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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,
Petitioner Below, Appellee

vs.

Docket Number: 32167
Mingo County Case No.: 03JN-43
Judge Michael Thornsby

MICHAEL S.
and
BRENDA E.

Respondents Below,

TINA S.,

Intervenor Below, Appellant.

IN THE INTEREST OF THE MINOR CHILD

MICHAEL S., JR.

DOB: 02-16-1998

GUARDIAN AD LITEM'S BRIEF

FROM THE CIRCUIT COURT OF
MINGO COUNTY, WEST VIRGINIA

TO THE HONORABLE JUSTICES
OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Guardian Ad Litem

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NATURE OF RULING IN THE CIRCUIT COURT

Comes now your Guardian Ad Litem, and submits this Brief in opposition of the brief submitted by the appellant, herein, and in support of the Order from Dispositional Hearing entered by the Circuit Court of Mingo County, West Virginia following a Dispositional Hearing held on May 27, 2004. The lower court in its order of May 27, 2004, denied the Intervenor Appellant's request for custody of the minor child, herein.

PROCEDURAL HISTORY

On December 17, 2003, a Preliminary Hearing was held on a Petition filed by the Department of Health and Human Resources (hereinafter, DHHR) requesting custody of Michael S., Jr. At the time the Petition was filed, Michael S., Jr. lived in the physical custody of his father, Michael S. in a dilapidated trailer in Mingo County, West Virginia. Living nearby, in another dilapidated trailer connected by an electrical line was the child's mother, Brenda E. Both homes were found to be very unkempt and dirty. A dead rodent was found in the yard of one home and four or five live puppies lived in each home. There were feces on the floors of each home and holes in the floors and walls of the father's home. The father's home had no electricity, other than that run from the mother's home by a cord, and no water. Michael S., Jr. was five years old at the time. He was not potty trained, he could hardly speak, and he had very poor personal hygiene. His father, with whom he resided, was a convicted sexual offender from the state of Ohio. He had lived with his father for several years because his mother was unable to provide a home for him. His father testified that he and Michael S., Jr. had lived numerous states during the preceding couple of years and had been in West Virginia for approximately six months. At the conclusion of the Preliminary Hearing, the Court ordered that the child should remain in the legal and physical custody of DHHR and that the parents, as well as all other parties, should be offered numerous services by DHHR. The Court also granted intervenor status to Tina S., the Appellant, herein. The Adjudicatory Hearing was scheduled for January 20, 2004, in open court, at the conclusion of this hearing. There is an Amended Order from the Preliminary Hearing which incorrectly states that the hearing was held on January 20, 2004.

An Adjudicatory Hearing was held on January 20, 2004 (however the order from this hearing is incorrectly titled Order from Preliminary Hearing). Tina S. and her counsel did appear at this hearing although the order does not reflect so. Counsel for Tina S. raised the issue that he appearance was not noted to the Court at the Dispositional Hearing on May 27, 2004, and the Court noted at that time that he was present at the Adjudicatory Hearing. At this hearing further evidence was taken regarding the circumstances of neglect surrounding the time of the removal of this child. The Court also heard evidence which indicated that the parents had been at least somewhat compliant with the services previously ordered by the Court. The Dispositional Hearing was scheduled for February 23, 2004, at the conclusion of this hearing, in open court.

On February 23, 2004, the parties appeared for Dispositional Hearing in the matter. Neither Tina S., nor her counsel appeared for this hearing. Prior to the taking of evidence, counsel for the parents requested post adjudicatory improvement period. The DHHR and the Guardian Ad Litem objected agreed with the mother's request, but objected to the father's request because he had become non-compliant with the Court's previous orders since the Adjudicatory Hearing. The Court denied the father request for improvement period, but granted the mother's request and ordered a 60-day, out-of-home improvement period. The Court also rescheduled the Dispositional Hearing in this matter for April 21, 2004. The parties were given the date and time of the hearing in open court.

On April 21, 2004, the parties again appeared for Dispositional Hearing in this matter. Again, neither Tina S. nor her counsel appeared for hearing. The mother requested an extension of her improvement period which was granted and the matter was again rescheduled for

Dispositional Hearing in open court. The order reflects that the hearing was scheduled for May 25, 2004.

