

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

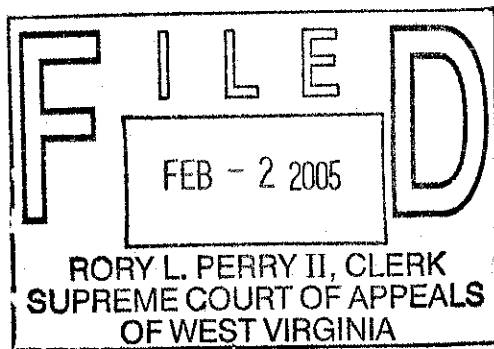
CASE NO: 32167

CHARLESTON, WEST VIRGINIA

IN THE INTEREST OF THE MINOR CHILD
MICHAEL S., JR.

Brief

INTERVENOR TINA S.'S APPEAL FROM THE CIRCUIT COURT'S
FINAL ORDER REGARDING THE MINOR CHILD MICHAEL S. JR.



Counsel for Appellant:
Stephen P. New (#7756)
100 Main Street
P.O. Box 5516
Beckley, WV 25801
(304) 250-6017

FILED
CIRCUIT COURT
Mingo County, WV
2005 DEC 14 A 11:03
ADMITTED TO RECORD
GRANT PREECE
MINGO CIRCUIT CLERK

TABLE OF CONTENTS

	PAGE
NATURE OF RULINGS IN THE CIRCUIT COURT.....	3
PROCEDURAL HISTORY.....	4
STATEMENT OF FACTS.....	6
ASSIGNMENTS OF ERROR.....	8
POINTS AND AUTHORITIES.....	9
ARGUMENT AND DISCUSSION OF LAW.....	10
PRAYER FOR RELIEF.....	14
DESIGNATION OF RECORD.....	15
CERTIFICATE OF SERVICE.....	16

NATURE OF RULINGS IN THE CIRCUIT COURT

Comes now Appellant, Tina S., by counsel, Stephen P. New, and submits this Appeal Brief in support of her appeal from the Final Order of the Circuit Court of Mingo County, West Virginia entered on May 27, 2004. The Circuit Court in its May 27, 2004 Order terminated Intervenor Tina S.'s interests in this action and ordered that she was not an appropriate adoptive placement for the child Michael S. Jr. It is from this Final Dispositional Order that your Appellant, and Intervenor below, Tina S. now appeals.

PROCEDURAL HISTORY

On December 15, 2003 a Petition was filed with the Department of Health and Human Resources requesting that the Circuit Court of Mingo County, West Virginia remove Michael S., Jr. from Michael S., Sr. (biological father) and Brenda E. (biological mother). The Court, at the preliminary hearing, determined the petition set forth facts sufficient to warrant the immediate removal of the child and found that, pursuant to West Virginia Code 49-1-3, that the children were at risk to be abused or neglected by the respondent, parents. The child, Michael S. Jr. was then remanded to the Respondent, DHHR's custody. On December 17, 2003 a preliminary hearing was held in the Circuit Court of Mingo County wherein the Court found probable cause based upon these facts ; that the child and the parents suffered from poor hygiene; the child urinates on the floor at school and defecates on himself; the parents abuse substances. At that time, Tina S., a close friend of Respondent Brenda E., intervened in the case in an effort to be considered for possible placement in the event the parents' parental rights were terminated as to their child Michael S. Jr.

On January 20, 2004, the Court held an Adjudicatory Hearing and found that the subject child was, in fact, neglected under West Virginia Code Section 49-1-1 et seq. and ordered that home studies in the case be

expedited, that the mother, Brenda E., be offered parenting education classes, with continued drug and alcohol testing and psychological examinations. These services were also ordered to be provided to Intervenor Tina S. as well as the parents.

On May 27, 2004, Intervenor Tina S. was unable to attend the Dispositional Hearing due to health issues and her work schedule in Columbus, Ohio. At that time, the Court refused to consider Tina S. as a possible adoptive placement and ordered that intervenor be denied consideration as a possible adoptive placement of the child.

STATEMENT OF FACTS

Michael S. Jr.'s father, Michael S. Sr., was previously convicted of Gross Sexual Imposition of Erroneous Sexual Penetration in the State of Ohio and was a registered sex offender at the time of the allegations of neglect as alleged herein. The respondent parents had exhibited transient lifestyles during the six years of Michael S. Jr.'s life. During the time that the Respondent Mother, Brenda E. lived in Columbus, Ohio, and she and her children developed a close emotional bond with Tina S. Brenda E. testified at the May 27, 2004 hearing that Tina S. cared deeply about the subject child, Michael S. and had developed a strong emotional bond with him during the numerous times in which she cared for him as babysitter.

