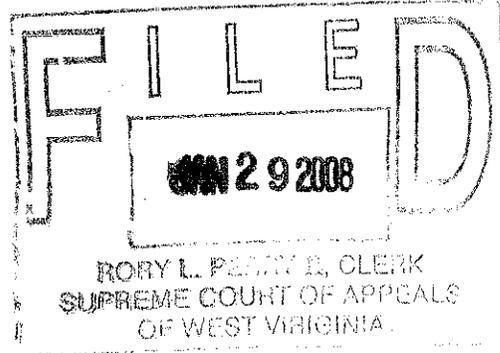


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No. 33716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At Charleston

IN THE MATTER OF: Abbigail Faye B.



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FROM THE CIRCUIT COURT OF  
CABELL COUNTY, WEST VIRGINIA  
Civil Action No.: 07-CIGR-1

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APPELLANTS RESPONSE TO BRIEF OF APPELLEES

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## ARGUMENT

1. The Absence Of A Finding That The Child Has Been Abused Or Neglected By The Appellees Is Not Dispositive, Nor Is Such A Finding Required Before A Court May Grant Guardianship Of An Infant To A Third Party.

The Appellees correctly point out that Abbigail was not an abused or neglected child.

What the Appellees ignore, however, is that the reason Abbigail was not abused or neglected or found to be at risk for abuse or neglect is because she had always been in the care of the grandparents. As the Child Protective Services worker testified:

“[T]he [final risk rating] number came out to be an eight, which falls within the moderate range. That’s something that we normally would recommend services for. For the family. If we did not already have the case.

Q. And in terms of this evaluation or this report, you’re looking at recommending services for Autumn and Josh if Abbigail were to be placed in the home?

A. Yes. Yes.

Q. If Abbigail continues to stay where she is, are you recommending any additional services?

A. No additional services.” (Tr. May 25, 2007, p. 90).

\* \* \* \*

“Q. Based on that information and the investigation you did, do you have a recommendation as to whether or not Abbigail should continue to remain in the [P.] home or should she be placed in the home of Autumn and Josh?

A. If you’re talking about immediately?

Q. Yes.

A. As I stated before, I think she’s in a safe home at this point. If at some point the child is going to return to the parents home, I think that it would be a good idea to have the services with the parents before the child returns to their home.

Q. Including the psychological evaluations you indicated?

A. I think that would be an excellent idea.” (Tr. May 25, 2007, p. 93).

Brenda Wright testified that the case is not being opened for services because

Abbigail is in a safe environment with Gala and Brent P. However, if Abbigail were placed with Autumn and Josh, then community services would be required, or it would be opened as a child protective services case, or both, and in either event she did not recommend the immediate placement of the child with her parents:

“Q. You’ve indicated in your report that this case was not going to be open for ongoing services; is that correct?

A. Yes.

Q. Is that because this child is in the [P.] home?

A. Because the child is in a safe environment. There are no safety issues at this time.

Q. If Abbigail were placed into the home of Josh and Autumn, would the case be open for ongoing services?

A. It’s a possibility that it would open or they would at least have community services. It would go one way or the other, or both. It could be another CPS case with community services too.

Q. And I understand you haven’t been asked or directed to prepare any sort of preliminary case plan or a case plan for the family. But in terms of your recommendation that the parents work with Abbigail prior to any attempts to, I guess an attempt to reunify her with her biological parents, what kind of period of time are you talking about in terms of - -

A. That would have to be determined by the providers. They - - the ones who would be working with the parents I think they would be the ones who would best be able to judge when the time’s right, based on the response of the parents and how well they’re adapting.

Q. And as we sit here today, it’s not - - you’re not recommending that Abbigail be immediately returned to the home of Autumn and Josh; is that correct?

A. I guess I would say, yes, that’s correct.” (Tr. May 25, 2007, pp. 97-98).

Moreover, what the Appellees ignore is that the test for the award of guardianship of the child in this case is not whether the child was abused or neglected pursuant to West Virginia Code §49-1-1 et. seq., but rather, the fitness of the proposed guardians and the

welfare and best interests of the child. While a finding of abuse or neglect by the Appellees against the child would be illustrative of the parent's fitness and what is in the welfare and best interests of the child, the absence of such a finding, particularly under the facts of this case, is not dispositive. West Virginia Code §44-10-3 does not require proof that a child has been abused or neglected to support the award of guardianship of that child to a third party.

2. This Is Not A Grandparent's Visitation Case.

The Appellees' reliance upon case law concerning the preference of the biological parents in grandparents visitation cases is entirely misplaced. The Appellants did not file a grandparents visitation petition pursuant to West Virginia Code §48-10-101, et. seq.. Rather, the Appellants filed an infant guardianship petition pursuant to West Virginia Code § 44-10-

3. The issue is not whether the Appellants should be granted visitation with the child, but rather the fitness of the proposed guardians and the natural parents and the welfare and best interests of the child. As a practical matter, the Appellants are exercising visitation with Abbigail, although, it is not as frequent as they would like and requires cloak and dagger arrangements such that the Appellants pick up Autumn and Abbigail only after Josh and his family have left their homes and requires that Autumn and Abbigail be brought back home before Josh and his family get back. (Affidavit of Gala Pack, Exhibit A). Moreover, were this a grandparents visitation case, the issue of the parents' preference, while accorded significant weight, is but one of at least thirteen factors which the family court would be required to consider pursuant to West Virginia Code §48-10-502.

Contrary to the findings of the Circuit Court, the evidence: lack of caring for the child, lack of interest in learning how to care for the child, recent substance abuse, allegations of violence, allegations of rape made to a third party, lack of bonding with the child and failure to be truthful during the CPS investigation, supports a finding that Abbigail's parents are unfit. Indeed, while the guardian ad litem now supports the circuit court's order, this was not the case at the conclusion of the evidence:

I really at this point am not convinced that they would be able to care for the child.

Now, whether that is the proper threshold that this Court should consider is up to you, but I'm not convinced that they would be able to care appropriately for the child. I don't think that that necessarily means that they should be written off. [. . .] But at this point, I think it would probably be in the child's best interest to be with the grandparents with a liberal visitation program set up for the parents." (Tr. June 8, 2007, p. 75).

### CONCLUSION

The evidence demonstrates that the Appellees were unfit and that was in the best interests of Abbigail to place her in the guardianship of the Appellants until such time as the Appellees complied with the services recommended by Child Protective Services and the service providers recommended the child's return.

Respectfully Submitted  
Brent P. and Gala P.  
Appellants by Counsel