

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL FROM THE CIRCUIT COURT OF
BROOKE COUNTY, WEST VIRGINIA**

In Re: Summer D.

**Supreme Court Case No. 33386
Brooke County Case No. 05-JA-12
The Hon. Martin J. Gaughan, Judge**

BRIEF OF THE APPELLANT, GUARDIAN AD LITEM

Parties in the instant proceeding and their respective counsel are:

PARTIES:

1. State of West Virginia

2. April J.T.
Appellee below

3. Douglas D.
Appellee below

4. Allison Adyniec Cowden
Guardian ad Litem for
Summer D.
Appellant below

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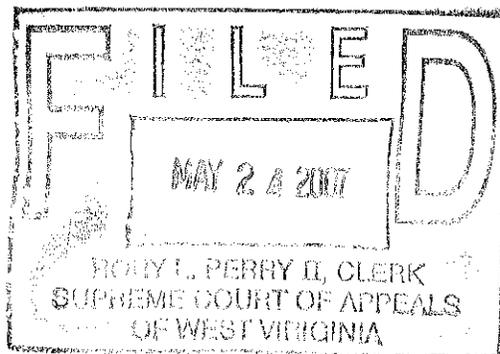


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KIND OF PROCEEDINGS AND NATURE OF RULING BELOW

This is a civil child abuse and neglect proceeding filed on April 26, 2005, against the appellees, April J. T. and Douglas D., (hereinafter "Appellee April J.T." and "Appellee Douglas D.") natural parents of Summer D., alleging that Appellee April J.T. had previously had her rights terminated to Zachary T. (born September 6, 2001) and Richard T., Jr. (born November 14, 2002), her natural children, in Taney County, Missouri, on April 15, 2005. A copy of the Order and Judgment Terminating Parental Rights of Appellee April J.T. was attached to the petition and incorporated therein. The petition further alleged that the West Virginia Department of Health and Human Resources (hereinafter "WVDHHR") was advised by the Missouri Department of Social Services on April 23, 2005, that Appellee April J.T. had given birth to another child. The WVDHHR confirmed that Appellee April J.T. had given birth to the child herein, Summer D., on December 27, 2004.

The basis for the termination of parental rights in Taney County, Missouri, was that (1) Appellee April J.T. failed to comply with five (5) written service agreements in that she had not visited with the children since May 10, 2004; (2) inconsistencies and lack of stability were barriers to any progress toward reunification; and (3) **Appellee April J.T. suffered from a mental condition that was either permanent or such that there was no reasonable likelihood that the condition could be reversed and rendered her unable to knowingly provide the minor children with the necessary care, custody and control.**

At a hearing held on December 2, 2005, the Court addressed the appellee, April J. T.'s, potential for parenting skills and lack thereof. Appellee April J.T. admitted that she

lacked the present ability to adequately care for the child, Summer D. The Court determined that the appellee's admission was willing, voluntary, and knowing and accepted the admission of Appellee April J.T. The Family Case Plan Including Objectives of Post-Adjudicatory Improvement Plan was accepted by the court and Appellee April J.T. was placed on a post-adjudicatory improvement plan on April 27, 2006. The Plan required that Appellee April J.T. complete parenting and adult life skills classes with Wellspring Family Services, that she would work toward attaining her G.E.D., and that she would attend individual therapy sessions.

On September 11, 2006, the Guardian ad Litem filed a Motion to Terminate Appellee April J.T.'s Improvement Plan as well as a Motion to Amend the Petition making allegations against the appellee, Douglas D. The Motion to Terminate the Improvement Plan alleged that Appellee April J.T., despite years of intensive services, would never be able to independently, safely, and appropriately parent a child. The Guardian ad Litem further alleged that Appellee Douglas D. failed to recognize Appellee April J.T.'s impairment, and, as such, the child was placed in significant risk of harm. Finally, the Guardian ad Litem alleged that Summer D. had been in foster care for the most recent sixteen (16) months of the previous twenty (20) month period.

The Motion to Amend the Petition alleged that Appellee Douglas D., during the course of the improvement period, refused to acknowledge Appellee April J.T.'s mental impairment which called into question his ability to protect the child from harm. The proposed Amended Petition which was attached to the Motion, alleged that Appellee Douglas D. refused to acknowledge that Appellee April J.T. has significant deficits that impair her parenting skills and that he has continually expressed his opinion that

Appellee April J.T. can appropriately, safely, and independently care for a child, even in light of evidence to the contrary. (First Amended Petition, ¶5.) Based upon this, the Amended Petition alleged that Appellee Douglas D. could not adequately protect the child from the threat of harm. (First Amended Petition, ¶6.)

The motions were bifurcated and heard by the Court on December 20, 2006. During the Motion to Terminate the Improvement Plan, the Court also heard testimony regarding **the safety and appropriateness of the placement of the child.**

In its Order entered January 18, 2007, the Court held that Appellee April J.T. would not be able to meet the requirements of the improvement plan even though she made a good faith effort to do so and granted the Guardian ad Litem's Motion to Terminate the Improvement Plan. Without taking testimony, the Court then denied the Guardian ad Litem's Motion to Amend the Petition holding that the failure of Appellee Douglas D. to acknowledge the impairment of Appellee April J.T. was not a sufficient legal basis to seek termination of parental rights. The Court further held that on December 20, 2006, Appellee Douglas D. was aware of the limitations of Appellee April J.T. and agreed that the limitations created part of the problem. Based upon the same, the Court held that Appellee Douglas D. should have custody of the child. However, the Court held that the child should not immediately be returned to Appellee Douglas D. due to the fact that he was prevented from having regular contact with the child during the pendency of this action. Rather, the supervised visitation that was being exercised two (2) times per week for a two (2) hour period was changed to one (1) supervised visit and one (1) unsupervised visit. The frequency and duration of the visitation was not changed.

On January 22, 2007, the Guardian ad Litem filed a Motion for Stay of Proceedings and a Motion for Reconsideration Pursuant to Rule 60 of the West Virginia Rules of Civil Procedure. On January 22, 2007, the lower Court granted the Guardian ad Litem's Motion for Stay of Proceedings pending the instant appeal. The Motion for Reconsideration Pursuant to Rule 60 of the West Virginia Rules of Civil Procedure has not been ruled upon by the lower Court.

This appeal, brought by Allison Adyniec Cowden, Guardian ad Litem for Summer D., challenges the Order entered by the Court on January 18, 2007, in which the Court denied the Guardian ad Litem's Motion to Amend the Petition and ordered that Appellee Douglas D. should have custody of the child.

STATEMENT OF THE FACTS OF THE CASE

On April 26, 2005, WVDHHR filed a Child Abuse and Neglect Petition against Appellees T. and D., alleging that Appellee April J.T.'s parental rights were terminated to two other children, namely Zachary T. and Richard T., Jr., on or about April 15, 2005. A copy of the Order from Taney County, Missouri, terminating Appellee April J.T.'s rights was attached to the Petition and made a part thereof. The instant petition was filed when the WVDHHR determined that Appellee April J.T. had given birth to Summer D. on December 27, 2004.

