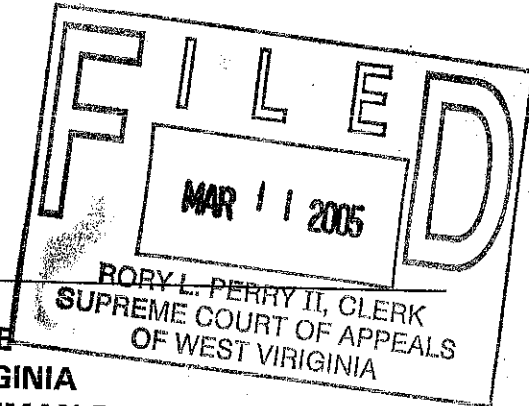


No. 32167

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN RE: MICHAEL S. JR.,



BRIEF OF APPELLEE
STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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I.

**KIND OF PROCEEDING AND NATURE OF RULING IN
LOWER TRIBUNAL**

This appeal arises from the Order from Dispositional Hearing of the Circuit Court of Mingo County, West Virginia, entered, nunc pro tunc, on May 27, 2004. The Circuit Court concluded that placement of the child, Michael S. Jr., with the Intervenor, Tina S., would not be in the best interest of the child.¹ Specifically, the Circuit Court opined that "[d]ue to her non-cooperation with these proceedings and failure to attend the visitation with the child and the hearings in this matter, placement with Tina S. would not be in the best interest of the child." The Appellant contends that the Circuit Court erred in its findings and conclusions of law that Tina S. was not an appropriate placement. The West Virginia Department of Health and Resources, on the other hand, asserts that the Circuit Court properly considered and rejected Tina S. as a possible placement and that such ruling was in the best interest of the child.

II.

STATEMENT OF FACTS

On or about October 29, 2003, the West Virginia Department of Health and Human Resources (hereinafter, Department) received a referral on Michael S. and

¹The Department follows the practice of identifying certain individuals in child abuse and neglect matters by their initials. Dept. of Health and Human Resources ex rel. Mills v. Billy Lee C., 199 W. Va. 541 n.1, 485 S.E.2d 710, 712 n. 1 (1997); In re: Danielle T., 195 W. Va. 530, 531 n.1, S.E.2d 189, 190 n.1. (1995).

Brenda E., biological parents of Michael S. Jr. (hereinafter, Michael or child).² The allegations were: (1) that the home conditions were deplorable; (2) that the child and parents suffered from poor hygiene; (3) that the child urinated on the floor at school; (4) that the child defecated on himself; and, (5) that the parents were substance abusers.

On December 12, 2003, Child Protective Services Worker, Natalie Buskirk, investigated the referral. Among deplorable living conditions, Ms. Buskirk also discovered that Michael S. had been previously convicted of several counts of gross sexual imposition in Franklin County, Ohio, and that the charges involved at least two minors. Moreover, Michael S. admitted to Ms. Buskirk that his parental rights had been previously terminated.³ Thereafter, on December 15, 2003, the Department filed a child abuse and neglect petition pursuant to West Virginia Code § 49-6-3 against the biological parents. Based upon the child being in imminent danger due to aggravated circumstances, the Department obtained an Order from the Circuit Court granting the immediate temporary transfer of the child's custody from the biological parents to the Department. The Court appointed counsel for the child and his parents and scheduled a preliminary hearing on December 17, 2003.

At the preliminary hearing on December 17, 2003, the Court found that the petition set forth sufficient facts to justify the immediate removal of the child from

²Michael's birthday is February 26, 1998.

