendance zone.

In a letter dated September 14, 2010, the Superintendent notified petitioners that after careful review of the information submitted to him, he believed that their children reside in the Normantown school attendance zone (petitioners' Heritage Lane home). In this letter, the Superintendent quoted West Virginia Code § 18-5-16(a), which states, in part, that "[t]he county board may divide the county into such districts as are necessary to determine the schools the students of its county shall attend[]" and that "the superintendent may transfer students from one school to another within the county." The Superintendent further stated in this letter that it was his decision that petitioners' child, K.A., be enrolled in the Normantown Elementary School no later than September 28, 2010. The Superintendent added that if petitioners wished for K.A. to remain at Glenville Elementary School, they needed to complete and return a "Student Transfer Request," which he anticipated would be approved.

Petitioners did not complete a "Student Transfer Request" because they did not believe that the issue involved a transfer. Instead, they sought a writ of mandamus in the circuit court asserting that they had no adequate remedy at law and seeking, inter alia, that the Superintendent be compelled to enroll K.A. and any other children of petitioners in the Glenville Elementary School. Because petitioners had not appealed the Superintendent's decision to the Board of Education as provided for in West Virginia Code § 18-5-16(a), the circuit court first required petitioners to do so.

A hearing on petitioners' appeal was held before the Board of Education on December 15 and December 20, 2010. Petitioners essentially argued that their family has dual residences by virtue of their ownership of their medical office building in Glenville and their Heritage Lane home. When petitioners were asked where they lived during the hearing before the Board of Education, they responded that where they live "varies" because they are both physicians and can be "on call." Based upon the testimony and evidence presented to it, the Board of Education voted to uphold the Superintendent's decision as set forth in his September 14, 2010, letter to petitioners. Thereafter, petitioners notified the circuit court of their intent to proceed with their mandamus action.

Following additional hearings before the circuit court, by order dated July 23, 2011, and entered by the circuit court clerk on August 1, 2011, the circuit court denied petitioners' request for a writ of mandamus. The circuit court found that although petitioners had argued that they have "dual residences" in Normantown and in Glenville as a consequence of their ownership of two properties in Gilmer County, respondents do not recognize "dual residences" as a legitimate status in relation to its school attendance zone policies. The circuit court concluded that neither the Board of Education nor the Superintendent is compelled to find that petitioners and their children are "residents of the living space in the basement of the Glenville office building when there is evidence and basic reasoning to indicate that they are, more likely than not, residents of a home [Heritage Lane] in the Normantown school attendance zone."

A review of the transcript of the hearings before the Board of Education reveals that petitioners do not deny that they live in their home on Heritage Lane; rather, it appears that they essentially argued that because they occasionally use their office building in Glenville for family purposes, they are entitled to use that address for county school attendance zone purposes. Petitioners do not cite any law, however, that imposes a duty on respondents to recognize dual residences for purposes of their school zone attendance policies. In our consideration of petitioners' argument in this regard, we are cognizant of the concerns raised by the circuit court in its order entered on August 1, 2011:

> Were a dual residency rule for school zone attendance purposes forced upon the Board of Education, it would have to recognize such claims from those who own property and those who merely use property in multiple school attendance zones. Obviously, such a loose rule could easily and frequently be abused, resulting in changing classroom enrollments, including enrollments beyond the classroom size limits required by law—thus necessitating the hire of additional staff. This Court cannot find that the Petitioners have a right to force the Board of Education into such a situation.

County Board of Education Policy 5117 requires students to attend the school located in the attendance zone in which they "legally reside." The Board of Education asserted that its use of the words "legally reside" was intended to convey and is applied to mean "domicile." The circuit court agreed and concluded that Policy 5117 clearly contemplates that students can have but one school attendance zone in which they legally reside, just as a person can have but one domicile. The circuit court found that the "law does not recognize dual residences" and that it is "crucial for a board of education to be able to determine the one attendance zone in which a child lives, so that it can determine the number of teachers and employees needed at each school."

