

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

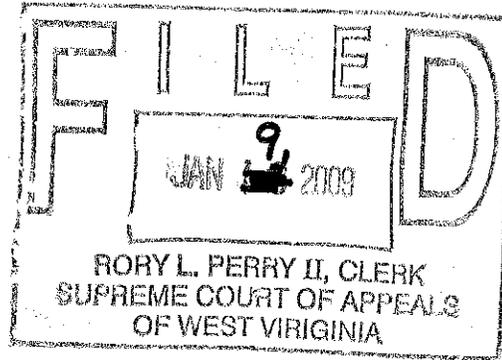
State of West Virginia ex rel. Freddie E. M. [REDACTED] Jr.,

Petitioner,

v. No. 34625

HONORABLE N. EDWARD EAGLOSKI, II  
Judge of the Circuit Court of Putnam County,  
West Virginia,

Respondent.



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FROM THE CIRCUIT COURT OF  
PUTNAM COUNTY, WEST VIRGINIA  
Case Nos. 08-JA-14, 15, 16, 17

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**AMENDED RESPONSE OF THE GUARDIAN AD LITEM TO THE  
PETITION FOR A WRIT OF PROHIBITION**

Duane C. Rosenlieb, Jr. (5595)  
Attorney at Law  
Post Office Box 913  
Saint Albans, W.Va. 25177  
(304) 727-0333

**Guardian Ad Litem for K. R., L. M., S. M. and B. T.**

## Overview

The instant petition for writ of prohibition was filed by counsel who, unfortunately, was not present at any evidentiary hearing and who did not participate in any of the off-the-record meetings and discussions of trial counsel.

Further, the Guardian ad Litem learned on January 5, 2009, that a transcript of these proceedings was never requested. The Guardian ad Litem has requested these proceedings be transcribed.

Therefore, it is apparent that the Statement of Facts in the Petitioner's Petition for Writ of Prohibition is merely a recitation of the pleadings and orders in this matter, quoted at length. Further, that the representations of other counsel are either recollections of counsel or gleaned from their trial notes. The Guardian ad Litem, therefore, is uncomfortable with the notion that a Writ of Prohibition might issue without a complete understanding of what occurred during these proceedings be available.

On this basis, the Guardian ad Litem also is somewhat troubled by the Petitioner's repeated assertion that the Respondent mother "admitted to starving her child," since the Guardian ad Litem is unaware that such an admission was ever made, either on or off the record.

It is correct to say that the Respondent mother admitted, in her stipulated adjudication, that she failed to provide the child, Blaine T., "with necessary food and nourishment thus threatening the physical health of the child." After the taking of evidence in this matter the Guardian ad Litem ultimately came to believe that this finding was more a result of the Respondent mother's failure to

act more aggressively in seeking a cause for the child's low weight and physical development, and not due to any intentional action on the mother's part.

However, it should be noted that the reason the child was at Charleston Area Medical Center in the first place was because the Respondent mother had followed up on the child's medical care.

In fact, as pointed out repeatedly by the Respondent mother's trial counsel, it appears that Blaine T. suffered from Patent Ductus Arteriosus (PDA), or a hole in his heart, and that this condition would explain the child's low weight and inability to thrive. The Guardian ad Litem has requested the prosecuting attorney to obtain from the DHHR worker the medical records from the October 21, 2008 surgical procedure to repair the child's heart so that they can be reviewed and considered by the Court.

The Guardian ad Litem believes when a Circuit Judge is given discretionary authority to make a ruling by the Legislature, that the Judge cannot abuse that discretion simply by making a decision-- in this case, ratifying a stipulation to grant an improvement period.

### **Standard of Review**

The standard for issuance of a writ of prohibition is contained in Syllabus Points 1 and 2 of *State Ex. Rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor*, 222 W.Va. 588, 668 S.E.2d 217 (2008):

1. "In determining whether to entertain and issue the writ of prohibition for cases not involving the absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate

means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus point 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

2. "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if \*220 the error is not corrected in advance." Syllabus point 1, Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979).

In addition, the Court also affirmed, in Syl. Pt. 4 of *River Riders, Inc. v.*

*Steptoe*, \_\_\_\_\_ W.Va. \_\_\_\_\_, \_\_\_\_\_ S.E.2d \_\_\_\_\_, Slip Opinion No.

