

IN THE STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston

IN RE THE CHILD OF :
ULISSA D, HOWELL,
Petitioner,
And

Supreme Court No. 080480

JOHN GOODE,
Respondent

BRIEF OF APPELLANT, ULISSA HOWELL

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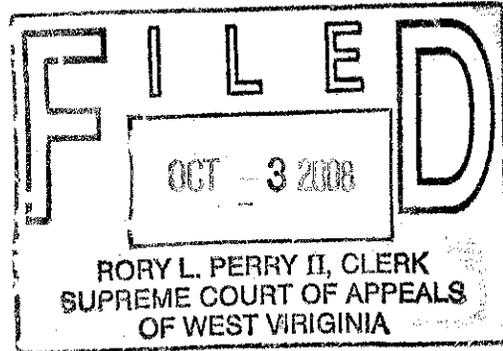


TABLE OF CONTENTS

I. STATEMENT OF THE CASE.....4

II. STATEMENT OF FACTS.....4

III. STANDARD OF REVIEW.....8

IV. ASSIGNMENTS OF ERROR.....8

V. POINTS AND LEGAL AUTHORITIES.....8

VI. DISCUSSION OF LAW

A. The Court erred in finding that the Respondent does not have a duty to support the parties' adult child under W.V. Code 48-11-103.....10

1. Judge Hicks' ruling that R.J. is not an eligible child because he could receive his diploma at any time is clear error and in direct contravention of the Individuals with Disabilities Education Improvement Act (IDEA) and legal precedent.....11

2. The Family Court further erred in its finding that the WV legislature did not intend to extend support for adult children based upon a clear reading of W.Va. Code 48-11-103(b) and this Court's ruling in Kinder v. Kinder.....12

VII. RELIEF REQUESTED.....13

TABLE OF AUTHORITIES

Reported Cases	Page
<u>Carr v. Hancock</u> , 216 W.Va. 474, 607 S.E.2d 803 (2004)	8,
<u>Kinder v. Schlaegel</u> , 185, W.Va. 56 (1991)	7,12
<u>James G. v. Caserta</u> , 175 W.Va. 406, (1985)	12,13
<u>McKinney v. McKinney</u> , 175 W.Va. 640, 337 S.E.2d 9 (1985)	7.
<u>Bd. Ed. Henrick Hudson Sch. Dist. v. Rowley</u> , 458 U.S. 176, 203, n. 25 (1982).	10,

Unreported Cases

<u>Kevin T. v. Elmhurst Comm. School Dist. No. 205</u> , 2002 U.S. Dist. LEXIS 4645, p. 42 (N.D. Ill. 2002).	9,11
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Statutes

W.Va. Code § 48-11-103	4, 8, 10,11,12
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Regulations

34 C.F.R. 300.101	8,9,11
W.Va. Code St. R. 126-16-2.3.	8,9
West Virginia Bd. of Educ. Policy 2419	9

I. STATEMENT OF THE CASE.

This appeal stems from the Tyler County Circuit Court's September 24, 2007 Order refusing a "Petition for Appeal" from the Tyler Family Court Order of August 3, 2007. Judge Hick's August 3, 2007 Order determined that there was no child support owed to Ms. Howell because her son, R.J., reached the age of 18, and did not qualify for child support beyond 18 under W.Va. Code §48-11-103(a) & (b). On September 24, 2007 Judge John T. Madden refused to overturn the lower court's erroneous Order. Appellant seeks an Order from this Honorable Court reversing the Tyler County Circuit Court's September refusal to overturn the Family Court's order, and requests that this Court and remand the issue with a directions to the Family Court to issue an order granting Ms. Howell child support for her son beyond the age of 18 to the age of 20 at a rate consistent with the child support formula because R. J. clearly meet the requirements of W.Va. Code 48-11-103(a)& (b).

II. STATEMENT OF FACTS.

Ulissa Howell, is the biological mother of the child, Robert Goode, born on October 16, 1987. Ulissa Howell initiated this immediate action on March 26, 2006 by filing her *pro se* "Petition for Modification of Child Support" and her "Petition for Contempt" which John Goode accepted for service.