THE PRIOR TERMINATION OF APPELLEE APRIL J.T.'S RIGHTS TO ZACHARY T. AND RICHARD T., JR.

On September 8, 2001, Appellee April J.T.'s first born child, Zachary T., born September 6, 2001, was placed into protective custody in Taney County, Missouri. Zachary T. was the son of Richard T., Appellee April J.T.'s husband at the time. The reason for the placement was Appellee April J.T.'s low level of intellectual functioning

that prevented her from being able to properly care for the infant. The physician making the referral stated concerns of maternal and paternal inadequacy, parental anger control, unstable home and living situation, medical noncompliance, and a lack of bonding and infant care in hospital.

Information received from Taney County, Missouri, revealed that Appellee April J.T. was low functioning and had trouble retaining information regarding the care of her children. Upon the birth of her first child, Zachary T., she could not remember to keep him swaddled in a blanket, had trouble feeding him, could not measure the ounces of formula that he drank and therefore could not record his intake. Further, it was believed that Appellee April J.T.'s ability to read and tell time was limited.

Upon the removal of Zachary T. in September 2001, Appellee April J.T. began receiving services which included parenting classes and counseling. On January 2, 2002, an Adjudicatory Hearing was held in Taney County, Missouri. The judge found the allegations of the Petition to be true.

On November 9, 2001, Appellee April J.T. had a psychological evaluation completed by Marci M. Manna, Psy.D. wherein she was diagnosed with major depression, recurrent, moderate, anxiety disorder and **borderline intellectual functioning**. The test data revealed that **April J. T. exhibited weak control over her impulses and was likely to engage in haphazard decision making**. Further, Dr. Manna questioned Appellee April J.T.'s ability to adequately parent her first minor child without significant support from family, friends and agencies.

On November 14, 2002, Appellee April J.T. gave birth to a second child, Richard T., Jr. The infant was initially placed in emergency foster care, but was subsequently

placed with Appellee April J.T. and the child's biological father, Richard T., on November 18, 2002. Zachary T. remained in foster care.

Upon placement of her second child, Richard T., Jr., in her care, intensive in-home services were implemented. In addition, in June 2003, Appellee April J.T. and Richard T. began receiving weekly unsupervised overnight in-home visits with her son, Zachary T.

On July 27, 2003, Richard T., Jr. was taken to the hospital with a broken femur. The parents initially reported that Richard had fallen out of bed the previous night. The story given to the doctor by Appellee April J.T. and Richard T. was inconsistent and Richard T., Jr. was placed back into the physical custody of the State of Missouri. The radiology report on the date of the initial Emergency Room visit stated that the suspected age of the injury was one to three weeks. Callus formation was already present.

Appellee April J.T. initially falsely represented to the physician that she left Richard T., Jr. unattended when the injury occurred. Later, she admitted that she was at work when the injury occurred and that the child was in the custody of Richard T. when the injury occurred. The biological father, Richard T., contended that the baby fell off of a bed. In August, 2003, Richard T. confessed to shaking Richard T. Jr. and throwing him on a bed. Richard T. subsequently pled guilty to First Degree of Endangering the Welfare of Child, a Class C Felony, and was sentenced to four years in the Moberly Correctional Facility.

In September 2003, Appellee April J.T. moved from Missouri to West Virginia. She only had one visit with the children, in May of 2004, to which Appellee Douglas D.

accompanied her. (Of note is the fact that Appellee April J.T. would have been pregnant with Summer D. during this visitation.) She had minimal telephone contact with the children after she moved back to West Virginia.

Appellee April J.T. had services provided to her from approximately September 2001 through September 2003. Although intensive in-home services were implemented, and Appellee April J.T. and Richard T. made excellent progress as a result thereof, Appellee April J.T. ultimately failed to protect the infant child and/or neglected the infant child inasmuch as he suffered from a broken femur that went untreated for at least one week.

During the course of this proceeding, two home studies had been completed by the State of West Virginia at the home of the maternal grandmother. The first home study, completed in August 2002, was denied because there were forty (40) bee's nests in an addition that had been added to the home. The second home study in March 2004 was denied because Appellee April J.T. would not be able to assume responsibility for the care of her children without intensive support of others, and her family members advised that April planned to move out on her own after the children were placed with her. Also, the home study revealed that Appellee April J.T. could not recall any specific training that she received in parenting. Further, placement with Appellee April J.T.'s mother was denied due to her inability to recognize April's responsibility in the abuse of her children.

From the time of their birth until September 2004, the permanency plan for Zachary T. and Richard T., Jr. was reunification with the mother. In September 2004, the permanency plan became Termination of Parental Rights and Adoption by the foster parents.

As stated earlier, Appellee April J.T.'s rights to the infant children were ultimately terminated on April 15, 2005, for the reasons previously set forth.

**THE CURRENT TERMINATION
PROCEEDINGS REGARDING SUMMER D.**

Shortly after Appellee April J.T.'s return to West Virginia in September 2003, Appellee April J.T. became pregnant with the child of Appellee Douglas D. sometime in April 2004. The child was born in December 2004 and a Petition was filed on April 26, 2005, and although there were no allegations made at that time against Appellee Douglas D. the child was taken into physical and legal custody by the WVDHHR.

Summer D. was placed into foster care at the age of approximately four (4) months. From April 26, 2005, through May 23, 2005, Summer was in a Youth Advocate Program foster home. She was then moved to the home of Cindy Tournay, Mr. D.'s first cousin, and her husband, Robert. She remained there for approximately four (4) months, until September 2005, when Mr. and Mrs. Tournay moved from the area. Summer was placed with her current non-related foster parents at that time at the age of nine (9) months.¹ Summer is now 29 months old, has been in foster care for 25 of those 29 months, and has been with the current foster parents for the last 20 months.

Even though there were no allegations against him in the original petition, Appellee Douglas D. has taken no action, whatsoever, during the course of this proceeding to attempt to obtain custody of his child, or even seek any form or increased visitation from that which was originally ordered in April 2004. Initially, the appellees were granted visitation four (4) times a week for one (1) hour. However, the visitation services had to be referred to Youth Service Systems for supervised

¹ To the best of the Guardian ad Litem's knowledge, no other biological relatives have ever come forward and offered to care for Summer.

visitation and the visitation was modified to two (2) times per week for two (2) hours. This visitation was never increased during the twenty (20) months prior to the December 20, 2006, hearing.²

At the time Appellee April J.T. became pregnant with Summer, she was still married to Richard T. She was not divorced from Mr. T. until November 28, 2005. She was pregnant with Appellee Douglas D.'s child, and gave birth to Summer while she was losing custody of her other children in Missouri. Appellee Douglas D. was aware that Appellee April J.T. was involved in proceedings regarding her children in Missouri, as he accompanied her on the one and only visitation she had with the children after leaving Missouri.³ Although Appellee April J.T.'s divorce has been final since November 28, 2005, the appellees have never married although they continue to cohabit. Appellee April J.T. became pregnant again with the child of Douglas D. in June 2005, just two (2) months after Summer was taken into custody. Appellee April J.T. later miscarried on December 4, 2005.