On May 27, 2004, the parties appeared for Dispositional Hearing. Although the order indicates that Tina S. and her counsel appeared, the findings of fact contained in the order make it clear that Tina S. did not appear in person, but only appeared by counsel. At this hearing, the parties, with the exception of Tina S. reached an agreed disposition. The mother voluntarily relinquished her rights to the child, herein, and was granted some limited supervised contact with the child. The father, who had not appeared for several hearing and had not participated in the majority of the previous orders of the Court, had his parental rights terminated with no visitation. Counsel for the intervenor presented some evidence on behalf of the intervenor and requested that she be awarded custody of the child. The Court denied her request and ordered that the child should remain in foster care with a goal towards adoption.

STATEMENT OF FACTS

Michael S. Jr. was five years old at the time of his removal from the physical custody of his father. He was not potty trained, he did not know his colors, his letters, etc. He could barely speak. He functioned on the level of a 2-3 year old child. Shortly after his removal, he began to make great strides in development. Although he remains developmentally delayed, he is much improved.

At the time Michael S. Jr. was removed, his father lived in a trailer with holes in the walls and floors. There were feces on the floor, no water in the home, and electricity was supplied by an electrical wire run on the ground from the mother's trailer nearby. There was little or no heat in the home and temperatures were frigid. The child slept in the bed with his father, who is a convicted sexual offender. Michael's mother lived in a trailer nearby. Although her trailer was in slightly better condition, there were feces on the floor and the home was very dirty. She did have running water and electricity.

The mother voluntarily permitted the father to have physical custody of the child at least two years prior to filing of the petition in this matter. During those two years, the father and child lived in as many as six different states and under very poor conditions. During most of that time, the mother lived in the state of Ohio.

After the Preliminary Hearing the mother moved back to Ohio. There, she lived next door to the Intervenor, Tina S., and with a man who had a long history of involvement with Ohio CPS, as evidenced by her home study. The mother was cooperative with DHHR and compliant with the orders of the Court. However, she could never understand the poor decisions she made regarding caretakers for her children and she never acknowledged her responsibility in their

abuse and/or neglect, either at her own hand or at the hand of other caretakers. She consistently chose partners with questionable backgrounds and bad habits and she was always dependant upon a partner for support. She faithfully attended visits and parenting throughout the case, and she presented herself for a psychological evaluation and a home study. The father disappeared after the first couple of hearings.

The Intervenor, Tina S., lived next door to Brenda E. She often provided transportation to West Virginia from Ohio so that Brenda E. could participate in visitation with her son and so that she could attend court hearings and MDT meetings. However, Tina S. did not participate in visitations with the child, though she was awarded such visitations. She only visited with the child briefly on one occasion. She did not attend her psychological evaluation. She did not complete the paperwork for her home study request, nor did she regularly attend hearings and MDT meetings. Her lack of commitment to receiving custody of the child was evident in the manner in which she chose to participate in this matter. In a final show of disinterest, she chose not to appear at the Dispositional Hearing, although she knew of the hearing and, according to the testimony of Brenda E., she told Brenda of the date and time of the hearing.

ASSIGNMENT OF ERROR

I. The Lower Court Did Not Err in Refusing to Grant the Intervenor, Tina S., Custody of the Child, Herein, Where Tina S. Failed to Participate in Hearings, MDT Meetings, and the Court-ordered Services Necessary to Be Considered for Placement of a Child.

The Appellant alleges that the Circuit Court erred in failing to consider her as adoptive placement for the child, Michael S., Jr. where there was evidence of a close emotional bond between she and the child. The Guardian Ad Litem supports the decision of the Circuit Court in this matter. In the instant case, there was no evidence of any bond between the intervenor and the child, herein. Tina S. was granted intervenor status in this matter immediately following the Preliminary Hearing in this matter when she presented herself to the Court as a very close family friend and frequent caretaker of the child Michael S., Jr. The Court granted her request in an effort to provide continuity of care for the child should the parents' parental rights be terminated. However, during the pendency of the case, the Court determined that Tina S. did not have the close relationship with the child which she originally portrayed. Tina S. exhibited her disinterest in the child and the outcome of this matter in several ways during the course of these proceedings. She attended the Court hearings sporadically. She never requested visitation with the child, though she often transported the mother to her visitation. She only visited the child briefly on one occasion when she picked the mother up following her visit. She did not

participate in her psychological evaluation and she did not complete the necessary paperwork to request her home study through interstate compact. The mother, Brenda E. testified at the Dispositional Hearing that Tina S. never kept the child for an extended period of time. In fact, she testified that the child had never spent the night with Tina S.