On August 3rd, 2006, Judge Robert Hicks of the Family Court conducted a hearing on Ulissa Howell's Petition for Modification and Petition for Contempt, at which Ulissa Howell appeared *pro se*. John Goode appeared in person and by counsel. After hearing testimony, the Family Court denied the Petition for Contempt, suspended

child support as of June 1, 2006, and continued the hearing on Petition for Modification of Child Support until November 9, 2006 at 2:00 p.m. On or about November 9, 2006 a scheduling conference was held and a final hearing was set for February 8, 2007 at 2:30 p.m. Due to inclement weather, the hearing scheduled for February 8, 2007 was continued to May 17, 2007 at 2:45 p.m, at which point a final hearing was held.

At this hearing the Petitioner presented evidence through the testimony of his natural mother, Ulissa Howell, that she is the natural mother of the child that is the subject of this action, namely, Robert Goode (hereinafter referred to as "R.J."), and John Goode is the natural father of R.J. R.J. was born on October 16, 1987 and was, at the time of the hearing, 19 years old.

Prior to the age of 18, R.J. was under the primary care, custody and control of his natural mother, Ulissa Howell, and upon attaining the age of 18, R.J. remained under the care of his natural mother, Ulissa Howell. At no point has R.J. ever married, nor has R.J. ever left the home of his natural mother, Ulissa Howell. R.J. is currently enrolled as a full-time student at Magnolia High School in New Martinsville, Wetzel County, West Virginia.

The Petitioner also presented evidence through the testimony of R.J.'s special education teacher, Kim Gongola, that R.J. has not yet received a diploma from any High School or Vocational School. However, R.J. has completed all core courses required by the State of West Virginia for graduation from high school. Ms. Gongola further testified that R.J. has been determined by Wetzel County Schools to be disabled under the meaning of the Individuals with Disabilities Education

Improvement Act (IDEA), and through IDEA R.J. has received an Individualized Education Program (IEP). R.J.'s IEP contains a number of goals and a transition plan which R.J. has failed to satisfactorily complete, but over the last year, R.J. has made substantial progress toward the goals on his IEP. Also, over the last year, R.J. has made substantial progress on the transition plan in his IEP. His transition plan has provided for and R.J. has engaged in a number of work-study programs with local businesses, including a job as a statistician with the local paper. Nevertheless, R.J. receives a significant amount of assistance with writing the articles for the newspaper due to his disability, and without such assistance, R.J. would be unable to write the articles attributed to him by the local paper. Ms. Gongola further testified that R.J. would not be able to be employed at the newspaper outside of the work-study program at school. In addition to the newspaper work-study program, R.J. has recently begun a work-study program at a local fast food restaurant, however, it is unclear whether R.J. could be satisfactorily employed at a fast food restaurant outside of the schools work-study program. Additionally, Ms. Gongola stated that due to R.J.'s disability, he could not serve in the Military or other Armed Forces, and the school has found that R.J. has not transitioned to the point where he could be gainfully employed.

Following the Petitioners evidence the Respondent submitted evidence to the Family Court through the testimony of John Goode that he is the natural father of R.J, and that he has had little contact with R.J. recently. However, he has kept the articles written in the newspaper and found them to be well written, and he believes R.J. is not disabled to the point where he could not be gainfully employed.

Following a presentation of the evidence, the family court requested proposed Findings of Fact and Conclusions of Law. Upon receiving these findings, the Court issued an order on or about August 3, 2007.

In that order, the Court found that in May 2006, R.J. completed all of the minimum requirements of the State of West Virginia and the Wetzel County Board of Education to receive a High School diploma. That R.J. continued in the Wetzel County school system, past his completion of the minimum requirements for graduation in order that he might be better prepared for post-secondary education or to enter the adult job market. R.J. is learning disabled with ADD, and currently reads and writes on a 7th grade level. The Court further acknowledged that R.J. had received Social Security Supplemental Income.

Based on these findings, the Court thus found that the R.J. was not "an adult child who is unmarried, unemancipated and insolvent and physically or mentally incapacitated from supporting himself" as required to fall into requiring support of a child over the age of eighteen as suggested by McKinney v. McKinney, 175 W.Va. 640, 337 S.E.2d 9 (1985), cited in Kinder v. Schlaegel, 185 W.Va. 56, 404 S.E.2d 545 (1991), or its progeny. The Court additionally found that "[i]t does not appear the legislature contemplated extending support for an adult child who can and will graduate high school and is still potentially considering post secondary education, nor did the statute reference an 'I.E.P.' classification by a local school system as the standard of consideration." The Court therefore denied the Petitioner's Petition to modify in this matter.