At some point, Kimberly Justice of Wellspring Family Services began working with Appellee April J.T. and the child for one (1) hour prior to the visitation. Ms. Justice then remained for the remainder of the visitation to provide further services and assess how the appellees were applying the parenting techniques she was teaching them. Often, there was concern regarding whether the appellees were maximizing their visitation time. On one occasion, Appellee Douglas D. left the visitation for twenty-five (25) minutes to have his car inspected. Ms. Justice requested numerous times that they have lunch ready

² Although the visitation was never formally increased by the Court, an additional hour was added to the visitation so that Wellspring Family Services could have the opportunity to work with the appellees with the child present. When Wellspring ceased services, the extra hour of visitation was not taken away.

³ It is the belief of the Guardian ad Litem that the appellee's trip to Missouri was for the purpose of Appellee April J.T. to testify against her husband in the criminal proceeding.

for Summer when she got there, so that they did not have to waste 15-20 minutes of visitation preparing her lunch. They never complied with this suggestion.

On September 29, 2005, Appellee April J.T. underwent a Forensic Psychiatry Evaluation with Dr. Christi Cooper-Lehki of the West Virginia University School of Medicine. The purpose of the evaluation was to assess parental capacity regarding the child, Summer D. Dr. Cooper-Lehki diagnosed Appellee April J.T. with borderline intellectual functioning, and that Ms. T. "had significant deficits that result directly from her lower I.Q. and those deficits impair her ability to parent appropriately and safely." (Transcript, p. 86)

The appellees have not been able to maintain consistent employment. Currently, Ms. T. is unemployed, and Mr. D. is employed in a temporary position with the Wal-Mart Distribution Center. **Neither appellee has paid any child support for Summer during the course of these proceedings.** Appellee April J.T. has not been able to obtain her G.E.D. She does not have a driver's license.

The appellees had been having supervised visitation with the child in their home. In June 2006, the appellees undertook a massive unnecessary remodeling project in their home that made the home unsafe for visitation. Walls had been knocked out, the floor was pulled apart, and the drop ceiling had been removed. Initially, the appellees attempted to have the parenting classes and visitation take place in a small bedroom of the home; however, because the conditions were unsafe for Summer, the visitation and parenting sessions had to be moved to a local church. Appellee Douglas D. was very angry when the visitation had to be moved to a local church, even though the conditions in the home were unsafe. This situation made it very difficult to continue the parenting

classes. The choice of undertaking a massive renovation was not logical for parents receiving parenting classes in their home and allegedly attempting to seek the return of their child.

Throughout the course of these proceedings, Appellee Douglas D. has consistently refused to recognize any incapacity of Appellee April J.T. He has consistently expressed the opinion that Appellee April J.T. can independently, appropriately, and safely parent a child even in light of overwhelming evidence to the contrary. **As Ms. T.'s live-in companion, he was in the best position to observe these deficits, yet he was unable to appreciate the same.** There is concern that Mr. D. will leave this child alone with Ms. T. As seen from Appellee April J.T.'s intellectual functioning and history, the child would be placed in significant risk of harm.

During a Multi-Disciplinary Team meeting on August 21, 2006, Appellee Douglas D. was questioned directly and pointedly by the Guardian ad Litem regarding his understanding of Appellee April J.T.'s parenting ability. **He unequivocally denied that Ms. T. had any impairment whatsoever.** He said he believed that Summer would be fine in Ms. T.'s care and custody alone and unsupervised. At that point, the Guardian ad Litem and the WVDHHR voiced their concern with regard to this belief, and the Guardian ad Litem voiced her intention to file a Motion to Amend the Petition based upon the same.

On or about September 11, 2006, the Guardian ad Litem filed a Motion to Amend the Petition alleging that Appellee Douglas D. refused to acknowledge that the appellee, April T., has significant deficits that impair her parenting skills and that Appellee Douglas D. continually expressed his opinion that the appellee, April T., can

appropriately, safely, and independently care for the child, even in light of evidence to the contrary. (Amended Petition, ¶5.) Further, the Guardian ad Litem alleged that based upon the appellee, Douglas D.'s refusal to acknowledge the limitations of April T.'s parenting skills, he cannot adequately protect the child from the threat of harm. (Amended Petition, ¶6.)

On December 20, 2006, an evidentiary hearing was held regarding the above-referenced motions. The Court bifurcated the motions and first heard testimony regarding the Motion to Terminate the Improvement Plan and the safety of the child with regard to placement. The Court heard testimony from the Guardian ad Litem's witnesses, Rhonda Stubbs of CASA, Kimberly Justice of Wellspring Family Services, and Dr. Christi Cooper-Lehki of West Virginia University School of Medicine.

Rhonda Stubbs, the executive director of CASA, who monitored this case throughout the course of these proceedings, first testified. Ms. Stubbs testified that although Ms. T. and Mr. D. were initially cooperative and accommodating at the beginning of the case, now **"it's not a very positive experience in going to the home."** (Transcript, p.14) Ms. Stubbs testified that on several different occasions, Mr. D. has said that **"he's going to drop out of the case"**, **"he could take custody of his daughter at any time"**, and **"he's going to hire his own lawyer who's...going to take care of this in a minute."** (Transcript, p. 15)

Further, Ms. Stubbs testified that **"[o]n almost every time that we go to the home he says that...he doesn't understand what this is all about. She has no problems. She does fine. Summer would be fine in her care. Everything's going – you know, she doesn't need to do any – to make any changes or improve her parenting."**

(Transcript, p. 15) Ms. Stubbs also testified that Mr. D. has not shown the requisite degree of initiative to seek the return of Summer. Ms. Stubbs stated that Mr. D. has said that he would be able to have custody of his daughter, but has let her stay in [the State's] custody. (Transcript, p.21) Finally, Ms. Stubbs opined that **"Mr. D. in my opinion doesn't see the dangers that Ms. T. presents to a small child and then on through adolescence."** (Transcript, p. 23)

Kimberly Justice of Wellspring Family Services testified with regard to the safety services that she provided to both appellees. Ms. Justice testified that Appellee April J.T. failed to rectify virtually every problem outlined in the Family Case Plan Incorporating the Terms of the Post-Adjudicatory Improvement Plan (Transcript, pp.56-58) Ms. Justice testified that **Mr. D. stated "he believed that April could parent the child just fine. That there were no mental incapacabilities."** (Transcript, p. 56) Ms. Justice testified that Ms. T. once told her **that they were not going to use what she was teaching them.** (Transcript, pp. 48-49) Further, Ms. Justice testified:

Q. And do you have any concerns that you would like to address with the Court today if the child were returned to the care and custody of Ms. T. and Mr. D.?