34206 (2008):

4. "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court." Syllabus Point 4, State ex rel. Shelton v. Burnside 212 W. Va. 514, 575 S.E.2d 124 (2002).

The bar for granting a writ of prohibition is very high, and, since the granting of an improvement period to a litigant is a discretionary decision, the

Guardian ad Litem believes that even if the Trial Court was wrong or abused his discretion, that a Writ of Prohibition is not the appropriate remedy.

### **Statement of the Facts**

The Respondent mother in this matter is Kari T., the natural mother of Kaitlyn R., Lillian M., Sydnee M. and Blain T. Kari T. was previously married to the Petitioner, Freddie M., from 2000 to September 29, 2005.

The abuse and neglect petition was filed in the Circuit Court of Putnam County on May 23, 2008 alleging that Kari T. had neglected and abused Blaine T., born November 2, 2007.

It is significant to note that prior to the filing of this Petition, Kari T. had noticed that her son, Blaine T. appeared to be unhealthy and had contacted the child's primary care physician Chris Bowman, MD, and made all appointment with him in regard to her son's care. Dr. Bowman referred her to Dr. Fereydoun Zangeneh for an endocrine study to determine if there was a problem with Blain T.'s thyroid system. From soon after birth, until Blain T.'s admission to Women and Children's Hospital on May 9, 2008, Ms. Thomas sought out services with Birth to Three and apparently kept all appointments with her son's care providers.

During Blaine T.'s hospitalization, from May 9 to June 17, 2008 different courses of medical treatment were pursued to attempt to determine the cause of the child's failure to thrive. Ultimately, during the time period of May 14 to May 17, 2008, a period of 72 hours, Kari T. was videotaped interacting with the child on the suspicion that she was not feeding him properly.

The video taping revealed that Kari T. squirted out some of the formula, but later offered the explanation she did so to make sure that the nipple on the bottle was unobstructed.

The video taping further revealed that she dumped a portion of a bottle of formula and replaced it with Pedialyte, although she had been advised not to do so by the hospital staff. Kari T. explained that she believed her son needed to take the nutrients from the Pedialyte as he would not take the formula.

During the 72 hours of videotaping of Kari T., these were the only incidents of any conduct, alleged or construed to be improper. These two incidents occur in one day within an hour of each other.

On the basis of this videotape, Kari T. was arrested by the Hurricane Police Department, and the instant Abuse and Neglect Petition was filed.

In the Abuse and Neglect proceeding, a Preliminary Hearing was held on May 29, 2008. An adjudicatory hearing was held on June 24, 2008, during which the State presented evidence from various witnesses. Dr. Kahn, who was a treating physician of the child Blaine T., while at CAMC Women and Children's Hospital, failed to appear although he had been properly subpoenaed.

The Circuit Court Ordered the adjudicatory hearing continued to allow Dr. Kahn to appear and to allow the parties time to access Family Law Court records that were requested by the Guardian Ad Litem after it was determined through testimony that these records were necessary to proceed forward in adjudication as it pertained to the father, Richard R.

A preliminary hearing was held on the criminal matter on June 25, 2008. Kari T. apparently refused to waive her preliminary hearing, and when the matter was called, the State of West Virginia dismissed the warrant, claiming a need for further investigation. As of this date, the State has not pursued further criminal prosecution of this matter.

The adjudicatory hearing on the abuse and neglect case was reconvened on August 20, 2008. Prior to the resumption of testimony, Kari T. stipulated to adjudication as set forth in the "Rules 25 & 26 Stipulated Adjudicational Agreement." This stipulated agreement was entered into by Kari T. and her counsel, the Guardian Ad Litem, and the Assistant Prosecuting Attorney on behalf of the DHHR.

As part of said agreement, Kari T. made various admissions regarding the neglect of the children named in the abuse and neglect petition, and the DHHR and the Guardian Ad Litem agreed not to oppose a motion by Kari T. for a post-adjudicatory period of improvement subject to the terms and conditions of the case plan to be developed by the multidisciplinary team. The Circuit Court accepted the stipulated agreement and found that there was clear and convincing evidence that Kari T. had neglected all four of her children as set forth in the "Adjudication Order."

Following the adjudicatory hearing, the multidisciplinary team convened to develop a family case plan and to develop terms for a post-adjudicatory period of improvement should Kari T. be granted the same. The DHHR subsequently

presented the Circuit Court and all parties with a copy of the Case Plan as developed by the multidisciplinary team.