On September 24, 2007, Judge John T. Madden of the Circuit Court of Tyler County entered an "Order" refusing the Petition for Appeal.

III. STANDARD OF REVIEW

In reviewing a final order entered by a Circuit Court Judge upon a review of, or upon a refusal to review, a final order of a Family Court Judge, this Court reviews the findings of fact made by the Family Court Judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. This Court review questions of law *de novo*. Syllabus, Carr v. Hancock, 216 W.Va. 474, 607 S.E.2d 803 (2004).

IV. ASSIGNMENTS OF ERROR

The Circuit Court clearly erred in refusing to review the Family Court's erroneous ruling, which was an abuse of its discretion.

The Family Court should be overturned because it is clear error and an abuse of its discretion to determine that R.J. did not meet the requirements of W.Va. Code §48-11-103.

V. POINTS AND AUTHORITIES RELIED UPON

A. Under West Virginia law, in order to attain child support beyond the age of eighteen (18), a Petitioner must show that the child is unmarried, residing with a parent, guardian or custodian and is enrolled as a full-time student in a secondary educational or vocational program and making substantial progress towards a diploma. W.Va. Code 48-11-103(a).

B. Federal law requires that "[a] free appropriate public education [FAPE] must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities." See 34 C.F.R. 300.101

C. Federal law requires that “[e]ach State ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade.” Id.

D. Education is a right extended to all individuals with exceptionalities and not a privilege. These mandates assure that all individuals with disabilities ages three through twenty-one years of age, including students with disabilities who have been suspended or expelled from school, all gifted students in grades one through eight, and all exceptional gifted students in grades nine through twelve, have available a free appropriate public education (FAPE) which includes special education and related services in the least restrictive environment (LRE) to meet their unique special educational needs. This applies to all public agencies that provide special education and related services to students with exceptionalities. W.Va. Code St. R. 126-16-2.3.

E. Free and Appropriate Public Education under IDEA is defined as special education and related services that:

1. Are provided without charge at public expense (free);
2. Are provided in conformity with an appropriate individualized education program (IEP) developed in adequate compliance with the procedures outlined in this manual and reasonably calculated to enable the student to receive educational benefit (appropriate);
3. Are provided under public supervision and direction; and
4. Include an appropriate preschool, elementary or secondary education that meets the education standards, regulations, and administrative policies and procedures issued by the WVDE, including the requirements of IDEA 2004.

See West Virginia Bd. of Educ. Policy 2419.

G. To graduate a student with a disability under the IDEA, the student must meet general graduation requirements and make progress on or complete the IEP goals and objectives. Kevin T. v. Elmhurst Comm. School Dist. No. 205, 2002 U.S. Dist. LEXIS 4645, p. 42 (N.D. Ill. 2002).

H. Automatic grade promotion does not necessarily mean that the disabled child received a FAPE or is required to be graduated. Id. (citing Bd. Ed. Henrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 203, n.. 25 (1982)).

V.I. DISCUSSION OF LAW

A. The Court abused its discretion in finding that the Respondent does not have a duty to support the parties' adult child under W.V. Code §48-11-103.

R.J. clearly meets the standard set forth in the W.Va. code which provides in pertinent part:

§48-11-103. Child support beyond age eighteen.

(a) Upon a specific finding of good cause shown and upon findings of fact and conclusions of law in support thereof, an order for child support may provide that payments of such support continue beyond the date when the child reaches the age of eighteen, so long as the child is unmarried and residing with a parent, guardian or custodian and is enrolled as a full-time student in a secondary educational or vocational program and making substantial progress towards a diploma: Provided, That such payments may not extend past the date that the child reaches the age of twenty.

(b) Nothing herein shall be construed to abrogate or modify existing case law regarding the eligibility of handicapped or disabled children to receive child support beyond the age of eighteen.

The facts are not in dispute. R.J. is unmarried, residing with the Appellant, and is enrolled in a secondary education and making substantial requirements towards a diploma.