A. **My concern is that the child would be left alone with April**, just because of her inability -- I mean, with her lower I.Q. She has a hard time reading, she has a hard time telling time, things like that, things that are absolutely necessary to take care of, especially, a 2-year-old.

Q. Well, if Mr. D. were present?

A. If Mr. D. was present I think that she would be able to. But I don't think that she could do it by herself. If he would go to work and be left alone with -- if she would be left alone with Summer, **I don't think Summer would [be] completely safe.**

Q. Do you trust -- given your experience with Mr. D. and Ms. T., do you trust that he would in fact not leave her alone with that child?

A. **I think he would leave her alone with Summer.** (Transcript, p. 59) (Emphasis supplied.)

Dr. Cooper-Lehki of the West Virginia School of Medicine, who performed the forensic psychiatry evaluation of Appellee April J.T. testified that during her interview with April T., that “she doesn’t make decisions well on her own and she goes along basically with whatever’s going on around her. What she told me was that Richard T., her husband, had threatened her and that’s why she didn’t take her son to the emergency room.” (Transcript, p.79) Dr. Cooper-Lehki testified that this information was inconsistent with other information provided to her:

Q. ...Did you find that to be inconsistent with any of the information that you had been provided?

A. Yes. Actually when looking through the records there were places where it stated from the Missouri documents that she had not known about what happened. And what she told me was that she was – I can tell you the exact words she used. She said that he was acting normal, that he wasn’t crying and that’s why she didn’t take him. The documents show that the fracture of his leg was at least one week old and anywhere up to three. So certainly you don’t have to be a physician to know that a baby with a broken leg is not going to be acting normal for that length of time. So I think it’s reasonable to note that that baby would not have been acting normally and still she chose not to take him there. She explained that it was out of fear. I think she had stated that he was okay and that she didn’t really know what – what she told – from what she told me, she did want to take him to the emergency room. So she was afraid to and that Richard wouldn’t let her go and he told her he would wire her jaw shut if she told anyone. So she did know and she opted not to go.” (Transcript, pp.79-80)

Dr. Cooper-Lehki also testified that Ms. T. did not have an adequate understanding of her whole scenario with her sons saying “[s]he still thought that she really didn’t do anything wrong with regards to Richard and her other son.” (Transcript, p.84)

Dr. Cooper-Lehki testified that although Ms. T. could answer questions appropriately about parenting, and actually showed a significant improvement in answering questions, "it didn't translate to parenting" because after she had been through intensive in-home services, the whole incident with Richard Junior still happened. (Transcript, p. 86) Dr. Cooper-Lehki opined "So she can take in this knowledge and answer the questions right, that doesn't mean that it's actually improved her parenting skills." (Transcript, p. 86)

Other concerning information derived from the evaluation was that April J. T. "was impulsive and she came across as being immature, naïve, somewhat gullible" (Transcript, p.82), "[h]er judgment was impaired" (Transcript, p. 82), "[s]he couldn't tell time from a clock" (Transcript, p.82), "she couldn't read the consent form" (Transcript, p. 82), she frequently became tangential (Transcript, p.83), her ability for abstract thinking was impaired (Transcript, p.83), she had significant difficulty with hypothetical situations (Transcript, p. 84), and there was an impairment in memory testing (Transcript, p. 84). Dr. Cooper-Lehki also testified that "So what came across very clearly, she was completely dependent on Mr. D." (Transcript, p. 83)

Dr. Cooper-Lehki testified that Ms. T. can only do as well as everyone around her is doing. (Transcript, p. 88):

"So if she's with a parent who is not a good parent, her parenting is not good either. So if she's around someone who is providing a safe home, money, modeling appropriate parenting, she's going to do better as well." (Transcript, p. 88)

Dr. Cooper-Lehki testified that **it would be "critical" for other individuals that would be around her to recognize her deficits in order for the child to be safe in her care.** (Transcript, p. 89) She further stated **"whoever is going to take over that**

responsibility and be the primary care provider has to understand – not only understand, but basically compensate for and accommodate for her deficits.”

(Transcript, p. 89) (Emphasis supplied.)

The appellee chose to call no witnesses to rebut the aforesaid testimony. The Court then made the rulings outlined in the aforementioned Order dated January 18, 2007, from which the Guardian ad Litem now appeals.

ASSIGNMENTS OF ERROR

- A. The Court’s Order is not supported by the factual evidence and is clearly erroneous.
- B. The Court erred in denying the Guardian ad Litem’s Motion to Amend the Petition.

POINTS AND AUTHORITIES RELIED UPON

Cases

Clifford K. and Tina B. v. Paul S., etc., 619 S.E.2d 138 (2005)

Collins v. Collins, 171 W.Va. 126, 297 S.E.2d 901 (1982)

In re Alyssa W. & Sierra H., 217 W.Va. 707, 619 S.E.2d 220 (2005)

In re Brandon, 183 W.Va. 113, 394 S.E.2d 515 (1990)

In the Matter of Brian D., 194 W.Va. 623, 461 S.E.2 129 (1995)

In re Carlita B., 185 W.Va. 613, 629, 408 S.E.2d 365, 381 (1991)

In re Christina L., 194 W.Va. 446, 460 S.E.2d 692 (1995)

In re: Daniel D. and Samantha D., 211 W.Va. 79, 562 S.E.2d 147 (2002)

In Re Edward B., 210 W.Va. 621, 558 S.E.2d 620 (2001)

In re Erica C., 214 W.Va. 375, 589 S.E.2d 517 (2003)

In re Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162 (1993)

In re Jonathan Michael D., 194 W.Va. 20, 459 S.E.2d 131 (1995)

In re Michael Ray T., 206 W.Va. 434, 525 S.E.2d 315 (1999)

In re Michael S. Jr., 218 W.Va. 1, 620 S.E.2d 141 (2005)

In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980)

In re Randy H., April G., Brittany T., and Megan H., 640 S.E.2d 185 (2006)

In the matter of Taylor B., 201 W.Va. 60, 491 S.E. 2d 607 (1997)

In the Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996)

Lemley v. Barr, 176 W.Va. 378, 343 S.E.2d 101 (1986)

Nancy Viola R. v. Randolph W., 177 W.Va. 710, 714, 356 S.E.2d 464, 468 (1987)

State of WV ex rel. Amy M., 196 W.Va. 251, 260, 470 S.E.2d 205 (1996)

State v. Julie G., 201 W.Va. 764, 500 S.E.2d 877 (1997)

State v. Scritchfield, 167 W.Va. 683, 685, 280 S.E.2d 315 (1981)

W.Va. Dept. of Human Services v. Peggy F., 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990)

West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996)

Rules

West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, Rule 19

DISCUSSION OF LAW

I. 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." Syllabus Point 1, In the Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996).

