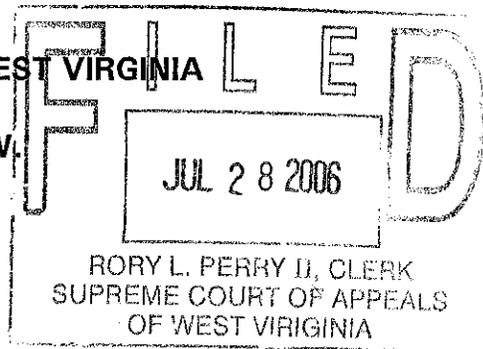


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**NO. 33133**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**IN THE MATTER OF CHRISTINA W.  
SISSY W.  
LISA W.**



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**BRIEF OF APPELLANT  
STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

---

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**Counsel for Appellant**

**Dated: July 27, 2006**

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**NO. 33133**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**IN THE MATTER OF CHRISTINA W.  
SISSY W.  
LISA W.**

**BRIEF OF APPELLANT, STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

**I. KIND OF PROCEEDING AND NATURE OF RULINGS IN THE  
LOWER TRIBUNAL**

The State of West Virginia, Department of Health and Human Resources (hereinafter referred to as "DHHR") appeals from an order in an abuse and neglect proceeding pending in the Circuit Court of Mercer County, West Virginia. The Order is dated March 1, 2006, and attached hereto as Exhibit A.

A petition for abuse and neglect based on domestic violence and sexual abuse by the custodial boyfriend, James B., was filed on September 21, 2005. The children were removed due to emergency circumstances. A preliminary hearing was held on September 30, 2005 where the Circuit Court of Mercer County found that the sexual allegations needed to be investigated further. It is unclear from the order, but parties to the case indicate that Judge Swope ordered on the record that the Guardian Ad Litem (hereinafter referred to as "GAL"), Mary Ellen Griffith, investigate the allegations of sexual abuse.

An amended petition was filed adding the appellee father, Larry W. An adjudicatory hearing was held on November 18, 2005, wherein the appellee mother and appellee custodial boyfriend stipulated to the allegations, and the children were adjudged neglected.

At the adjudicatory hearing, the lower Court granted a post-adjudicatory improvement period for the mother and custodial boyfriend. The improvement period as outlined and agreed to by all parties was for reunification with the mother and the custodial boyfriend and also included unsupervised visits between the children and appellees, including the sexual perpetrator.

On December 16, 2005, a Motion to Terminate Parental Rights of the biological father was filed. This motion was based on the incarceration of the biological father Larry W. due to the repeated sexual assault of a child-sibling of the children to this action. An adjudicatory hearing was held on the appellee father on January 6, 2006. The Court took the Motion to Terminate Parental Rights of the appellee father under advisement.

About one week prior to February 17, 2006, the child disclosed again that the original allegation of sexual abuse occurred and that she had told the GAL this sometime shortly after the preliminary hearing. DHHR immediately stopped the unsupervised visits with the sexual perpetrator, filed a report to the Court and requested that the GAL be removed due to conflict. DHHR believes that the GAL was negligent regarding her duties as GAL. DHHR further believes that the GAL was not candid with the Court in her investigation. DHHR stated its belief that the GAL

independently investigated and knew of the sexual abuse and should not have recommended nor allowed unsupervised visits between the victim and sexual perpetrator, nor recommended reunification with the sexual perpetrator. The Judge denied DHHR's motion to relieve the GAL stating that since the child disclosed to others, conflict did not exist. The Court went on to find that a GAL must keep client confidences and cannot divulge information given by a child. It is from this denial that DHHR appeals.

## **II. STATEMENT OF FACTS**

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A petition for abuse and neglect based on domestic violence and sexual abuse by the custodial boyfriend, James B., was filed on September 21, 2005. The children were removed due to emergency circumstances. A preliminary hearing was held on September 30, 2005, where the Circuit Court of Mercer County found that domestic violence existed in this home. The trial court further found that the sexual allegations needed to be investigated further. It is unclear from the order, but parties to the case indicate that Judge Swope ordered on the record that the GAL, Mary Ellen Griffith, investigate the allegations of sexual abuse.

An amended petition was filed adding the appellee father, Larry W., and outlining the domestic violence in more detail. This amended petition also included police reports of the domestic violence.

An adjudicatory hearing was held on November 18, 2005, wherein the appellee mother and appellee custodial boyfriend stipulated to the allegation of domestic violence and acknowledged that the children made allegations of sexual abuse. The children were adjudged neglected.

