No. 33317 – *In re: Cesar L.*

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OF WEST VIRGINIA

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

I concur with the majority opinion on the very limited basis that it reaches the proper legal result for the facts of the underlying case. I write separately to register my firm dissent to the manner in which the majority has seen fit to unreasonably extend its decision to facts not before the Court. I fear that the majority's zeal to eliminate entirely the possibility that biological parents might seek modification of court decisions involuntarily terminating parental rights in an abuse and neglect case wrongly establishes a new point of law. That new point of law overlooks the constitutional limitations of this Court, ignores legislative intent and disregards prior post-termination visitation rulings of this Court. The specific language of the majority opinion to which I refer appears in syllabus point four of the majority opinion and reads, in pertinent part: "A final order terminating a person's parental rights, *as the result of either an involuntary termination* or a voluntary relinquishment of parental rights, completely severs the parent-child relationship," thus denying such parents standing to seek modifications.

The underlying action involved a mother who *voluntarily* relinquished her parental rights. She subsequently sought to revoke her relinquishment and petitioned for

modification of the abuse and neglect dispositional order pursuant to the provisions of West Virginia Code § 49-6-6 (1977) (Repl. Vol. 2004). Section 4, article VIII of the West Virginia Constitution provides in relevant part that "[w]hen a judgment or order of another court is reversed, modified or affirmed by the [supreme] court, every point fairly arising upon the record shall be considered and decided." This Court has taken the enforcement of this provision seriously by entertaining and deciding only those matters fairly arising from the record. Syl. Pt. 9, *State v. Comstock*, 137 W.Va. 152, 70 S.E.2d 648 (1952) ("Under the West Virginia Constitution, . . .when a judgment or decree is reversed or affirmed by this Court, the Court will not consider and decide a point which does not fairly arise upon the record of the case."); *Thornton v. CAMC*, 172 W.Va. 360, 364, 305 S.E.2d 316, 320-21 (1983) (appellate review must be limited to those issues which appear in the record). The majority improvidently declined to adhere to this long-recognized, self-imposed restriction. Instead, the majority extends its holding to include cases involving involuntary termination of parental rights, a circumstance not present in this case. The issue was not raised in the facts and the issue was not properly developed before this Court through brief and argument. As a result the majority's decision is ill-considered and fatally flawed.

It is equally disconcerting that the conclusion reached in the majority opinion clearly ignores legislative intent. Proper reading of the statutory provision regarding modification necessarily results in the conclusion that a biological parent is permitted to seek

modification of a dispositional order in an abuse or neglect case. The statute expressly provides that a motion to modify a dispositional order may be made by a "child, a child's parent or custodian or the state department" and "[t]hat a dispositional order pursuant to subdivision (6), subsection (a) of section five [§ 49-6-5 (a)(6)] shall not be modified after the child has been adopted." W.Va. Code § 49-6-6. West Virginia Code § 49-6-5 (a)(6) (2002) (Repl. Vol. 2004) includes the circumstances under which a court may proceed to involuntarily terminate parental rights. By using a direct internal cross-reference to the termination of parental rights provision, the Legislature has expressed the intent that biological parents whose rights have been judicially terminated have a narrow window of opportunity to seek modification of dispositional orders. The majority wrongly rebuffs that clear legislative intent in order to announce a judicially created social policy that closes the door in child abuse and neglect cases to modification by any natural parent, including those whose parental rights are involuntarily terminated by judicial decree.

Furthermore, by its holding the majority has created a conflict with established case law allowing post-termination visitation. No mention is even made in the majority opinion of the decision authored by Justice Cleckley in 1995 in the case of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). The relevant and significant holding in *Christina L.* involved the recognition that a close emotional bond between a parent and child may exist even when parental rights are terminated in abuse and neglect cases and that continued

visitation or other contact may be in the best interests of the child. *Id.* at Syl. Pt. 5. It is not surprising that the majority ignores *Christina L.* because any effort to distinguish that case would be at best disingenuous since visitation under *Christina L.* is conditioned upon the existence of a close emotional bond *between* the parent and child. Without addressing *Christina L.*, the majority has inappropriately created conflict in this very difficult and particularly sensitive area of the law.

At first blush, the approach taken in the majority opinion seemingly streamlines the adoption process by reducing potential impediments for placement of children who have been victims of abuse and neglect. However, it also turns a blind eye to what the future actually holds for too many of these children. Adoption often is not a viable possibility for "special needs children." Like it or not, the reality is that some children will never be candidates for adoption because of their age, mental or physical disability, race or other factor, and they will simply languish in foster care for any number of years. It is possible that a parent whose rights have been involuntarily terminated could, over time, effect a change in circumstances which would support countermanding the termination decision. It may very well be that it is these children the Legislature contemplated would be protected and served by the policy it adopted by enacting the modification statute and providing that narrow window of opportunity.

I do not understand the majority's desire to so drastically restrict the standing of parents whose rights have been judicially terminated to seek modification. Having standing to apply for modification and attaining modification are far from synonymous. A natural parent seeking to overturn a termination decision has an exceptionally heavy burden to overcome in proving timeliness of the motion, fitness to be a parent, the validity of the claimed change in the parent's errant ways and finally, the lodestar – that the change would be in the best interests of the child. It is the quantum of proof and not the elimination of the opportunity that has governed and should govern the rare modification of termination orders in abuse and neglect cases. *See Overfield v. Collins*, 199 W. Va. 27, 483 S.E.2d 27 (1996) (setting forth burdens and quantum of proof in proceeding by natural parent to regain custody of child either permanently or temporarily transferred to third party).

In sum, I concur with the majority's affirmance of the rulings of the court below in the instant case because no clear error was proven as to application by the lower court of the facts to the law with regard to voluntary relinquishment of parental rights.[1] However, I adamantly dissent from the majority's reaching beyond the matters fairly arising upon the record in order to foreclose the opportunity of natural parents whose rights have been involuntary terminated to seek modification of dispositional orders in abuse and neglect

[1]Of course, a person retains standing to challenge the existence of a valid voluntary relinquishment. Although Appellant's contest of the validity of the relinquishment was unsuccessful in this case, that challenge was rejected on the merits by both this Court and the lower court, not on the basis of a lack of standing.

case. The majority's policy statement is contrary to the expressed intention of the Legislature, is at odds with prior case law regarding post-termination visitation, and engineers a poor social policy by judicial fiat. As a result, I concur, in part, and dissent, in part.

I am authorized to state that Justice Starcher joins in this separate opinion.