At a hearing on November 13, 2008, the Circuit Court adopted the Case Plan as submitted by the DHHR and granted Kari T. a post-adjudicatory period of improvement. The Circuit Court found that there was no objection from the DHHR or the Court Appointed Special Advocate (CASA), while counsel for the Petitioner did object to placing Kari T. receiving an improvement period because reunification of the children with Kari T. was in the best interests of the children.

Further, during the November 13 hearing, the Circuit Court also adopted the recommendation of the DHHR and CASA and ordered that Kari T. could have unsupervised visits with all four children at the discretion of the DHHR and based on Kari T.'s progress with her case plan.

### **Statement of the Issues**

The Petitioner, Freddie E. M. [REDACTED] Jr., raises the following issues in his Petition for Writ of Prohibition:

1. The Circuit Court erred in granting the respondent mother a post-adjudicatory improvement period where she had not filed a written motion requesting the improvement period.
2. The Circuit Court erred in granting the respondent mother a post-adjudicatory improvement period where the hospital staff at CAMC suspected that her intentional starvation of Blain T. was caused by Munchausen Syndrome by proxy and where the results of the psychological evaluation on the mother, which might rule in or out MSBP, were not available to the multidisciplinary treatment team or the court at the time the improvement period was granted.
3. The Circuit Court erred in failing to find that the intentional starvation of an infant is an "aggravated circumstance" where the DHHR is not required to exercise reasonable efforts to reunify the family and which finding justifies the denial of an improvement period.

## **Amended Answer of the Guardian ad Litem**

In addition to the points raised in the Guardian ad Litem's initial response to the Court dated December 15, 2008, the additional response is offered:

**1. No Error Occurred Simply Because The Circuit Court Ratified The Stipulated Adjudication Agreement And Granted The Respondent Mother A Post-Adjudicatory Improvement Period, Even Though She Had Not Filed A Written Motion Requesting The Improvement Period.**

The Guardian ad Litem believes no error occurred because a written motion for improvement period was not filed. This was a stipulated adjudication. The Respondent mother agreed to do certain things and the State of West Virginia agreed to do certain things. The Respondent Mother agreed to stipulate that she had neglected her child and the State agreed to not oppose a post-adjudicatory period of improvement.

Because this was a stipulation, and agreement of counsel, the requirement of a written motion for improvement period was waived. Further, no party objected to the Respondent Mother being placed on a post-adjudicatory improvement period.

Further, it is part of the normal litigation practice for the State to not oppose a post-adjudicatory period of improvement where an admission or stipulation is made.

As pointed out by all counsel in this matter, the Respondent mother made an oral motion for an improvement period, albeit after entering into the stipulated adjudication agreement, and no objection was made on the record of this matter. Therefore, it might properly be said that any objection was waived.

Further, the Court, as pointed out previously in this Reply, could not have made an error simply by exercising its authority and performing a discretionary judicial function, i.e., granting an improvement period.

Even if it is determined that the Court should have required a written motion for improvement period to be filed, it is difficult to see how this so prejudiced the Petitioner, a non-custodial father living outside the home, so as to form the basis for a Writ of Prohibition.

**2. The Circuit Court did not err in granting the respondent mother a post-adjudicatory improvement period just because the hospital staff at CAMC wanted to rule out that the child's below normal weight and failure to thrive was due to intentional starvation. It is not an error of the Circuit Court that the MDT made its decision to grant a post adjudicatory period of improvement without a full psychological evaluation of the mother.**

First, it should be noted that after asserting that the only cause of the child's failure to thrive was malnutrition, Dr. Melissa Fox equivocated under cross examination and admitted that PDA could be another cause of the child's failure to thrive and that she was not aware of the details of the child's heart disorder. In fact, it turned out that the child, Blaine T., suffered from PDA and underwent a surgical procedure to repair a hole in its heart in October 2008.

The Respondent mother's cross examination defense included factors such as that PDA made infants less interested in feeding, which the mother had contended off the record was one of the issues she faced in Blaine T.'s care.

Secondly, the MDT had an informal opinion from the evaluating psychologist to the DHHR worker which indicated no concerns regarding the Respondent mother from a psychological perspective, as pointed out in the Prosecuting Attorney's response filed in this matter.

