Nos. 30511 and 30512 - *In re Destiny Asia H.*

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OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

While I concur with the majority's determination that Destiny should not be returned to her mother (Shacara H.), I must respectfully dissent from the majority's conclusion that the facts establish that Destiny was neglected within the meaning of West Virginia Code § 49-1-3(h)(1) (1999) (Repl.Vol.2001). The statute is clear regarding what conduct amounts to neglect:

> (h)(1) "Neglected child" means a child:
> (A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or
> (B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian[.]

W.Va. Code § 49-1-3(h)(1) (A), (B).

Under these standards, the lower court was correct in determining that Destiny was not a "neglected child." *See id.* There is no indication in the record that the care Destiny

received was inadequate at the time the petition was filed and she was residing with her guardian and custodian K.T., or that she was then without the necessary food, clothing, shelter, supervision, or medical care. *Id.* K.T. was presumably taking good care of, or at least adequate care of, Destiny, as the lower court specifically found that "[t]here has been no showing of abuse or neglect on the part of the guardian, Kim T."

In its rush to approve this child's removal from her caretaker's home, the majority has concluded, with little discussion of the law, that Shacara S. abandoned Destiny for purposes of our neglect statutes. *See* W.Va. Code §§ 49-6-1 to -12 (Repl.Vol.2001). Unfortunately, the term "abandonment" is not defined within the sections of the Code that address abuse and neglect other than for purposes of an emergency taking situation. See W.Va. Code § 49-6-9 (1980) (Repl.Vol.2001) (defining "abandoned" as "without supervision . . . for an unreasonable period of time in light of the child's age and the ability to care for himself or herself in circumstances presenting an immediate threat of serious harm to such child"); cf. W.Va. Code §§ 48-22-102, -306 (2001) (providing definition of abandonment for purposes of adoption law and identifying conduct presumptively constituting abandonment). Given this statutory omission, this Court has on occasion looked to the definition provided in the adoption statutes for guidance in specific cases. *See State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 496 S.E.2d 198 (1997) (involving issue of whether voluntary relinquishment of parental rights incident to adoption placement could constitute abandonment for abuse and neglect purposes). That definition identifies as abandonment "any conduct . . . that demonstrates a

settled purpose to forego all duties and relinquish all parental claims to the child." W.Va. Code § 48-22-102.

Based on the mother's execution of a Power of Attorney and, apparently, the intermittent, albeit limited, contact that Shacara S. had with Destiny during the months she resided in Florida, the trial judge viewed the evidence in this case as not rising to the level of abandonment. While enunciating the proper standard for reversing the lower court's finding of fact, the majority fails to state that the lower court was clearly erroneous in its determination regarding the issue of abandonment.[1] Interestingly, the majority suggests that

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[1]This case aptly illustrates the point made by Justice Starcher, who joins in this concurrence and dissent, in *State of West Virginia v. Julie G.*, 201 W.Va. 764, 500 S.E.2d 877 (1997), when he observed how a double standard appears at times to exist with regard to the level of deference this Court gives to circuit court decisions regarding neglect findings:

> When circuit judges determine that a child is neglected, or that parental rights be terminated, the decisions of this court often (and in my view quite properly) state that in these difficult cases we must give deference to the circuit court's perception and weighing of the evidence. Why? Because the judges see the people involved. The judges get a sense and feel of the situation and can size it up. Is this parent well-meaning and trying? Could the parent, with enough support, do a decent job? Look at the child – is it really fair to say that the child is neglected? Is it really fair to say that the parent is an abuser? Is it fair to separate a child from a parent, even when limited parenting skills are obvious? It's a tough call to make such determinations, and I think that it's a call that requires a face-to-face look at the people involved, to be done well.
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> But when circuit judges say – based on the same sorts of assessments – that a child should *not* be found to be neglected, or

factual issues arose regarding "her [Shacara H.'s] intent to return, her motivation to provide for the care of Destiny . . . and Destiny's actual future." Rather, than remanding for a determination of those issues, however, this Court summarily concluded that abandonment had occurred.

The facts of this case demonstrate, as the lower court noted in its order,[2] that the statutes at issue do not expressly provide a method for dealing with the situation that was presented below. Certainly, the issues presented in the instant case demonstrate a flaw inherent to the system for providing financial assistance to care givers. Apparently, the DHHR determined that it could not provide K.T. any financial assistance in the care of the child, but could provide such financial assistance if the child were placed with other persons selected by

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> that parental rights should *not* be terminated, that the court should give the parent-child relationship another chance – then I sense that our decisions too often tend to find reasons why we shouldn't defer to or trust the circuit judge's judgment.