³Michael S.'s parental rights to a biological daughter had been previously terminated in the state of Ohio.

the biological parents. The Court specifically found, *inter alia*, that:

1. Michael S. and Brenda E. lived in two separate houses, very close in proximity.
2. Brenda E.'s home had large holes in the bathroom and kitchen floors and you could see the ground through the holes.
3. Michael S. did not have potable water in his home and his source of electricity was an extension cord run from Brenda E.'s home.
4. Both homes were very unkempt and dirty.
5. Each home contained four or five puppies.
6. Each home had puppy feces on the floor.
7. The child lived in the home with Michael S. and slept in the bed with him.
8. The child and Michael S. went to Brenda E.'s home to take showers.
9. Michael S. admitted to Ms. Buskirk that he had been convicted of several counts of gross sexual imposition and that the charges involved two children under the age of thirteen.
10. Michael S. admitted to Ms. Buskirk that his parental rights to a biological child had previously been terminated.
11. Brenda E. was aware of Michael S.'s previous criminal sexual convictions.
12. Michael S. reported that he has been residing in West Virginia since Father's Day, 2003.

Order from Preliminary Hearing (Dec. 17, 2003), attached hereto as **Exhibit A**.

Due to poor living conditions, poor hygiene, previous sexual offense convictions, failure to protect, and previous termination of parental rights, the Circuit Court found probable cause to believe that Michael was a neglected child at the hands of Michael S. and Brenda E. The Circuit Court ordered continued placement of the child in the physical and legal custody of the Department, and set the matter for an adjudicatory hearing on January 20, 2004.

Before the conclusion of the preliminary hearing, the Circuit Court awarded Tina S. of Columbus, Ohio, intervenor status. Tina S. had stated that she was a friend of

Brenda E. and had taken care of the child in the past. Tina S. was advised that she was required to complete a home study and undergo a psychological evaluation.

At the adjudicatory hearing of January 20, 2004, the Circuit Court found that the evidence supported a finding that Michael S. and Brenda E. had neglected Michael, all in accordance with W. Va. Code §49-6-2(c). The Circuit Court set the matter for dispositional hearing on February 23, 2004. Order from [Adjudicatory] Preliminary Hearing (Jan. 20, 2004), attached hereto as **Exhibit B.**⁴

Case Worker, Dora Justice, for the Department was present at the adjudicatory hearing and assumed responsibility of the case continuing forward. Tina S. also attended the adjudicatory hearing and was advised by Dora Justice that her psychological evaluation had been scheduled for February 9, 2004. Tina S. responded by stating that the only reason why she was acting as an intervenor was because of the insistence of Brenda E. Tina S. further advised Dora Justice that she did not want to hurt Brenda E.'s feelings by backing out. Tina S. asked Ms. Justice not to tell Brenda E. of their conversation. Tina S. further advised that she only wanted to be involved if Brenda E. lost her parental rights. Tina S. concluded by stating that she needed time to make up her mind about remaining as an intervenor in the case. Ms. Justice then informed Tina S. that time was of the essence and that her psychological evaluation and other paper work needed to be completed and sent to Ohio for the completion of her home study.

⁴This Order erroneously reflects this hearing as the preliminary hearing instead of the adjudicatory hearing.

By letter dated February 9, 2004, Dora Justice received notice from Dr. Pamela A. Ryan, a licensed psychologist, confirming the cancellation of Tina S.'s psychological evaluation, which was precipitated by Tina S.'s desire not to pursue intervenor status. See, Letter from Dr. Ryan to Dora Justice, attached hereto as **Exhibit C**.

Tina S.'s actions or inactions to participate to any reasonable degree as an individual interested in becoming a possible placement continued. A multidisciplinary treatment team meeting (hereinafter, MDT) was scheduled on February 19, 2004, but Tina S. failed to attend despite the fact that she was aware of it being scheduled. Likewise, Tina S. did not appear at the dispositional hearing on February 23, 2004, even though Tina S. was at the adjudicatory hearing when the dispositional hearing was set.