II. ARGUMENT

A. The Court's Order of January 18, 2007, is not supported by the factual evidence.

1. The Court's holding that the child should be returned to the custody of Appellee Douglas D. was not supported by the factual evidence. The record is replete of any evidence that supports this finding.

The Court held that although the Court denied the Guardian ad Litem's Motion to Amend the Petition, evidence on the point was fully developed and the Court was satisfied. The Court held that on December 20, 2006, (the day of the hearing) Appellee Douglas D. was aware of the limitations of appellee, April J. T., and agreed that the

limitations created part of the problem. (Order, ¶ 12.) Based upon the same, the Court was of the opinion that Appellee Douglas D. have custody of the child. (Order, ¶ 12.)

In the case at hand, the Guardian ad Litem presented factual testimony from two (2) witnesses regarding Appellee Douglas D.'s negative attitude regarding these proceedings and his consistent refusal to recognize Appellee April J.T.'s parenting deficits and that as a result of this refusal, safety concerns existed should Summer D. be returned to the care and custody of Appellee Douglas D. Further, expert testimony was presented that it was **critical** for the person parenting this child to understand the deficits of Appellee April J.T., and to further be able to compensate and accommodate for these deficits.

Appellees T. and D., presented no evidence in defense of these claims. When the Guardian ad Litem closed her case, the appellees presented no witnesses, including themselves, in response to the evidence presented by the Guardian ad Litem.

Even in light of the foregoing, the Court held that on December 20, 2006, (the day of the hearing) Appellee Douglas D. was aware of the limitations of appellee, April J. T., and agreed that the limitations created part of the problem. (Order, ¶ 12.) Based upon the same, the Court was of the opinion that Appellee Douglas D. should have custody of the child. (Order, ¶ 12.) **There was absolutely no evidence presented at the hearing from which the Court could have concluded that Appellee Douglas D. was aware of these limitations and agreed that they created part of the problem. As such, the lower Court's ruling in this case was clearly erroneous.**

It has been proven through expert testimony that the past history of Appellee April J.T., combined with her diagnosis of borderline intellectual functioning, places this

child in significant risk of danger should she be required to parent on her own. The Guardian ad Litem presented uncontroverted evidence that Appellee Douglas D. does not believe and refuses to recognize the deficits of Appellee April J.T. Appellee Douglas D. was not placed under oath, did not testify, and was not subject to cross-examination regarding the multiple statements that he has made throughout this case that were inconsistent with the Court's ruling.

The Guardian ad Litem contends that Appellee April J.T.'s impairment is readily apparent. **The appellees have cohabited together since the institution of this proceeding. Appellee Douglas D. is present with Appellee April J.T. on a daily basis and observes her daily functioning. Appellee Douglas D. was in the best position to observe, recognize, and understand Appellee April J.T.'s deficiencies, yet he has consistently failed to appreciate Appellee April J.T.'s shortcomings.** This, in and of itself, calls into question Appellee Douglas D.'s own intellectual functioning. The mere fact that he was present during the hearing and the psychiatrist's testimony cannot lead to the conclusion that he now understands these limitations. Further, a directive by the Court cannot make him understand these limitations. Appellee Douglas D. was in the best position to figure this out on his own, yet failed to do so.

Further, the appellee, Douglas D.'s failure to testify regarding the allegations made against him is questionable. This Court has recognized that a lower court may properly consider an individual's silence as affirmative evidence of culpability:

"Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability." In re: Daniel D. and Samantha D., 211 W.Va. 79, 562 S.E.2d 147 (2002). (Emphasis supplied.)

In In re Carlita B., 185 W.Va. 613, 629, 408 S.E.2d 365, 381 (1991), the Court held that [a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made **in the context of all the circumstances of the case** to justify the return of the child. Id. at 626. (Emphasis supplied.) Looking at this case in the context of all the circumstances, it cannot be said that the appellees have sufficiently improved their parenting skills so as to adequately protect this child.

In In re Jonathan Michael D., 194 W.Va. 20, 459 S.E.2d 131 (1995), this Court failed to overturn a termination of parental rights based upon the fact that the mother's attitude and beliefs did not change during the improvement period. This Court stated, "Furthermore, this Court has recognized **it is possible for an individual to show 'compliance with specific aspects of the case plan' while failing 'to improve...[the] overall attitude and approach to parenting.'**" Citing W.Va. Dept. of Human Services v. Peggy F., 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990). Id. at 27. This Court considered the fact that the circuit court was concerned that the mother's behavioral change during the last few months of the improvement period was an attempt to deceive the Department. There was evidence that she was merely going through the motions to appease the Department while her true intentions were to reunite with the perpetrator of the abuse and move out of state. Id.

The Guardian ad Litem proved by uncontroverted evidence that Appellee Douglas D.'s attitude did not change throughout these proceedings. This failure to improve his overall attitude and approach to parenting should have been very concerning to the Court. It is the Guardian ad Litem's position that the Court's ruling was clearly erroneous because there was absolutely no evidence introduced to support the conclusion that Appellee Douglas D. understood Appellee April J.T.'s limitations and that Summer D. should be safely returned to the custody of the appellee, Douglas D.

2. The Court failed to consider the best interest of the child in determining that the child should be returned to the care and custody of the appellee, Douglas D. The record in this case and the Order entered January 18, 2007, is devoid of any reference to the best interest of the child.

This Court has held that "although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family matters, must be the health and welfare of children. Syllabus Point 2, In re Randy H., April G., Brittany T., and Megan H., 640 S.E.2d 185 (2006). In cases dealing with children this Court has repeatedly stated that the best interest of the child is the polar star upon which decisions should be based. In re Erica C., 214 W.Va. 375, 589 S.E.2d 517 (2003). Determining what is in the child's best interest is especially important when the child has been abused and neglected by his or her own parents and is currently in limbo as to a permanent home. In re Michael S. Jr., 218 W.Va. 1, 620 S.E.2d 141 (2005). Further, cases involving children must be decided not just in the context of competing sets of adults' rights, but also with regard for the rights of the child(ren). Syllabus Point 3, In re Michael Ray T., 206 W.Va. 434, 525 S.E.2d 315 (1999).

The January 18, 2007, Order from the lower Court is replete of any reference to the best interest of this child. Rather, the issues were decided purely from the standpoint of the appellee, Douglas D.'s, rights.

As stated earlier, as of the filing of this Brief, Summer will have been in custody 25 of the 29 months of her life. This Court has recognized the vitality of the early years of development. In Carlita B., this Court recognized the writings of Burton L. White, Ph.D., and Doris E. Durrell, Ph.D.:

After seventeen years of research on how human beings acquire their abilities, I have become convinced that it is to the first three years of life that we should now turn most of our attention. My own studies, as well as the work of many others, have clearly indicated that the experiences of those first years are far more important than we had previously thought. In their simple everyday activities, infants and toddlers form the foundations of *all* later development. Burton L. White, Ph. D., in his book, *The First Three Years of Life* (1985) at v. (Emphasis supplied.)

