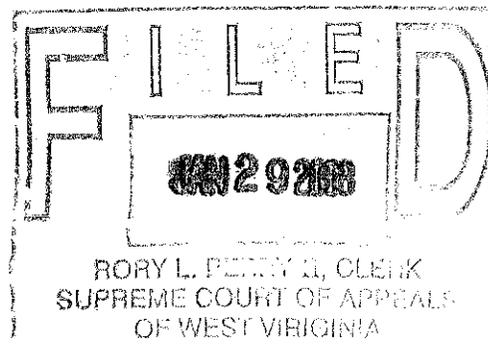

No. 33716

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

IN THE MATTER OF: Abbigail Faye B.



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

RESPONSE OF APPELLANTS TO BRIEF OF THE
GUARDIAN AD LITEM

Noel M. Olivero (#6646)
SAMMONS, OLIVERO & PARASCHOS
Counsel for the Appellants

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DISCUSSION

1. Rule 48a Of The Rules Of Practice And Procedure For Family Court Was Not Correctly Applied.

Contrary to the allegation of the guardian ad litem, Rule 48a was not correctly applied.

Rule 48a requires that allegations of child abuse and neglect must be those as are "defined in W.Va. Code §§49-1-3."

Virginia Code §49-1-3, defines an "abused" or "neglected" child as follows:

(a) "Abused child" means a child whose health or welfare is harmed or threatened by: (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or (2) Sexual abuse or sexual exploitation; or (3) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section sixteen, article four, chapter forty-eight of this code; or (4) Domestic violence as defined in section two hundred two [§§ 48-27-202], article twenty-seven, chapter forty-eight of this code.

(I)(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;

The allegations made by the Appellants are not allegations of "abuse" or "neglect" as defined by West Virginia Code §49-1-3. In fact, as the child protective services worker and Ellen Cundiff of Team for West Virginia Children both testified, the child was not abused and neglected nor subject to any risk of abuse and neglect while she resided with her grandparents. It is wholly illogical to contend, as the guardian ad litem now does, that the grandparents are required to prove allegations of "abuse" or "neglect" where no such abuse or neglect existed. In short, where there are no allegations of "abuse" or "neglect" as defined

by West Virginia Code §49-1-3, Rule 48a of the Rules of Practice and Procedure for Family Court has no application.

Moreover, while the guardian ad litem suggests that the Appellants are critical of the circuit court for failing to exercise its mandamus powers pursuant to Rule 48a of the Rules of practice and Procedure for Family Courts and Rule 3a of the Rules of Procedure for Child Abuse and Neglect, the guardian ad litem has misinterpreted the Appellants argument and misses the point. The point of the argument is that child protective services did not file a petition for abuse and neglect nor did the circuit court order child protective services to file such a petition or to show cause why such a petition should not be filed. The fact that no petition for abuse or neglect was filed, and the fact that the court did not order one to be filed, evidences that the allegations contained in the guardianship petition were not allegations of abuse or neglect within the meaning of West Virginia Code §49-1-3, and accordingly not allegations of abuse and neglect within the meaning of Rule 48a, and therefore the Appellants cannot be held to the standard of proof required by Rule 48a.

2. The Guardian Ad Litem's Argument That "If this court adopts the position proposed by the petitioners, it will be establishing an alternative proceeding that can be used to remove children from the custody of their biological parents using the best interests of the child standard alone" Both Misstates The Appellants Argument And Ignores West Virginia Code §44-10-1, et. Seq.

The Appellants have never argued that the sole criteria for the award of guardianship of Abbigail is the best interests of the child. As the Appellants have clearly articulated in their Petition for Appeal and in the Appellant's brief, the standard set forth for the award of guardianship pursuant to West Virginia Code §44-10-3, is "the competency and fitness of the proposed guardian and the welfare and best interests of the minor. . . ." The Appellants have not, and do not, advocate the adoption of a standard wherein "the best interests of the child" standard is the only criterion for the award of custody or guardianship and to suggest

otherwise is to misstate the Appellants' Brief.

The guardian ad litem's Brief appears to suggest that the only avenue available for the removal of custody of a child from his or her parents is to prove that the child was abused or neglected as those terms are defined in West Virginia Code §49-1-3. This argument, however, ignores the plain language of West Virginia Code §44-10-3, which clearly provides for the award of guardianship to persons other than the natural parents absent any finding of "abuse" or "neglect" as those terms are defined by West Virginia Code §49-1-3, and the prior opinions of this Court. See, Syllabus Point 1, *Synder v. Scheerer*, 190 W.Va. 64, 436 S.E.2d 299 (1993):

1. "A parent has the natural right to the custody of his or her infant child and, **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 permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her child will be recognized and enforced by the courts." Syl. pt. 2, *Hammock v. Wise*, 158 W.Va. 343, 211 S.E.2d 118 (1975); Syllabus, *State ex rel Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d 798 (1969); Syllabus, *Whiteman v. Robinson*, 145 W.Va. 685, 116 S.E.2d 691 (1960). Syl. pt. 1, *Leach v. Bright*, 165 W.Va. 636, 270 S.E.2d 793 (1980)." Syllabus, *Ford v. Ford*, 172 W.Va. 25, 303 S.E.2d 253 (1983). (Emphasis added).

The guardianship statute, 44-10-3, does not require proof of abuse or neglect of a child by its biological parents. Rather, the issues are fitness and the welfare and best interests of the child. The fact that a parent has not "abused" or "neglected" a child within the meaning of §49-1-3, does not mean that the parent is a "fit" parent or that it is in the best interests and welfare of the child to grant custody to the parent. Indeed, while the guardian ad litem now argues in support of the circuit court's ruling, at the conclusion of the evidence the guardian ad litem opined quite the opposite:

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

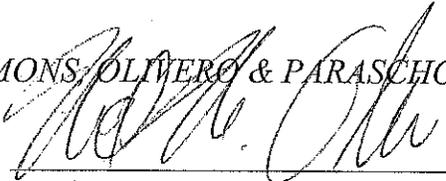
Now, whether that is the proper threshold that this Court should consider is up to you, but **I'm not convinced that they would be able to care appropriately for the child.** I don't think that that necessarily means that they should be written off. [. . .] But at this point, **I think it would probably 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). (Emphasis added).

CONCLUSION

The Appellants do not argue for the adoption of any new or novel theory for the award of guardianship. Rather, the Appellants argue that where there are no allegations of "abuse" or "neglect" as defined by West Virginia Code §49-1-3, that they should not be held to the standards of Rule 48a, but rather, they should be held to the standards set forth in the guardianship statute, West Virginia Code §44-10-3. In addition, the Appellants argue that based upon the evidence and testimony before the circuit court, the circuit court erred in denying their petition for guardianship of Abbigail.

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

SAMMONS, OLIVERO & PARASCHOS

By: 

Noel M. Olivero (#6646)
652 Sixth Avenue
Huntington, WV 25701
(304) 522-7730
Fax: 522-7801