At the dispositional hearing held on February 23, 2004, the respective parents requested a post-adjudicatory improvement period. The Court granted Brenda E. a post-adjudicatory improvement period for sixty (60) days, but denied Michael S.'s motion. Because the Circuit Court granted Brenda E. an improvement period, the Circuit Court rescheduled the dispositional hearing for April 21, 2004, at 3:30 p.m. Order Granting Post Adjudicatory Improvement Period (Feb. 23, 2004), attached hereto as **Exhibit D**.

Prior to the dispositional hearing of April 21, 2004, Tina S. transported Brenda E. from Ohio to a supervised visit with Michael on April 16, 2004. It is from this visit that Dora Justice observed very little interaction between Tina S. and Michael, and was able to later testify that she observed no emotional bonding between them. According to Dora Justice, this was the one and only visit that she recalled between

Tina S. and Michael. Tina S. never requested Dora Justice to arrange for any visits with Michael before or after the April visit.

On April 20, 2004, the day before the scheduled dispositional hearing, the Circuit Court changed the time from 3:30 p.m. to 8:30 a.m. On the evening of April 20, 2004, Dora Justice telephoned Tina S. in order to relay information to Brenda E. of the changed time of the dispositional hearing. It should be noted that Brenda E. did not have a phone at her residence. Although notified of this hearing, again Tina S. failed to appear.

At the hearing on April 21, 2004, Brenda E. informed the Court that the only reason she was in attendance was because Tina S. informed her of the changed time. Because Brenda E. requested and was granted an extension on her improvement period, the dispositional hearing was rescheduled for May of 2004. Order Extending Respondent Mother's Post-Adjudicatory Improvement Period (April 21, 2004), attached hereto as **Exhibit E.**⁵

The dispositional hearing took place on May 27, 2004. Dora Justice testified that she observed no emotional bond between Tina S. and the child during the April visit. Ms. Justice also testified that Tina S. refused a home study for possible placement of Michael. It was also noted that although Tina S. was previously awarded visitations with Michael, her last contact was approximately 1-½ months ago when she attended a visitation with the child's mother. The Circuit Court's Order further

⁵This Order erroneously reflects the hearing was held on February 23, instead of April 21, 2004.

reflected that Tina S. was a non-participatory intervenor because she did not attend the hearing on April 21, 2004, nor the MDT that followed the hearing. Order from Dispositional Hearing (May 27, 2004), attached hereto as **Exhibit F.**⁶

At the conclusion of the dispositional hearing, the Court found that due to Tina S.'s non-cooperation with the proceedings, failure to attend visitations with the child and the hearings in this matter, placement of the child with Tina S. would not be in the best interests of the child. The Court also ruled that it was in the child's best interest that the parental rights of Michael S. and Brenda E. be terminated and that the child be placed for adoption.

III.

STANDARD OF REVIEW

In appeals of this nature, this Court has applied a standard of review subjecting questions of law to *de novo* review and findings of fact to the clearly erroneous standard. In syllabus point two, this Court stated, "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two - prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Walker v. West Virginia Ethics Comm'n, 201 W. Va. 108, 492 S.E. 2d 167

⁶Although this order reflects the Appellant was present and testified, this is believed not to be the case. This is also supported by the Appellant's Brief.

(1997). Furthermore, "Typically, a grant of discretion to a lower court commands this Court to extend substantial deference to such discretionary decisions." State v. Allen, 208 W. Va. 144, 155, 539 S.E.2d 87, 98 (1999). This was further defined by Hensley v. West Virginia Department of Health and Human Resources, when the Court held, "under the abuse of discretion standard, we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances.'" 203 W. Va. 456, 461, 508 S.E.2d 616, 621 (1998) (quoting Gribben v. Kirk, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995)).

IV.

ARGUMENT

Because the Appellant, Tina S. and intervenor below, did not cooperate and participate in the underlying proceedings and activities, the Circuit Court did not err by denying her request that the child be placed in her home as a possible adoptive placement.