In addition, the Guardian ad Litem was aware that although strong allegations of criminal misconduct had been initially leveled against the mother by the State, that these charges were dismissed at the Preliminary Hearing in Magistrate Court.

Petitioner's counsel was not familiar with any of this information, because he did not attend the Court hearings and was not present during the MDT's discussions. In addition, I believe I am correct in advising the Court that Petitioner's counsel never contacted any of the lawyers in this case prior to filing his Petition for Writ of Prohibition.

**3. The Circuit Court did not err in failing to find that the intentional starvation of an infant is an "aggravated circumstance" where the DHHR is not required to exercise reasonable efforts to reunify the family and which finding justifies the denial of an improvement period.**

The Court did not err by not making a finding of "intentional starvation" in this case because the evidence didn't support such a finding. In fact, the evidence in this case, as indicated above, supported a definite defense by the Respondent mother that there was another cause for the conditions identified in this child.

Ultimately the Respondent mother's cross examination defense was born out by the subsequent diagnosis and surgical procedure on the child's heart.

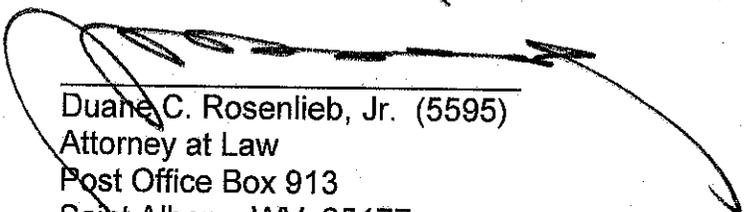
Therefore, even in 20-20 hindsight, it appears that the current factual situation supports the decision to offer the Respondent mother an improvement period where her parenting of the child can be monitored and services can be provided in the home.

Considering the ultimate factual situation regarding this child, the decision

by the Court to grant an improvement period—based upon the stipulation of trial counsel—even if determined to be an abuse of discretion, was not of the magnitude that it would be the “trial [would] be completely reversed if the error is not corrected in advance,” per Syllabus point 1, *Hinkle*, supra.

### **Prayer for Relief**

Wherefore, the Guardian ad Litem prays that this Honorable Court deny the Petition for Writ of Prohibition for the reasons as stated.



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Duane C. Rosenlieb, Jr. (5595)  
Attorney at Law  
Post Office Box 913  
Saint Albans, WV 25177  
Guardian ad Litem  
(304) 727-0333

## Certificate of Service

I, Duane C. Rosenlieb, Jr., Guardian Ad Litem for K.R., L.M., S.M. and B.T., do hereby certify that I have served copies of the attached "Amended Response of the Guardian Ad Litem to the Petition for a Writ of Prohibition" upon the following parties of record by depositing true copies thereof in the United States Mail, postage prepaid and addressed as follows on January 9, 2009.

Honorable Philip Stowers  
Judge of the Circuit Court of Putnam County  
Putnam County Judicial Building  
3389 Winfield Road  
Winfield, WV 25213

Noel M. Olivero, Esquire  
652 Sixth Avenue  
Huntington, WV 25701

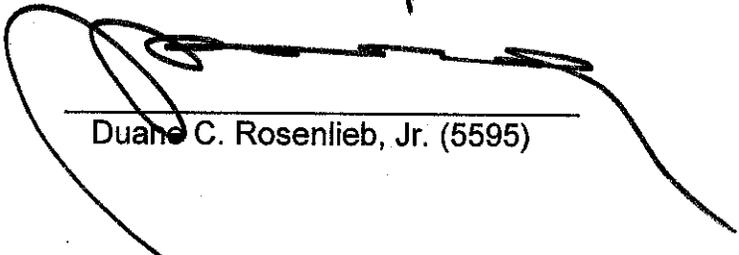
Herbert Hively, Esquire  
3566 Teays Valley Road  
Hurricane, WV 25526

Paige W. Hoffman  
Assistant Prosecuting Attorney  
Putnam County Judicial Building  
3389 Winfield Road  
Winfield, WV 25213

Joseph Reeder, Esquire  
Post Office Box 1027  
Hurricane, WV 25526

CASA  
Attn: Kim Runyon Wilds  
Post Office Box 1653  
Huntington, WV 25717

Amanda Bree Whipp-Ogle  
Post Office Box 300  
Buffalo, WV 25033



Duane C. Rosenlieb, Jr. (5595)