The Appellant argues that she did not participate in any of the above-referenced activities because the DHHR did not permit her to do so. In fact, this matter was ongoing for a period of six (6) months. At no time during that time did the Intervenor or her counsel request any services. Tina S. did not participate in her psychological evaluation. At no time following her scheduled appointment did she or her counsel contact the DHHR to reschedule the appointment. At no time following her scheduled appointment did she or her counsel obtain an independent psychological evaluation to submit to the Court. All parties were provided a copy of the home studies of the father and the mother. At no time prior to the Dispositional Hearing did the Intervenor or her counsel obtain a home study, through the interstate compact or otherwise, to present to the Court. Neither the Intervenor or her counsel appeared at the MDT meeting held on April 21, 2004, during which time the members of the team discussed the possible placement of the child.

The Intervenor, Tina S., was a represented party during this matter. At no time during the pendency of the case did she or her counsel make any effort or do any thing to further her interests or to support her claim for custody of the child, Michael S., Jr. It is inappropriate for Tina S. to sit upon her rights as a party to this action for six (6) months and then argue that she did not receive the services ordered by the Court immediately following the Preliminary Hearing on December 17, 2003.

The child, Michael S., Jr., has had too much inconsistency in his life. His parents have been inconsistent in their care of him and Tina S. has been inconsistent in her request for custody of him. If Tina S. had put forth any evidence that the child had an emotional bond with her and that she is a fit and proper caretaker, the Guardian ad Litem would support her request for custody, herein. However, Tina S. put forth no such evidence.

It would be inappropriate and unfair to delay this matter further due to Tina S.'s tenuous claim for custody of Michael S., Jr. This child needs permanency, consistency, and stability in his life. Since the Dispositional Hearing ten (10) months ago, the child was removed from his foster home due to substantiated physical abuse. Following that removal, he was placed in two foster homes in quick succession, and then in River Park Hospital for twelve (12) days. He was then placed in a foster home in which he began to adjust and thrive, only to be removed after several weeks at the foster mother's request because the DHHR would not permit her to have other young foster children simultaneously with Michael S., Jr. Also during this time, the mother, Brenda E., became more and more inconsistent with her visitation and has finally missed in excess of three scheduled visits. The Guardian Ad Litem has requested that her visits be terminated.

Since the Dispositional Hearing, the DHHR has not provided Michael S., Jr., with much more consistency and stability than his parents did. The Guardian Ad Litem requests that the Appeal filed herein be denied and that the DHHR be permitted to locate an acceptable, appropriate adoptive placement for the child, Michael S., Jr.

CONCLUSION

The Guardian Ad Litem supports the ruling of the Circuit Court in this matter as well as the brief filed on behalf of DHHR. Further, the Guardian Ad Litem believes that Tina S. had little or no emotional bond with the child, Michael S., Jr. at the time of the Dispositional Hearing in this matter and that she has even less emotional bond with him at this time. There is no evidence that Tina S. would be a fit and proper care-taker for the child. Tina S. was a party to this action beginning December 17, 2003. She made no effort to present any evidence on her own behalf or to be an active participant in this case. This child needs immediate permanency, as well as consistency and stability. Tina S. has demonstrated the opposite characteristics throughout this case. To further delay permanency for the child in this matter would be unfair to the child and would not be in his best interest. Michael S., Jr. is currently in a successful foster placement and DHHR is looking for an immediate adoptive placement. His current placement may be an adoptive placement. The Guardian Ad Litem, on behalf of the child's best interests, requests that Tina S.'s appeal be denied and that the child be permitted to have permanency.

Dated: March 14, 2005



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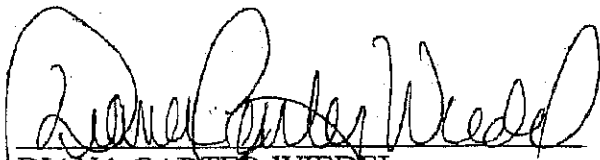
CERTIFICATE OF SERVICE

I, Diana Carter Wiedel, Guardian Ad Litem, do hereby certify that I provided a true and correct copy of this Brief to the following, by United States Postal Service, postage prepaid, as follows, on this the 14th day of March, 2005:

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