Id. at 775, 500 S.E.2d at 888.

In this case, the majority simply discarded the lower court's determination that Destiny had not been neglected under our law to expedite the process under which DHHR could obtain legal custody of the child. Engaging in statutory "end runs," such as that employed by the majority in this case to obtain the specific result of removing a child from his or her home, especially where no statutory basis for the removal exists, can only serve to harm both the child in the short term and the judicial system in the long run.

[2]The lower court observed: "There is some confusion as to how to proceed in matters such as this. When someone asks, a petition o[f] abuse and neglect may be the only option, or the only way to handle a situation [such as that presented here by the guardian's request for financial assistance]."

the DHHR who were perfect strangers to this little child.

What the majority overlooks in its rush to rubberstamp Destiny's removal from the only continuous care givers she had known at the time the petition was filed,[3] is the critical issue of the child's psychological and emotional attachment to K.T. This Court has long advised the DHHR and the courts dealing with these matters that children cannot be plucked from one home environment, absent emergency situations that were not present here, without due consideration of the effects on the child and the child's attachment to caretakers and siblings. *See In re Brian D.*, 194 W.Va. 623, 638, 461 S.E.2d 129, 144 (1995) (recognizing that "a child has a right to continued association with those to whom he has formed an emotional bond") (citing *Honaker v. Burnside*, 182 W.Va. 448, 452-53, 388 S.E.2d 322, 325-26 (1989)). Yet, in this case, the child was apparently removed from K.T.'s home with little concern for these important issues that play an undeniably pivotal role in the child's formation as an individual.

Further troubling is the majority's use of a validly executed document transferring physical custody of Destiny to a guardian, ostensibly prepared not for the purpose of abandoning the child, but to secure the child's attainment of proper medical care, if

[3]Even during the first four and a half months of Destiny's life when her mother was present, K.T. was also present in Destiny's life for a month and a half of that time period.

necessary, and to alleviate any question of K.T.'s legal right to have Destiny in her physical custody. While the majority makes clear in its opinion that this document on its own was not evidence of Sharcara H.'s intent to abandon Destiny, my concern is that the decision will perhaps be relied upon to obtain rulings of abandonment, possibly without the proper statutory basis, rather than forcing the DHHR to go through the requisite statutory steps of proving that a child was in actuality "abused" or "neglected" within the statutory scheme established by the Legislature. *See* W.Va. Code §§ 49-6-1 to -12.

When the facts of this case are fairly examined, one is left with a definite sense that the DHHR has managed to obtain legal custody of Destiny with no proper showing that the child was "abused" or "neglected" under our law. *See* W.Va. Code § 49-1-3. Any conclusion that the mother in this instance never intended to return and reclaim her child amounts to rank speculation on the record before us. In my judgment, it is simply wrong for this Court to sanction, even indirectly, a finding of abandonment that is grounded in fact on the proper exercise by the mother of her legal right and duty to provide for the care of her minor child during an anticipated absence, especially in light of the fact that there were no findings of improper care related to the guardian's (or custodian's) physical custody of the child.[4] Obviously, if actual evidence of neglect had been present, this would be an open and shut case.

[4]A "benefit" to the DHHR that obtains when a child is removed from a home based on abandonment is that the agency does not have to "make reasonable efforts" to preserve the family unit for temporary custody purposes. *See* W.Va. Code § 49-6-3(d).

Paradoxically, the child was removed from the home of the only care givers she knew based primarily on the care givers's professed need of financial assistance and yet, the statutory definition of a "neglected child" expressly excludes a determination of neglect based on "lack of financial means on the part of the parent, guardian or custodian." W.Va. Code § 49-1-3(h)(1)(A).

My final concern involves the manner in which the majority grants relief to the DHHR. Typically, in a case where the underlying decision of the circuit court included a finding of no abuse and/or neglect, and this Court determined that a reversal of such decision was warranted, the matter would be remanded with specific instructions that the lower court enter an order adjudicating the child to be abused and/or neglected. The majority opinion lacks any such direction. This is of concern as this Court cannot *sua sponte* make such a factual finding. Also missing from the relief delineated in the majority opinion is any direction for the circuit court, upon its entry of a finding of neglect, to proceed to the dispositional phase of such litigation. *See* W.Va. Code § 49-6-5. As we observed in *In re Travis W.*, 206 W.Va. 478, 525 S.E.2d 669 (1999), "neither this Court nor circuit courts can simply ignore mandatory procedural requirements." *Id.* at 486, 525 S.E.2d at 677.

I am authorized to state that Justice Starcher joins in this concurring and dissenting opinion.