As a reviewing court, we defer to a board of education's expertise and discretion in the interpretation of its policies. In *Shroyer v. Harrison Cnty. Bd. of Educ.*, 211 W.Va. 215, 220, 564 S.E.2d 425, 430 (2002), we stated that

> "[a]n inquiring court—even a court empowered to conduct *de novo* review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Appalachian Power* [*Co. v. State Tax Dept. of West Virginia*], 195 W.Va. [573] at 582, 466 S.E.2d [424] at 433 [(1995)]. As this Court further explained in *State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W.Va. 525, 534-35, 514 S.E.2d 176, 185-86 (1999), "[w]hen a governmental official or administrative agency has exerted its authority by interpreting an unclear statutory provision that it has the duty to implement and execute, this Court historically has extended great deference to such an interpretation, insofar as it comports with accepted notions of legislative intent and statutory construction."

As the circuit court stated in its order entered on August 1, 2011, "'[m]andamus will lie to control a board of education in the exercise of its discretion upon a showing of caprice,

passion, partiality, fraud, arbitrary conduct, some ulterior motive, or misapprehension of the law,' *Dillon v. Board of Educ. of Wyoming Co.*, 351 S.E.2d 58, Syl. Pt. 4 (W.Va. 1986)." The circuit court found that petitioners failed to show that the Board of Education's action in upholding the Superintendent's finding that petitioners live in the Normantown school attendance zone and in not recognizing petitioners' claim of "dual residency" were violations of a clear legal duty and/or the result of caprice, passion, partiality, fraud, arbitrary conduct, ulterior motive, or misapprehension of the law. We agree.

This Court has previously explained the heavy burden a petitioner undertakes when challenging a discretionary action:

> Because mandamus is a drastic remedy to be invoked only in extraordinary situations, a party seeking such a writ must satisfy three conditions: (1) there are no other adequate means for the party to obtain the desired relief; (2) the party has a clear and indisputable right to the issuance of the writ; and (3) there is a legal duty on the part of the respondent to do that which the petitioner seeks to compel. *See* Syl. Pt. 1, *State ex rel. Billings v. Point Pleasant*, 194 W.Va. 301, 460 S.E.2d 436 (1995). The issuance of a writ of mandamus is normally inappropriate unless the right or duty to be enforced is nondiscretionary. The importance of the term "nondiscretionary" cannot be overstated—the judiciary cannot infringe on the decision-making left to the executive branch's prerogative.

McComas v. Bd. of Educ. of Fayette Cnty., 197 W.Va. 188, 192-93, 475 S.E.2d 280, 284-85 (1996). As the *McComas* Court further stated, and as recognized by the circuit court sub judice, "courts may not interfere with the decisions of a school board without strong evidence justifying such interference." *Id.* at 193, 475 S.E.2d at 285.

"A *de novo* standard of review applies to a circuit court's decision to grant or deny a writ of mandamus." Syl. Pt. 1, *Harrison Cnty. Comm'n v. Harrison Cnty. Assessor*, 222 W.Va. 25, 658 S.E.2d 555 (2008). We review a circuit court's underlying factual findings and conclusions of law in a mandamus case under a clearly erroneous standard. *O'Daniels v. City of Charleston*, 200 W.Va. 711, 715, 490 S.E.2d 800, 804 (1997), citing *Staten v. Dean*, 195 W.Va. 57, 62, 464 S.E.2d 576, 581 (1995).

Upon consideration and review of the parties' arguments and the appendix record and for the reasons set forth above, we find no clear error in the decision of the circuit court as reflected in its August 1, 2011, order dismissing petitioners' petition for a writ of mandamus. We agree with the circuit court's conclusion that petitioners failed to show that respondents had a legal duty to do that which petitioners seek to compel and failed to show that they have "a clear and indisputable right" to the issuance of the writ.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh