

No. 26915 -- In re: Emily and Amos B.

Starcher, J., concurring:

**FILED**  
July 20, 2000  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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I write to say that I am troubled by the future implications of the majority’s opinion. While I do concur with remanding this matter to the circuit court, I am uncertain as to the message we are sending.

The circuit judge in this case went to great lengths to protect the welfare of a very troubled family. The mother is a drug addict; the father committed a crime allegedly to “feed his family.” The mother is in and out of rehab; the father is stuck in a federal prison until the end of the year. And in the middle, two young children are growing up very quickly.

In looking at the facts in this case the judge did the best he could with the situation as presented to the court. It appears that the mother is so wrapped up in her addiction that she does not provide care for the children. The father, however, seems to regret his actions and is struggling to maintain a relationship with the children. He regularly visits with the children in a prison visiting room, plays with them, talks, and inquires about their well-being. Beyond that, there isn’t much he can do from the confines of prison except count the days.

The circuit judge placed the children in the legal custody of the Department of Health and Human Resources (“DHHR”), but provided both parents with an improvement period, with the father’s to begin *after* he is released from prison.

This Court and the Legislature have repeatedly urged the DHHR to bring abuse and neglect cases to a quick conclusion, and I agree with this. But exactly how a prison sentence -- even a brief one --

fits into the concept of abandonment of children by a parent has never been considered by this Court. The DHHR is advocating for a clean, sharp rule: Because the father voluntarily committed a crime, he voluntarily “abandoned” the children. Because he abandoned the children, he fits within the abandonment portion of the abuse and neglect statutes, and should have his parental rights terminated. The DHHR basically argues that incarceration, *ipso facto*, requires a parent’s rights to raise their children to be automatically terminated.

The Legislature has crafted broad guidelines for the DHHR and for the circuit courts to follow in deciding whether to terminate the “parental rights” of a parent. However, nowhere in these guidelines is “criminal incarceration” mentioned.

The majority opinion rightly rejects the DHHR’s premise that incarceration of a parent should call for an automatic termination of parental rights. And I agree. The majority states that a parent’s incarceration might be *a* factor to consider in deciding whether DHHR can take custody of a child, and even *a* factor in determining whether to entirely terminate any parental rights. But it cannot be *the sole* factor, as this case demonstrates.<sup>1</sup>

While a circuit court should not delay or drag out a parent’s improvement period, the trial judge should not be stripped of the right to fashion a solution in these cases that addresses the ultimate best interests of a child -- even if it means waiting for a dad to conclude a brief prison stint.

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<sup>1</sup>Criminal defense attorneys should, hereafter, warn their clients of the holding in this case if they have young children. By pleading guilty to a crime, a defendant may not only be giving up his freedom, and maybe his right to vote, own a gun, get a hunting or fishing license, but a defendant now may also, in some circumstances, have their parental rights terminated and lose their right to parent his child.

I agree with the majority's returning of this case to the circuit court for final disposition. But I do not agree that we should dictate the outcome to the circuit judge. The circuit judge in this case has demonstrated a strong desire to protect the interests of both the children and the parents. The father has repeatedly indicated he is willing and able to parent his children -- his only impediment is a relatively short federal sentence. If the circuit judge believes that this parenting arrangement deserves a chance for the benefit of the children, this Court should not second guess the judge and arbitrarily say otherwise.

The goal of abuse and neglect proceedings is to protect children from severe physical and emotional trauma, and to provide every child with long-term stability. While we may not be able to provide every child with the perfect, white bread, cookie-cutter childhood replete with sitcom-like suburban experiences, the court system must fashion a solution that provides protection for children, with a reasonable opportunity to reach adulthood safely and in as good physical and mental health as practicable. And this opportunity may include permitting a father who has been incarcerated for a crime to continue to parent his children.

I am troubled that the majority's opinion might be read as giving direction to the circuit court to simply terminate both parents' rights. I would hope that the circuit judge in this case will again carefully examine the interests of the children and the parents, and again take whatever action he deems to be in the best interests of the children, even if it means repeating the court's ruling that the father's rights not be terminated. Termination of the rights of the parents should be the answer only when other alternatives have failed.

With this caution, I concur.

I am authorized to state that Justice McGraw joins in this concurrence.