The Court based its decision to deny Intervenor Tina S.'s request for adoptive placement based upon primarily the testimony of West Virginia DHHR worker Dora Justice. Despite the fact the Court had ordered home studies on all parties, including Intervenor Tina S., as well as psychological testing, criminal investigation, background checks and drug screens, DHHR worker Dora Justice failed to comply with any of the Court's Orders relative to Intervenor Tina S. because she thought that "Tina S. was dropping it."

Intervenor Tina S. had never informed the West Virginia DHHR that she was "dropping it" or withdrawing as an intervenor in the case but stated

that she wished to be considered for adoptive placement if and when Brenda E.'s parental rights were terminated. Any other statements by Dora Justice to the contrary are fabrications.

ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER APPELLANT/INTERVENOR TINA S.'S REQUEST TO BE CONSIDERED AS ADOPTIVE PLACEMENT FOR THE SUBJECT CHILD WHERE THERE WAS EVIDENCE THAT A CLOSE EMOTIONAL BOND EXISTED BETWEEN INTERVENOR TINA S. AND THE CHILD AND THE WEST VIRGINIA DHHR FAILED TO PROVIDE SERVICES TO TINA S.

POINTS AND AUTHORITIES

1. West Virginia Code Section
49-1-3 ...Page 4
2. West Virginia Code Section
49-1-1 ...Page 5
3. West Virginia Code Section
49-6-5 ...Page 10
4. West Virginia Code Section
49-6-5 ...Page 11

ARGUMENT AND DUSCUSSION OF LAW

THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER APPELLANT/INTERVENOR TINA S.'S REQUEST TO BE CONSIDERED AS ADOPTIVE PLACEMENT FOR THE SUBJECT CHILD WHERE THERE WAS EVIDENCE THAT A CLOSE EMOTIONAL BOND EXISTED BETWEEN INTERVENOR TINA S. AND THE CHILD AND THE WEST VIRGINIA DHHR FAILED TO PROVIDE SERVICES TO TINA S.

West Virginia Code Section 49-6-5 requires the West Virginia Department of Health and Human Resources to file a Child Case Plan, including a Permanency Plan. W. Va. Code Section 49-6-5 states:

“The Court shall forthwith proceed to disposition giving both the Appellant and Respondents and opportunity to be heard. The Court shall give precedence to dispositions in the following sequence...(5)...the Court Order shall also determine under what circumstances the child’s commitment to the department shall continue considerations pertinent to the determination include whether the child (i) be continued in Foster Care for a specified period; (ii) be considered for adoption; (iii) be considered for Legal Guardianship; (iv) be considered for permanent placement with a fit and willing relative; (v) be placed in another planned permanent living arrangement but only in cases where the department has documented to the Circuit Court a compelling reason for determining that it would not be in the best interest of the child to follow one of the options set forth in paragraphs 1-3 or 4. The court may order services to meet the special needs of the child.”

The Child’s Case Plan in the instant case was filed on February 18, 2004. Despite the fact that on January 21, 2004, the Circuit Court ordered the department to conduct a home study and provide other services to Intervenor Tina S., the department did not provide any of these services and the Child’s

Case Plan is silent as to Intervenor Tina S. Moreover the Child's Case Plan is wholly lacking and in no way comports with the detailed requirements of West Virginia Code Section 49-6-5.

A close review of Section 5 of both the Family Case Plan and the Child's Case Plan reveals that they are (1) identical and (2) do not comply with the law. Despite the fact that Judge Thornesbury had on January 21, 2004 ordered services and a home study on Intervenor Tina S.'s home, West Virginia DHHR completely ignores Intervenor Tina S. in the permanency plans set forth in the Family Case Plan and Child's Case Plan (see Child's Case Plan February 18, 2004 attached hereto as Exhibit A Family Case Plan February 18, 2004 attached hereto as Exhibit B).

Dora Justice testified at the Dispositional Hearing that she did not consider Tina S. for placement due to the fact that she thought Tina S. would be "dropping it" (See, Order from Dispositional Hearing, May 27, 2004 attached hereto as Exhibit C). The Circuit Court did not accept the undersigned counsel's explanation as to the absence of Tina S. at the Dispositional Hearing on May 27, 2004. The Supreme Court of Appeals should note that the Circuit Court of Mingo County had previously scheduled the Dispositional Hearing on April 21, 2004 at 3:00 p.m. and announced this date at the February 2004 Adjudicatory Hearing. However,

on April 20, 2004 at approximately 4:00 p.m., the Court changed the time of the April 21, 2004 hearing from 3:00 p.m. to 8:30 a.m. and failed to advise intervenor or her counsel. Tina S. then therefore missed the Adjudicatory Hearing wherein the Respondent mother, Brenda E. voluntarily relinquished her parental rights, as well as the MDT which followed.