Throughout my years of experience in raising children and treating children in a clinical setting, I have been continually impressed with the degree to which personality has been formed by the time a child is three years old. By this time, certain positive behaviors will have been established which will continue to bring your child positive responses, or negative behaviors may be established which will cause your child problems with peers and adults. Doris E. Durrell, Ph.D., *The Critical Years: A Guide for Dedicated Parents* (1984) at 9. (Emphasis supplied.)

In Carlita, this Court itself remarked regarding a six month delay in the proceeding stating, “[s]uch delays do, however, always harm the child, as the significance of a six-month period in the first three years of life must once again be viewed as an extremely vital time in the course of a child’s human development.” Id. at 624.

This case is distinguishable from Carlita B. in that the delay in Carlita B. was as a result of the court system. Here, services were put in place on a timely basis (August

2005), and the case was regularly reviewed by the Court. On balance, Appellee Douglas D. chose to allow this child to languish in foster care during the most formative years of her life. He was under the belief that he could have sought the return of this child, but specifically decided not to even try. Further, in contravention of the Order of the Court, he was not “prevented” from having regular, substantial contact with the child, rather he simply never even requested any additional contact or visitation.

This court has held that where a child is under the age of three (3), immediate termination without an intervening period employing a less drastic alternative is more reasonable than in other cases. A child of that age has a far greater susceptibility to illness; the child is not as irrevocably attached to his parents; and, numerous placements may severely retard the child’s ability to form lasting attachments. **At the early stage of development a child needs close interaction with an adult fully committed to helping the child’s emotional as well as physical development and, it is difficult for foster parents to fulfill this role because they often fear forming a deep emotional attachment to the child.** In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980). (Emphasis supplied.)

Here, Appellee Douglas D. has unequivocally failed to demonstrate any significant commitment to this child. Summer D. recognizes her foster family as her parents and merely recognizes the appellees as essentially “playmates” who visit with her six (6) hours per week. It is not in the best interest of this child to tear her away from her foster family, the only fully committed adults she has ever known, in favor of placement with the appellee.

This Court specifically addressed this issue in In the Matter of Brian D., 194 W.Va. 623, 461 S.E.2 129 (1995), wherein this Court held:

Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren). Thus, how Jeffrey has fared educationally and emotionally with these foster parents and Jeffrey's own feelings and emotional attachments should be taken into consideration by the lower court. *Id.* at 142. (Emphasis supplied.)

Citing Lemley v. Barr, 176 W.Va. 378, 343 S.E.2d 101 (1986), the Court stated:

The day is long past in this State, if it had ever been when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of constitutional magnitude. *Id.* at 142.

In In re Alyssa W. & Sierra H., 217 W.Va. 707, 619 S.E.2d 220 (2005), this Court considered whether the child had established a bond with her stepfather:

“Regarding the issue of whether Sierra H. has established a strong emotional bond with Robert H., we are left with the definite and firm conviction that the circuit court committed error. The circuit court merely found, as set forth above, that, [Sierra H.] had always been excited about seeing her father, Robert [H.], for past visitation, so much so that [Sierra H.] would sometimes cry when she had to leave him or when she thought visitation was going to be cancelled or postponed. Evidence was also presented that during those visits [Sierra H.] and Robert [H.] played and interacted appropriately, got along well, and seemed to enjoy themselves. [Sierra H.] never showed any signs of being afraid of Robert [H.]

We believe that the evidence relied upon by the circuit court is inadequate to establish that Sierra H. developed a close emotional bond with Robert H. Frankly, the fact that Sierra was only fourteen months old when the instant proceedings commenced below and the fact that her subsequent contact with Robert H. was limited to regular visits are alone sufficient to cast serious doubt on the notion that Sierra H. developed the enduring and emotionally intimate relationship with Robert H. inherent in the phrase ‘close emotional bond.’” *Id.* at 711. (Emphasis supplied.)

In support of this notion, Kimberly Justice of Wellspring Family Services testified that “Summer had a bond with them, but it wasn’t a bond that I would say is a parental bond. I mean, she had a bond with me, she had a bond with Danny from YSS, but we were also there for three hours twice a week – once a week.” (Transcript, p. 50)

In the case at hand, there was no consideration given to the best interest of Summer D. Summer has been with her current foster parents for the majority of the most formative years of her life. She has a deep emotional bond, not with her biological parents, but with the foster parents. The evidence presented at the hearing revealed that everyone involved with this case has serious concern for Summer’s best interests, well-being and safety if she is returned to the custody of Appellee Douglas D. On balance, there was no evidence presented that returning Summer to her biological father is in the best interest of this child – it was not even considered. Rather, this issue was decided purely from the antiquated possessory interest of the biological father and the Court failed to weigh this against the best interest of the child. As such, the Court clearly committed error.

3. The Court erred in holding that Douglas D. has been a supportive father to the child, Summer D. Further, the Court erred in holding that Appellee Douglas D. should be commended for his patience in not seeking the return of the child since she has been in placement in an effort to parent the child in a traditional sense.

The Court held that the Appellee Douglas D. has been a supportive father to the child, Summer D. (Order, ¶ 9.) Additionally, the Court held that Appellee Douglas D. should be commended for his patience in not seeking the return of the child since she has been in placement in an effort to parent the child in a traditional sense. (Order, ¶ 10.)

Appellee April J.T. returned to the area in September 2003. Shortly thereafter, she became pregnant with Appellee Douglas D.'s child. At that time, Appellee April J.T. was married to another man who was incarcerated for breaking her child's leg. She was in the process of losing her parental rights to her two (2) children in Taney County, Missouri. She was not visiting with these children or regularly contacting these children and essentially abandoned these children, which ended up being an additional basis for the termination. Appellee Douglas D. was aware she was losing her rights to these children, as he accompanied her on the one and only visit she had with these children subsequent to leaving the state of Missouri.

Appellee April J.T. was not divorced from Mr. T. until November 28, 2005. Even in light of the divorce, the appellees have never gotten married. For Appellee Douglas D. to be permitted to rely upon the fact that he was attempting to raise this child in a traditional sense is simply not founded by the facts of this case. This "family" has been anything but "traditional."

The fact of this matter is that Mr. D. prioritized the relationship with his girlfriend, Appellee April J.T., while allowing this child to be raised in foster care during arguably the most formative years of her life. Further, he stood by while Appellee April J.T. lost her rights to her children in Missouri. Now, he is being permitted to rely upon the fact that he has not sought the return of this child because he wanted to parent Summer in a "traditional sense."