At the adjudicatory hearing, the lower Court also granted a post-adjudicatory improvement period for the mother and custodial boyfriend. The improvement period, as outlined and agreed to by all parties, was for reunification with the mother and the custodial boyfriend and also included unsupervised visits between the children and appellees, including the sexual perpetrator.

On December 16, 2005, a Motion to Terminate Parental Rights of the biological father was filed. This motion was based on the incarceration of the biological father Larry W. due to the repeated sexual assault of a child-sibling of the children to this action. An adjudicatory hearing was held on the appellee father on January 6, 2006. The Court took the Motion to Terminate Parental Rights of the appellee father under advisement.

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requested that the GAL be removed due to conflict. DHHR stated its belief that the GAL should not have recommended nor allowed unsupervised visits between the victim and sexual perpetrator nor recommended reunification with the sexual perpetrator. DHHR believes that the GAL neglected her duties as GAL in her recommendations to the Court, as well as failing to be candid with the Court.

A hearing was held on February 17, 2006, where the Judge denied DHHR's motion to relieve the GAL stating that since the child disclosed to others conflict did not exist. The Court went on to find that a GAL must keep client confidences and cannot divulge information given by a child. It is from this denial that DHHR appeals.

### **III. STANDARD OF REVIEW**

Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in

light of the record viewed in its entirety." In re: Tiffany Marie S., 196 W. Va. 223. 470 S.E.2d 177 (1996).

#### **IV. ASSIGNMENTS OF ERROR, POINTS AND AUTHORITIES RELIED ON AND DISCUSSION OF LAW**

#### **THE CIRCUIT COURT OF MERCER COUNTY ERRED IN DENYING DHHR'S MOTION TO REMOVE THE GUARDIAN AD LITEM, AND IN FINDING THAT A GUARDIAN AD LITEM OWES A DUTY OF CONFIDENTIALITY WHEN SUCH CONFIDENTIALLY IS NOT IN THE CHILDREN'S BEST INTERESTS AND IS DETRIMENTAL TO THEIR WELL-BEING**

Several legal authorities have formed a definition of an attorney for children. West Virginia Code 49-6-2(a) mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings, and the Court in the case of State v. Scritchfield, 280 S.E.2nd 315 (1981), addressed a child's right to independent counsel in child abuse and neglect cases.

The Preamble to the Rules of Professional Conduct define an attorney as an officer of the legal system. Rules 1.1 and 1.3 of the West Virginia Rules of Professional Conduct go on to require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client. Rule 3.3 of the West Virginia Rules of Professional Conduct demand that an attorney be candid with the Court. Rule 1.14 of those same Rules goes on to state that representing a client under a disability, which includes a minor, is somewhat different.

"(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

Rule XIII of the West Virginia Rules for Trial Courts of Record provides that a GAL shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. The case of In re: Jeffrey R.L., 435 S.E.2d 163 (1993), addresses the role of the GAL in abuse and neglect cases. The Court in this case looked at extensive case law, statutes, and rules of professional conduct, as well as professional literature, to draft the guidelines for a GAL. In re: Jeffrey R.L. states that a GAL shall investigate, including meeting with the child, and that relevant evidence should be developed and presented to the Court.

"Any guardian ad litem shall make a full and independent investigation of the facts involved in the proceedings; and either by his testimony made of record, or by full and complete answer therein make known to the Court his (or her) recommendations."

The Court in In re: Jeffrey R.L. further states that:

"The GAL should render information and independent recommendations which serve the child's best interests. The child's wishes should be considered by the GAL, but need not be adopted by the GAL unless doing so serves the child's best interests."

This same case goes on to state:

“The Guardian Ad Litem should take an active role in presenting evidence regarding the child’s well-being. The GAL does not necessarily represent a child’s desires but should formulate an independent position regarding relevant issues.”

In the case at hand, the GAL did not report to the Court the verification of the sexual assault of the children. She was not candid to the Court as she was ethically bound to do so as an officer of the Court. An improvement period was drafted with the GAL’s involvement, which included unsupervised visits between the sexual perpetrator and victim. The improvement period also included reunification with the sexual perpetrator. The GAL in the instant case did not make a full and independent report to the Court, nor did she make independent recommendations to the Court in the children’s best interests. All of these actions are in violation of her ethical duties, as well as her duties as GAL.