The record demonstrates that the Circuit Court went above and beyond its responsibility in considering the Appellant as a possible permanent placement for Michael. The Circuit Court permitted the Appellant to intervene when in fact it appears that the Court should have denied her motion to intervene. While it has been decided by this Court that current foster parents may have standing to intervene in an abuse and neglect proceeding, it appears that the case sub judice is

one of first impression and the Appellant should have been denied intervenor status.

This Court held that foster parents who had care and custody of a child for more than two years were entitled to full opportunity to be heard in the termination proceeding regarding questions of the child's interests and their continued relationship to that child. In re Jonathan G., 198 W. Va. 716, 482 S.E.2d 893 (1996). The rights of the foster parents to be heard, however, are limited to the extent that, "[t]he foster parents' involvement in abuse and neglect proceedings should be separate and distinct from the fact-finding portion of the termination proceeding and should be structured for the purpose of providing the circuit court with all pertinent information regarding the child. The level and type of participation in such cases is left to the sound discretion of the circuit court with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed." Id., at Syl. pt. 1. In addition, "Foster parents who are granted standing to intervene in abuse and neglect proceedings by the circuit court are parties to the action and have the right to appeal adverse circuit court decisions." Syl. pt. 1, In re Harley C., 203 W.Va. 594, 509 S.E.2d 875 (1998). However, in a case of first impression wherein former foster parents were denied intervention status in an abuse and neglect proceeding involving their former foster children by a circuit court, this Court affirmed the lower court by stating " . . . in the interest of expediting the resolution and conclusion of abuse and neglect proceedings, we are hesitant to expand the realm

of intervenors to individuals who are no longer guardians or custodians of the children at issue for fear that " 'unjustifiable procedural delays' " undoubtedly would attend the ever-increasing roster of interested participants." In re Michael Ray T., 206 W. Va. 434, 442, 525 S.E.2d 315, 323, also quoting Syl. pt. 3, in part, Jonathan G., 198 W. Va. 716, 482 S.E.2d 893 and Syl. pt. 1, in part, In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

Given the above holdings, the right of intervention is limited to current foster parents. Intervention by current foster care parents is not automatic. Rather, it is within the discretion of the circuit court. When granted, the primary purpose for intervention is to provide the lower court of relevant information regarding the child. In the case at hand, the Appellant was never a foster parent, former or otherwise, to the child. Because the Appellant was never a foster parent, the Circuit Court should not have granted her intervention status. If Tina S. was prevented from becoming an intervenor in the underlying abuse and neglect case, she would not be a party and therefore would have no right to seek this appeal.

Assuming *arguendo* that the Circuit Court has discretion to permit intervention by the Appellant in the underlying abuse and neglect proceeding, the Circuit Court did not err, nor did it exceed the bounds of permissible choices given the circumstances.

The thrust of the Appellant's argument is that the Circuit Court and the Department did not properly consider her as a possible placement for the child. However, the record demonstrates that the Appellant did not participate to any

reasonable degree in order to become worthy of being a proper placement. A reading of the Circuit Court's Order from the dispositional hearing of May 27, 2004, clearly shows that the Court made the correct decision and it was not based solely upon the testimony of Ms. Justice. The Circuit Court was well aware of Tina S.'s failure to regularly visit with the child, failure to attend MDT meetings, failure to attend scheduled court hearings, and her refusal to complete the necessary paper work for a home study and cancellation of her psychological evaluation. From December 17, 2003, the date that the Appellant was awarded intervenor status, until the dispositional hearing on May 27, 2004, the Appellant never put forth any significant effort to persuade the Court to consider her as a possible adoptive placement for Michael.

According to the case worker, Dora Justice, the Appellant only visited Michael on one occasion, and that was when the Appellant provided transportation for the biological mother to visit her son. It is interesting to note the absence of any mention in the Appellant's Brief of any visits other than the one mentioned above. At no time does Appellant's brief mention any Christmas, Valentine, Birthday or Easter presents and/or cards sent by the Appellant to Michael. It is interesting to note that Appellant's Brief is silent to the fact that Tina S. was not at Michael's birthday party.