Again, Appellee Douglas D. has been living with Appellee April J.T. throughout the course of these proceedings. He has observed firsthand the deficiencies of the Appellee April J.T. This case has been pending for two (2) years, and in that time, he has

never second-guessed his decision to stay with Appellee April J.T. rather than seek the return of his child. He has chosen his girlfriend, who he has made no formal commitment to, over his own daughter. This cannot be considered evidence of a supportive father.

Further, with regard to the visitation, there was testimony at the hearing that the appellees did not often make effective use of their parenting time. They would spend a portion of the valuable four (4) hours of visitation they would have every week preparing lunch for Summer, even though the Wellspring Family Services worker often suggested that they have lunch ready ahead of time so that they could spend more time with the child. There was testimony that during one of the visitations, Appellee Douglas D. forewent 25 minutes of visitation with Summer to have his car inspected. It was also reported that Appellee Douglas D. cleaned the kitchen while Summer was there and had to be interrupted from his guitar playing to visit with the child.

This Court has held that a parent's level of interest in visiting with his or her child during an out-of-home improvement period is an **extremely significant factor** for the circuit court to review. A parent who consistently demonstrates a desire to be with his child obviously has far more potential for being a nurturant and committed parent than one whose interest in being with his child is erratic. Carlita at 628. Further the Court stated:

Despite the responsibility of the D.H.S. and the court to provide interventive resources and to aid the parents, the rehabilitation envisioned by an improvement period is not a task which anyone can accomplish *for* the parent. **The natural parental instinct is to do the work necessary to regain full custody of the child.** Evidence of that instinct and the concomitant energy required to achieve that goal is missing from this case. Id. at 629. (Emphasis supplied.)

Moreover, in In re Brandon, 183 W.Va. 113, 394 S.E.2d 515 (1990), this Court considered the following:

If a child has resided with an individual other than a parent for a significant period of time such that the non-parent with whom the child resides serves as the child's psychological parent, **during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so**, the equitable rights of the child must be considered in connection with any decision that would alter the child's custody. **To protect the equitable rights of a child in this situation, the child's environment should not be disturbed without a clear showing of significant benefit to him, notwithstanding the parent's assertion of a legal right to the child.** *Id.* at Syl. Pt. 4. (Emphasis supplied.)

In Clifford K. and Tina B. v. Paul S., etc., 619 S.E.2d 138 (2005), this Court defined a psychological parent as:

“a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, **fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support.** The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and **must have begun with the consent and encouragement of the child's legal parent or guardian.**” *Id.* at 157. (Emphasis supplied.)

In this case, it is questionable as to whether Appellee Douglas D. possesses the natural parental instinct to adequately parent his child. This court has held that where parents who have the right to maintain continuing substantial contact with the child, such as Appellee Douglas D., fail to do so the child's environment should not be disturbed without a showing of significant benefit to the child, regardless of the parent's legal right. Finally, Appellee Douglas D.'s limited weekly visitation does not rise to the level of “psychological parent” as defined by this Court, even though he is the biological parent.

This court, in addressing time limitations for improvement periods, stated “there comes a time for decision, because a child deserves resolution and permanency in his or her life, and because part of that permanency must include **a minimum right to rely on his or her caretakers to be there to provide the basic nurturance of life.**” State of WV ex rel. Amy M., 196 W.Va. 251, 260, 470 S.E.2d 205 (1996). (Emphasis supplied.)

Here, the appellee, Douglas D. was content with permitting his child to languish in foster care for 25 of the 29 months of her life while he exercised his four (4) hours of visitation per week. He has not paid child support on behalf of the child. He has never sought increased visitation with the child. This Court has held that weekly visitation alone is not sufficient to establish a strong emotional bond with the child.

The lower Court's ruling that Appellee Douglas D. was a supportive father to this child is clearly in error. Further, the Court clearly erred in holding that Appellee Douglas D. should be commended for his patience in not seeking the return of the child since she has been in placement in an effort to parent the child in a traditional sense. To the extent that the Court relied on this in making the determination that Summer D. should be returned to the custody of Appellee Douglas D. is clearly error.

B. The Court erred in denying the Guardian ad Litem's Motion to Amend the Petition.

The Court held that the failure of Appellee Douglas D. to acknowledge the impairment of Appellee April J.T. was not a sufficient legal basis to seek termination of parental rights and thereby denied the Guardian ad Litem's Motion to Amend the Petition. (Order, ¶ 11.)

Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings governs the filing of amended petitions:

Under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment, consistent with the intent underlying Rule 19 to permit liberal

amendment of abuse/neglect petitions. Syllabus Point 4 of State v. Julie G., 201 W.Va. 764, 500 S.E.2d 877 (1997).

In In Re: Randy H., April G., Brittany T., and Megan H., an amended petition making allegations that the appellee was allowing her children to be in the company of sex offenders was dismissed by the Circuit Court because the DHHR failed to further investigate the allegations in the Amended Petition and present testimony with regard thereto. This Court held that the circuit court had the authority to compel the DHHR to further investigate the allegations and had a duty to make findings of fact and conclusions of law regarding the allegations. This Court held:

To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, we therefore hold that **if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.** *Id.* at 191. (Emphasis supplied.)

Further, it has been held that:

Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order. Syllabus Point 5 of In Re Edward B., 210 W.Va. 621, 558 S.E.2d 620 (2001)

It is the Guardian ad Litem's position that she presented sufficient evidence to raise concern that this child would be at risk if placed in the custody of Appellee Douglas D. Dr. Cooper-Lehki testified that Ms. T. can only do as well as everyone around her is doing. (Transcript, p. 88):

“So if she’s with a parent who is not a good parent, her parenting is not good either. So if she’s around someone who is providing a safe home, money, modeling appropriate parenting, she’s going to do better as well.” (Transcript, p. 88)

Dr. Cooper-Lehki testified that it would be **“critical” for other individuals that would be around her to recognize her deficits in order for the child to be safe in her care.** (Transcript, p. 89) She further stated **“whoever is going to take over that responsibility and be the primary care provider has to understand – not only understand, but basically compensate for and accommodate for her deficits.”** (Transcript, p. 89) (Emphasis supplied.)

Based upon this the Court should have conducted, further investigation into the beliefs, understanding, and background of Appellee Douglas D. to ensure the safety of this child. Otherwise, the child remains at risk for harm.

Further, it is the Guardian ad Litem’s position that Appellee Douglas D.’s failure to acknowledge the limitations of Appellee April J.T. is, in fact, a sufficient legal basis for termination. In State v. Scritchfield, 167 W.Va. 683, 685, 280 S.E.2d 315 (1981), the mother had a history of mental illness and was diagnosed with schizophrenia. This Court held:

We do not question that the definition of "neglected child" contained in W.Va. Code § 49-1-3 includes those children whose well-being is endangered or impaired by the inability of the parent, **as a result of a mental condition**, to perform the most fundamental and essential of the parental obligations--to feed, clothe, shelter, supervise, educate and provide medical care. Under such circumstances, neglect may be proved upon a showing of an ongoing condition or course of conduct which has been or is likely to be detrimental to the physical or mental well-being of the child and which the parent has been unable or unwilling to correct. Id. at 691. (Emphasis supplied.)