The GAL argued on February 17, 2006, that she had to keep client confidences. The GAL argues that client-attorney confidences must be kept as mandated by Rule 1.6 of the Rules of Professional Conduct. The GAL further argues that she serves a traditional role in an attorney-client relationship. However, case law has distinguished the roles of attorney and GAL. In re: Scottie D., 185 W.Va, 191 (1991); In re: Carlita B., 185 W.Va. 613 (1991). The traditional role of lawyer in an attorney-client relationship is one of an advocate. An advocate is to serve the wishes of the client no matter whether those wishes are in the client’s best interests. An advocate is not to say or do anything that is contrary to the client’s wishes. However, the traditional role

of attorney-client does not truly apply with minors as we see in Ethics Rule 1.14.

This flows into the reasoning behind the trial court's authority to appoint a GAL. A GAL serves in a different capacity. A GAL must serve the best interests of the child and must keep that goal as paramount in his or her service as GAL. The Court in In re: Carlita B., emphasized that a GAL must demonstrate a commitment to ensuring that the best interests of the child be achieved. The Court in In re: Jeffrey R.L. took great pains to differentiate and guide GALs in their endeavor to serve the best interests of children. These cases state that a GAL should take a child's wishes into consideration, but must ultimately do what is in the best interests of the child even if that is contrary to the wishes of the child.

In this case, the GAL was not candid with the Court. The GAL did not act in the best interests of the children and actually placed the children at risk for additional abuse. Surely, as outlined by ethics rules, trial court rules and case law, taking the role of the GAL in serving a child's best interests, the Circuit Court erred in its finding that GAL's could keep confidences even to a child's detriment, in not finding that the GAL neglected her duties as GAL, as well as ethical duties, and erred in the subsequent denial of DHHR's Motion to Relieve the Guardian Ad Litem.

## V. CONCLUSION

The trial court erred in denying DHHR's Motion to Remove the Guardian Ad Litem. The trial court also erred in not finding that the GAL neglected her duties, both ethically and as GAL. More importantly, the trial court erred in its findings that a

Guardian Ad Litem owes a duty of confidentiality to a child even when such confidentiality is not in the child's best interest, and when such confidentiality works to the child's detriment.

#### **VI. PRAYER FOR RELIEF**

Wherefore, DHHR prays that this Court reverse the trial court's erroneous findings of fact and conclusions of law and remand this action to the trial court with specific directions to take appropriate action.

Respectfully submitted,

State of West Virginia  
Department of Health and Human Resources

By Counsel

Darrell V. McGraw, Jr.  
Attorney General



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Assistant Attorney General  
Health and Human Resources  
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## CERTIFICATE OF SERVICE

I, Angela A. Ash, Assistant Attorney General, do hereby certify that on this 27<sup>th</sup> of July, 2006, an original and nine copies of Brief of Appellant State of West Virginia, Department of Health and Human Resources, were mailed via first class mail, postage prepaid, to the Supreme Court of Appeals of West Virginia for filing, with one copy of the same mailed to the following parties of record:

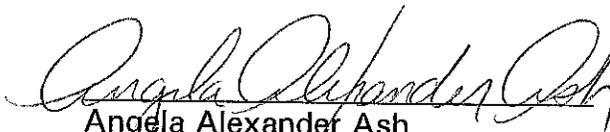
Tom Berry  
1501 W. Main Street  
Princeton, WV 24740

Mary Ellen Griffith  
1505 Princeton Ave.  
Princeton, WV 24740

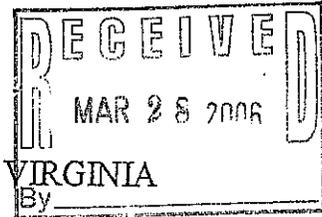
Jay Williams  
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IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

IN THE INTEREST OF  
Christina W 3/26/1990  
Lisa W 8/25/1992  
Sissy W 6/13/1995

Juvenile Abuse Neglect Nos.  
05-JA-104-S  
05-JA-105-S  
05-JA-106-S

Judge Derek C. Swope

Adult Respondents:  
Linda H  
James "Mike" B  
Larry W

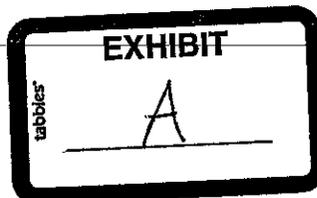
REVIEW

On February 17, 2006, a hearing was held on the following:

The following persons were present:

The Department, by Stacey Cockerham; Thomas L. Berry, Assistant Prosecutor;  
Linda H Respondent; Thomas M. Janutolo, Jr., counsel for Respondent Linda  
H ; James "Mike" B , Respondent; Susan E. F. Henderson, counsel for  
Respondent James "Mike" B ; Larry W , Respondent; John E. Williams, Jr.,  
counsel for Respondent Larry W Mary Ellen Griffith, guardian ad litem for the  
children. Also appearing from the Department is Melanie Urquhart and their Assistant  
Attorney General, Angela Ash.