- 1. Judge Hicks' ruling that R.J. is not an eligible child because he could receive his diploma at any time is clear error and in direct contravention of the Individuals with Disabilities Education Improvement Act (IDEA) and legal precedent.**

The Family Court abused its discretion by ignoring the provisions of W.Va.

Code § 48-11-103 (b). The Court conceded that R.J. is learning disabled with

ADD. It further conceded that he reads and writes on a 7th grade level. The record further indicates that R.J. received Social Security Supplemental Income which he lost based upon *household income*. (emphasis added).

The Court chose instead to erroneously rule that R.J. could receive his diploma at any time, however that is an incorrect statement of applicable federal law. The law requires that “[a] free appropriate public education (FAPE) must be available to all children residing in the State between the ages of 3 and 21, including children with disabilities.” See 34 C.F.R. 300.101. Additionally, the law requires that “[e]ach State ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade.” *Id.* Further under the IDEA, federal courts have found that a student must make progress on or *complete* his IEP goals and objectives before he can receive a diploma. See Kevin T. v. Elmhurst Comm. School Dist. No. 205, 2002 U.S. Dist. LEXIS 4645, p.42 (N.D. Ill. 2002) (To graduate a student with a disability under the IDEA, the student *must* meet general graduation requirements *and* make progress on or complete the IEP goals and objectives.) In Kevin T., the school graduated the student based upon *only* on his completion of the required credit hours, and not based upon whether he had made progress on his IEP goals and objectives. *Id.* at 43. The Court found that the school district “inappropriately graduated [him].” *Id.*

Under these requirements R.J. has been identified as a student with a disability. Therefore, he has an IEP with goals and objectives, he has not completed those

goals and objectives thus, he has neither earned a diploma nor has he graduated from high school. The Family Court's ruling that R.J.'s lack of diploma is an "agreement of the mother (presumably the child) and the school system." is clear error based upon FAPE, and IDEA. In determining, that Ms. Howell and R.J. choose between his right to FAPE or child support the Family Court abused its discretion under the law.

2. The Family Court further erred in its finding that the WV legislature did not intend to extend support for adult children based upon a clear reading of W.Va. Code 48-11-103(b) and this Court's ruling in Kinder v. Schlaegel.

In his ruling Family Law Judge Hicks discusses the Kinder case and its progeny, and erroneously determined that R.J. does not qualify. Kinder v. Schlaegel, 185 W.Va. 56(1991) However an examination of Kinder shows that Judge Hicks abused his discretion in making that determination. The child in question in Kinder was mentally retarded and receiving SSI income and this Court determined that the lower Court should determine if he was "mentally incapacitated from supporting himself" Id. at 58.

The record is clear that R.J. is incapacitated from supporting himself. R.J.'s special education instructor testified to his limitations. She further testified that he was physically unable to enter the military, and not capable of being gainfully employed. Further, at this time R.J. has applied for but been denied, SSI income. The Kinder case is devoid of a bright line rule of what determines incapacity however, it does discuss common law in James G. v. Caserta, 175 W.Va. 406, (1985) (recognizing common law rule that where a child is incapable of supporting himself because of physical or emotional disabilities, the parents'

obligation to support continues beyond the child's age of majority). Id. The appellant and her son have taken all the necessary steps to get him an appropriate education and to obtain him the training necessary to become a productive member of society, however his physical and emotional disabilities that have been previously recognized by the Wetzel County School System, and the Social Security Administration were ignored by the Family Court in its ruling in a clear abuse of its discretion.

3. RELIEF REQUESTED

Wherefore, the appellant Ulissa Howell requests that this Court issue a ruling overturning the Circuit Court's refusal to hear the appeal from the Family Court of Tyler County and remands this case with instructions that Ms. Howell is entitled to child support based upon the applicable formula from May 2006 until the child reaches 20 years of age.

RESPECTFULLY SUBMITTED
ULISSA HOWELL,

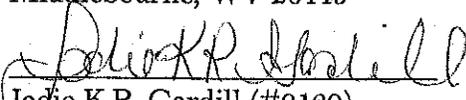


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CERTIFICATE OF SERVICE

I, Jodie K.R. Gardill, attorney for the Petitioner, and Legal Aid of West Virginia, hereby certify that I have this 1st day of October, served a copy of the foregoing Appellant's Brief upon the following person by placing a true copy thereof in the United States mail first class, postage prepaid, addressed as follows:

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