Even in light of her Appellee April J.T.’s prior admissions, the Guardian ad Litem proved by clear and convincing evidence that Summer D. is an abused and neglected

child pursuant to §49-1-3. It was then proven by expert testimony that Appellee April J.T. does not have the ability to improve her parenting skills to a level where she could effectively parent a child due to her mental condition of borderline intellectual functioning.

This Court has consistently held that in order for an abuse and neglect problem to be rectified, the problem must first be identified. In West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996), the Court held:

[I]n order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense. Id. at 498. (Emphasis supplied.)

Further, this Court held in Doris S. that “[i]mplicit in the definition of an abused child under West Virginia Code §49-1-3 is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent.” Id. at 497.

This Court considered the foregoing in In the matter of Taylor B., 201 W.Va. 60, 491 S.E. 2d 607 (1997), wherein this Court held that the lower court committed reversible error in failing to terminate parental rights. This Court cited expert testimony stating that “in the absence of recognition by a parent that child abuse occurred, **the child remains at risk.**” Id. at 616.

Here, Mr. D. has consistently failed to acknowledge the existence of the problem, i.e., the truth of the basic allegation that Appellee April J.T. does not have the ability to

adequately parent a child due to her diagnosis of borderline intellectual functioning. Further, Appellee Douglas D. refused to acknowledge the fact that Appellee April J.T. is an “abusing parent”, i.e., the perpetrator, akin to the appellee’s failure to identify a perpetrator in the Doris S. case. Applying the facts of the instant case to the holding in Doris S., Appellee Douglas D.’s failure to acknowledge Appellee April J.T.’s limitations is, in fact, a sufficient legal basis for seeking termination of parental rights and clearly makes this an untreatable problem that would make an improvement period an exercise in futility. Further, his failure to acknowledge that the child’s well-being is in danger at the hands of Appellee April J.T. places this child at continued risk in his care and custody.

In State of W.Va. ex rel. Amy M., 196 W.Va. 251, 470 S.E.2d 205 (1996), the Court considered the Guardian ad Litem’s argument that error was committed when the circuit court denied a Guardian ad Litem’s motion to reconsider and offer to adduce additional evidence at a hearing stating:

“There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. W.Va. Code, 49-6-5 (1992), states that the circuit court shall give “both the Appellant and appellees an opportunity to be heard” when proceeding to the disposition of the case...This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process.” Id. at 260-261. (Emphasis supplied.)

Although this Court did not reach the ultimate issue of whether this constituted reversible error, this Court also cited reversible error committed in In re Christina L., 194 W.Va. 446, 460 S.E.2d 692 (1995) wherein this Court held that the trial court’s refusal to allow the Guardian ad Litem to submit a proposed dispositional plan at the close of a

dispositional hearing constituted reversible error, as well as the guidelines for Guardians ad Litem in In re Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162 (1993).

In addition to all the concerns previously described, it is in the best interest of this child for the Court to conduct further investigation into the background of the appellee, Douglas D. By way of proffer, the appellee, Douglas D. has two (2) prior arrests for domestic violence that were dismissed without prejudice as a result of counseling sought by the appellee. This Court has recognized that spousal abuse is a factor to be considered in determining parental fitness for child custody in Nancy Viola R. v. Randolph W., 177 W.Va. 710, 714, 356 S.E.2d 464, 468 (1987), as well as in Collins v. Collins, 171 W.Va. 126, 297 S.E.2d 901 (1982). Further, the Guardian ad Litem was prohibited from questioning the expert witness at the hearing regarding the role past domestic abuse would play in the instant case. (Transcript, p. 90)

Based upon Appellee April J.T.'s history of being in a past domestically abusive relationship that resulted in her child suffering an untreated broken femur, this is certainly a clearly relevant factor that if not looked into, could result in dire results for Summer D.

Further, Mr. D. previously admitted to the DHHR that he had a prior history of mental health treatment. There remains a question regarding the appellee, Douglas D.'s propensity toward violence as well as his own emotional stability. His own intellectual functioning should be at issue given his inability to recognize Appellee April J.T.'s deficiencies while living and interacting with Appellee April J.T. on a daily basis. These are all certainly factors that the Circuit Court had a duty to investigate prior to ordering the return of this child.

This is supported by the testimony during the hearing. During the improvement period, there was a period of time that both appellees were unemployed. Ms. Justice of Wellspring Family Services testified that **there was no improvement in the acceptance of services during this period of time even though the appellees were jointly in a position to cooperatively parent the child.** (Transcript, pp. 56-57)

It is the Guardian ad Litem's position that the appellee, Douglas D., cannot safely parent this child, and, as such, she should not be returned to the custody of either appellee. There are issues in this case that the Circuit Court had a duty to investigate and resolve regarding the appellee, Douglas D.'s ability to adequately parent this child. Expert testimony revealed that Appellee Douglas D. must be able to provide a safe home, money, model appropriate parenting, and not only understand the appellee, April J. T.'s deficits, but compensate and accommodate for them. This is a heavy burden that, as of this point, no evidence has been introduced that Appellee Douglas D. is capable of safely undertaking.

It is the Guardian ad Litem's position that Appellee Douglas D.'s failure to recognize the deficits of Appellee April J.T., is, in fact, a legal basis for an Amended Petition, especially when combined with the circumstances of the instant case. At a minimum, further investigation is required in this case to protect this child. This could be accomplished through the Amended Petition.

CONCLUSION

The Guardian ad Litem asserts that this child will be in significant risk of danger should she be returned to the custody of the appellee, Douglas D. There has been no

investigation by the Court into the basis of the appellee, Douglas D.'s alleged acknowledgement of this problem, or any analysis of Mr. D.'s mental capacity, and his ability to safely and appropriately care for this child. There has been no evidence adduced that does, in fact, demonstrate that Mr. D. has the ability effectively parent a child and to recognize and compensate for Appellee April J.T.'s deficits.

The Guardian ad Litem respectfully requests that this Honorable Court seriously deliberate regarding the above-stated issues and consider the impact on the health and welfare of Summer D. should this Court allow the ruling below to stand without comment. This Guardian ad Litem requests an oral presentation and respectfully appeals the ruling of the Circuit Court of Brooke County, West Virginia.

Respectfully submitted,

Allison Adyniec Cowden
Guardian ad Litem for Summer D.
Appellant



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CERTIFICATE OF SERVICE

Service of the foregoing **Brief of the Appellant, Guardian ad Litem**, was had upon the following by mailing a true and accurate copy thereof, United States Mail, postage pre-paid, this 23rd day of May, 2007:

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