Upon consideration of the matters presented and argument of counsel, this Court  
finds and concludes, in the best interest of the children that:



The Court acknowledges receipt of the Summary from the Department dated February 13, 2006 along with the response from the Guardian Ad Litem. Upon inquiry by the Court, the Guardian Ad Litem advises that the infant children realized that the respondent father will be incarcerated until the youngest child, Christina W reaches the age of majority, but the infant, Christina W does not want his parental rights terminated. The Court inquires as to whether such decision by a fifteen (15) year old child isn't absolute, the State maintains that the Court may depart from the child's wishes if the nominated guardian is found to be unfit, counsel for the respondent mother advises that case law grants such decision making to the sound discretion of the Court, and the Guardian Ad Litem advises that W.Va. Code 49-6-5 merely requires the Court to give consideration to such a child's wishes; counsel for the respondent father, Larry W agrees with the Guardian Ad Litem in that such nomination by a child is not absolute. The Court finds that the recommendation of the Guardian Ad Litem is that her client's wishes should be honored. After due consideration, the Court finds that even if the infant children have reached the age of majority upon the release from incarceration of Larry W, the Court intends that supervision continue and provides that Larry W may request modification herein or any other additional relief under his criminal supervision.

The Court then considers the motion of the Department/State to remove Mary Ellen Griffith as Guardian Ad Litem in this matter as she had information that Christina W had reverted back to allegation of inappropriate sexual contact by the

respondent custodian, James B. [redacted], and that if she would have provided the Court with such information, we would not be pursuing a reunification plan with a potential sex offender. The Guardian Ad Litem asserts that confidentiality is the highest duty and at the time this issue arose, the child's best interest did not outweigh that duty, and she may have reevaluated her position at the time of reunification. Counsel for the respondent mother agrees one-hundred percent (100%) with the Guardian Ad Litem. Counsel for James B. [redacted] advises that she previously withdrew as Guardian Ad Litem in a similar situation, and counsel for Larry W. [redacted] maintains that the allegations of the child created a difficult situation because of their inconsistency. The Court finds that Angela Ash, Assistant Attorney General, is not the attorney for the State, but upon inquiry, she advises that she believes the Guardian Ad Litem's duty is to the best interest of the child and the Guardian Ad Litem's lack of disclosure prevented a meaningful improvement period. The Court then considers whether a Guardian Ad Litem is a mandatory reporter, and finds that W.Va. Code 49-6A-2 abrogates confidences with regard to doctors, the clergy, and others, but does not include lawyer. The Court finds that any Guardian Ad Litem is a lawyer, refers to Rule 1.6 of the Rules of Professional Responsibility, and finds that the attorney-client privilege is controlling and that the Guardian Ad Litem is not specifically mandated to report such information. The Court reviews the case of *In re Jeffrey R.L.*, finds that that case is controlling, and does not believe the Guardian Ad Litem could have divulged the information to which she was privy. However, the Court does find the Guardian Ad Litem should have

advised the Court of her potential conflict and requested that the Court appoint a new Guardian Ad Litem for the infant child thereby allowing her to transition into the role as counsel for the child. The Court finds that since the child has now made such disclosure to other individuals, any conflict is now resolved.

The Court finds that the respondent mother and the respondent custodian, James B were granted post-adjudicatory improvement periods on November 18, 2005. Finding no objections, the Court finds that the respondent mother's improvement period should continue. Upon inquiry, the Court finds that the infant children are not currently in counseling.

WHEREFORE, it is hereby ORDERED that:

the parental rights of the respondent father, Larry W , be terminated as those rights relate to the infant children, Christina W , Lisa W and Sissy W .

It is the ORDER and DECREE of this Court that the motion of the Department/State to remove Mary Ellen Griffith as Guardian Ad Litem is hereby denied.

It is the ORDER and DECREE of this Court that the infant children have no more contact with the respondent custodian, James B . The Court ORDERS the State of West Virginia to bring this matter before their Multidisciplinary Investigative Team. Further, it is the ORDER and DECREE of this Court that the State of West Virginia provide counseling for the infant children. The Court directs the State/Department to file any motion intended for the termination of the improvement

period and/or disposition of the respondent custodian, James B . The Court sets this matter for hearing on May 12, 2006 at 9:30 at which time the Court will conduct a review of the respondent mother's improvement period and a disposition as to the respondent custodian, James B

The Circuit Clerk shall provide a copy of this Order to all counsel of record, and to any pro se parties and persons entitled to notice.

ENTER March 1, 2006

JUDGE Deborah A. Sledge