The Appellant attempts to make an argument that because she was not included in the Child's Case Plan, she was not properly considered as a possible placement. The Appellant totally ignores the fact that shortly after the Circuit Court

awarded her intervenor status in December 2003 and ordered a home study and psychological testing, the Appellant advised Dora Justice after the adjudicatory hearing in January 2004 of her apprehensions in becoming involved. After the Appellant stated she needed more time to make up her mind, Dora Justice reminded her that time was of the essence. Due to the Appellant's uncertainty and no clear indication from her that she did not want to participate, the psychological evaluation remained scheduled for February 9, 2004.

The Appellant's apprehension was further crystalized, however, when she failed to appear at Dr. Ryan's office for her psychological evaluation on February 9, 2004. Dora Justice was first made aware of Tina S.'s failure to make her appointment by the letter she received from Dr. Ryan. Dora Justice never communicated to Dr. Ryan, directly or indirectly, that Tina S. no longer wished to seek intervenor status. The Department asserts that it was the Appellant who made her desires known to Dr. Ryan that she no longer wished to be involved. Indeed, Dr. Ryan's letter mentions, "Please contact this office if your client changes her mind. . . ."

Furthermore, Appellant's desire not to participate is evident by her failure to attend the court hearings that were held on February 23, April 21, and May 27, 2004, although she had been notified of their dates and times. Moreover, the Appellant never attended an MDT during the entire time of the underlying proceedings.

The Appellant alleges in her Brief that she was not notified of the hearing on April 21, 2004. Appellant's Brief, p. 12.⁷ However, the record contradicts this statement. A reading of the Circuit Court's Order of May 27, 2004, shows that Brenda E. testified that she had personally spoken to Tina S. about the date and time of the hearing. Order from Dispositional Hearing, page 9. paragraph 70. Apparently, this conversation was after the telephone conversation that Dora Justice had with Tina S. in which Ms Justice was relaying information to Brenda E. through Tina S. that the time had changed.

The Appellant also mentions in her Brief that she was not present at the dispositional hearing on May 27, 2004. The Appellant provides no further detail other than to state that the explanation for her absence was not accepted by the Circuit Court. The Department can only conclude, as did the Circuit Court, that the explanation given was skeptical at best. Appellant's Brief, p. 11.⁸ The dispositional Order from the May 27, 2004, hearing clearly discloses that the Appellant was non cooperative, failed to attend visitations, failed to attend hearings, and the most significant failure is the fact that no emotional bond was

⁷The Appellant references the April 21, 2004 hearing as the adjudicatory hearing wherein Brenda E. relinquished her parental rights. However, the Orders actually reflects that the adjudicatory hearing was held on January 20, 2004 and that Brenda E. relinquished parental rights at the dispositional hearing on May 27, 2004.

⁸Given the Appellant's Brief that she was absent at the hearing on May 27, 2004, it appears that the Order from this hearing erroneously reflects the Appellant appeared in person.

observed between the Appellant and Michael. Clearly, the Circuit Court did not err when it denied the Appellant's home as a possible adoptive placement for Michael. The Circuit Court made a decision that took into account the interest that mattered most, that of the child. This Court has stated that, "the best interests of the child is the polar star by which decisions must be made which affect children." Michael K. T. v. Tina L. T., 183 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989).

V.

CONCLUSION AND RELIEF REQUESTED.

In conclusion, the Appellant's behavior, time and time again, depicts a person who is not interested in making the effort to become an approved placement for Michael. Tina S.'s behavior is consistent with the actions or inactions of an individual who was forced or coerced by Brenda E. in becoming an intervenor, especially now that the Circuit Court had terminated her parental rights. For the above stated reasons, the Department respectfully prays this Honorable Court affirms the Order of the Circuit Court of Mingo County entered on May 27, 2004, denying placement of the child with the Appellant.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF
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