No. 34751 - *In Re: Richard P. and Devon P.*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Chief Justice, concurring:

I agree with the result obtained by the majority of the Court, and I concur that, pursuant to W. Va. Code § 44-10-3 (2006) (Repl. Vol. 2010), the decision of whether a guardian should be appointed for a minor child in a particular case rests within the sound discretion of the presiding court. Nevertheless, I feel compelled to write separately to reiterate my concerns regarding the inadequacy of the guardianship statutes currently in place that fail to consider the unique circumstances of modern-day families and leave such parents with little assurance that their children will be sufficiently provided for in an emergency situation.

Throughout its jurisprudence, the Court frequently has acknowledged that a parent has the right to the custody of his/her child. *See, e.g.*, Syl. pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973) ("In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and

United States Constitutions."); Syl., *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960) ("A parent has the natural right to the custody of his or her infant child, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.").

Attending such custodial rights is the parent's corresponding responsibility to make decisions to promote and ensure his/her child's well-being, including making provisions for the child's care in the event of an emergency. Although such arrangements necessarily must comport with a child's best interests and are presumed to be made by a parent in accordance therewith,[1] providing for a child's best interests and well-being in anticipation of an emergency situation is not always easily achieved as is evidenced by the presence of the case *sub judice* before this Court. While the instant proceeding arose in the context of a less traditional family structure, the concerns expressed by Jennifer and Cary might easily have occurred in any number of typical American households. Oftentimes, a child's parent is requested to sign a form authorizing another person to obtain medical care for a child as a prerequisite to the child's participation in school, sports, extracurricular, or

[1]*See, e.g.*, Syl. pt. 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal . . . in all family law matters . . . must be the health and welfare of the children.").

religious activities. However, a seeming double-standard exists when, as here, a parent's attempt to give another person the authority to seek medical care for his/her child is not heeded, arguably because such authorization was not provided on an "official" childcare authorization form such as would be used by schools and sports, extracurricular, and religious organizations.

In still other families, as with the family involved in this case, one of the child's parents might work very far from home, or even out of the country, as with the case of a tractor trailer driver or deployed military personnel. The parent remaining at home in both such families understandably would want to make provisions for his/her child should something happen to the home-based parent given the delay in contacting the off-site parent. Appointment of an alternate formal guardian pursuant to W. Va. Code § 44-10-3 is not always viable because it is rather invasive of the parents' parental rights, yet the necessity of executing decision-making documents that will be honored by medical, educational, and other facilities is of real concern to these families. Similar problems arise in households in which the children have only one residential parent–either because the other parent is deceased or because the other parent's parental rights have not been exercised or have been terminated. In these families, what happens if the remaining parent becomes incapacitated and cannot care for the children or if that parent is out of town and cannot be reached? Does the law of this State enable this parent to adequately plan for such

a contingency?

While the Legislature has made significant inroads in recent months to accommodate a parent's need to provide for his/her children's medical care in the event of an emergency through its enactment of the Caregivers Consent Act, W. Va. Code § 49-11-1, *et seq.*, more certainty and direction is needed to ensure that a parent's authorization of another to act on his/her behalf for his/her child's well-being will be respected by medical, educational, and legal authorities. This Court, too, through its recognition of a power of attorney as a method by which a parent may delegate medical, educational, and legal decision-making authority regarding his/her child to another adult gives parents substantial power to plan for their children's safety and well-being in the event of an emergency. With the promulgation of this new statutory law and the Court's decision of this opinion, I fervently hope that other families will not have to endure the turmoil that Jennifer and Cary have undergone, all in an effort to provide for the best interests of their children. However, whether either an affidavit prepared in accordance with the Caregivers Consent Act or a power of attorney executed pursuant to this Court's holding will satisfy the demands of cautiously wary educational, medical, and legal institutions to actually permit a non-parent to exercise such delegated decision-making authority remains to be seen. While the law of this State is evolving to recognize the changing dynamics of modern families and the arrangements they wish to make to provide for unforeseen contingencies, many institutions

have not yet embraced the accommodations that are required to carry out these parents' legally enforceable decisions for the care of their children.

As a final matter, I would be remiss if I did not also comment on the Court's seeming reluctance, in footnote nine of the majority's opinion, to embrace the discretion afforded to courts to appoint guardians for minor children. As clearly delineated in the guardianship statute, *see* W. Va. Code § 44-10-3, and as I pointedly held in Syllabus point 6 of *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008), courts have the discretion to determine when a child's best interests require the appointment of a guardian. *See* W. Va. Code § 44-10-3(a) (2006) (Repl. Vol. 2010) ("The circuit court or family court of the county in which the minor resides, or if the minor is a nonresident of the State, the county in which the minor has an estate, *may* appoint as the minor's guardian a suitable person." (emphasis added)). *See also* Syl. pt. 6, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008) ("Pursuant to the plain language of W. Va. Code § 44-10-3(a) (2006) (Supp. 2007), the circuit court or family court of the county in which a minor resides *may* appoint a suitable person to serve as the minor's guardian. In appointing a guardian, the court shall give priority to the minor's mother or father. 'However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.' W. Va. Code § 44-10-3(a)." (emphasis added)). This discretion is clearly provided for in the governing

statutory law and should be accepted without question.

It goes without saying that the law dictating precisely when a guardian should be appointed for a minor child is murky and does not contemplate all of the nuances of today's modern family. Although custodial placements are not directly at issue in this case, the majority's reticence to permit courts to appoint guardians in necessary circumstances may thwart a court's ability to honor a child's best interests by prematurely thrusting him/her into a custodial placement with a parent or another adult with whom the child does not have an established relationship. For example, a child may be living with one parent and have little or no contact with his/her other parent who moves out of state following the parents' divorce. If the child's residential parent dies, becomes incapacitated, or otherwise becomes unfit to care for the child, and if the non-residential parent is fit to have the child's custody, the law governing child custody directs that child's best interests are best served by a gradual transition to the non-residential parent's custody. *See* Syl. pt. 3, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991) ("It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives."). The

appointment of a guardian under such circumstances would serve to accomplish this transition by bridging the gap between the former residential parent's custody and the subsequent non-residential parent's custody. Such a guardian might simply be a grandparent with whom the child has an exceptionally close relationship and with whom the child previously has resided. In this scenario, the appointed guardian might not be afforded the full gamut of parental rights but the guardian would be vested with the ability to make decisions on the child's behalf to ensure his/her safety and well-being during the period of transition. If courts are not afforded the discretion–granted to them by statute– to appoint guardians, the gradual transition of custody most befitting the child's best interests could not be accomplished in such a case. Therefore, I urge that any decisions or changes in the law regarding the propriety of guardianship appointments be made with extreme caution to ensure that innocent children do not become hapless victims of the laws that are intended to provide them with safety and security.

Although progress has been made through the recent decisions of this Court to clarify the circumstances in which the appointment of a guardian is appropriate and by the Legislature with its promulgation of the Caregivers Consent Act, additional legislative action must be taken to further clarify the process by which laypersons may delegate medical, educational, and legal decision-making authority for their children in the event of an emergency. Until such further guidance is provided, and heeded by the medical,

educational, and legal institutions to whom parents direct such permission, I remain cautiously optimistic about families' abilities to adequately plan for the safety and well-being of their children should an emergency arise.

For the foregoing reasons, I respectfully concur in the majority's decision in this case.