The West Virginia DHHR at no time seriously pursued Tina S. as a possible adoptive placement for the subject child Michael S.

Tina S. was the best alternative for permanent placement of the child, Michael S., and should have been considered by the Court for placement. Had the West Virginia DHHR appropriately offered her services in accordance with Courts' Order, of January 21, 2004, the DHHR could have addressed Intervenor Tina S. in its Child Case Plan. Instead, what we are left with is an intervenor who desperately desires to have Michael S. placed in her home. Intervenor Tina S. has cared for Michael S. Jr., and Michael S. Jr. has played and grown up with Tina S.'s children in Columbus, Ohio. Sufficeth to say, Tina S. is as close to a second mother as Michael S. Jr. may have in the world.

The West Virginia DHHR, as it frequently does, chose the path of least resistance instead of the path which will place the child in a loving home

with people who care for him and with whom he has strong emotional bonds.

The Court in its May 27, 2004 hearing completely ignored the close emotional bond between Michael S. and Tina S. as testified to by the Respondent Mother, Brenda E.

The Court should not have permitted the Dispositional Hearing to go forward where the West Virginia DHHR had not complied with previous orders of the Court. DHHR worker Dora Justice should not have been allowed to insist that Intervenor, Tina S., had "dropped it," there is no evidence in the Court file or correspondence to or from the undersigned counsel to confirm this fact. To the contrary, Tina S.'s actions were consistent with an intervenor desiring to obtain custody in the event the respondent mothers' parental rights were terminated. In support of this, Brenda E. testified at the May 27, 2004 hearing that Tina S. had brought her to West Virginia for visitation and had conducted visitation with the child at DHHR prior to the Disposition Hearing. These facts are inconsistent with DHHR worker Dora Justice's assertions that Tina S. was not interested in pursuing custody.

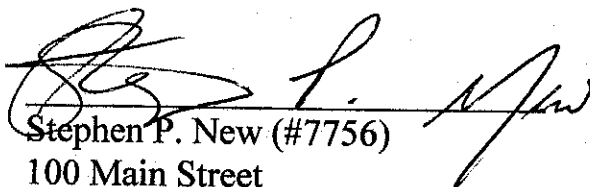
Therefore, this Honorable Court should overturn the Circuit Court's Final Disposition Order of May 27, 2004 and order that another Disposition

Hearing take place following the court ordered services to determine whether or not placement with Tina S. would be in the best interest of the subject, child Michael S. Jr.

PRAYER FOR RELIEF

WHEREFORE, Your Appellant Tina S. (Intervenor Below) respectfully requests that this Honorable Court **REVERSE** the May 27, 2004 Dispositional Order of the Circuit Court of Mingo County, West Virginia and order that the Appellant, Tina S.'s interests in this action be restored as possible adoptive or permanent placement of the child Michael S. Jr.

Tina S.
by counsel



Stephen P. New (#7756)
100 Main Street
P.O. Box 5516
Beckley, WV 25801
Phone: 304-250-6017
Fax: 304-250-6012

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

Respondent,

v.

CIVIL ACTION NO. 03-JN-43

MICHAEL S. SR. et al.,

TINA S., Petitioner (Intervenor)

IN THE INTEREST OF THE MINOR CHILD
MICHAEL S. JR. D.O.B: 2-16-98

DESIGNATION OF RECORD

I, Stephen P. New, counsel for appellant, Tina S., hereby designate all pleadings, orders and transcripts in the above captioned civil action as the Record for Appellate Review.

FILED
CIRCUIT COURT
MINGO COUNTY, WV
2004 DEC 14 A 11:03
ADMITTED TO RECORD
GRANT PREECE
MINGO CIRCUIT CLERK

CERTIFICATE OF SERVICE

I, **Stephen P. New**, counsel for Appellant, Tina S., hereby certifies that the foregoing Appeal Brief Regarding Minor Child, Michael S. Jr., has been served upon all counsel of record, and all other parties relevant to this matter, by mailing a true copy thereof as follows:


C. Michael Sparks, Esq.
Mingo County Prosecuting Attorney
P.O. Box 2236
Williamson, WV 25661

William H. Duty, Esq.
P.O. Box 277
Williamson, WV 25661

Teresa Hall Maynard, Esq.
P.O. Box 988
Williamson, WV 25661

Diana Carter Wiedel, Esq.
84 East 3rd Avenue, Suite 24
Williamson, WV 25661

on this the 10th day of December, 2004


Stephen P. New (#7756)
Attorney at Law

ADMITTED TO RECEIVING
GRANT PEEBLES
MINGO CIRCUIT CLERK

2004 DEC 14 A 11:03

FILED
CIRCUIT COURT
MINGO COUNTY, WV