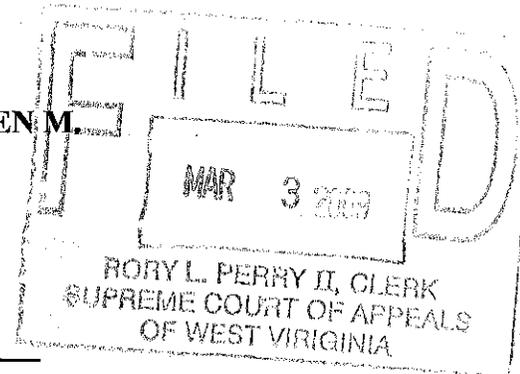

NO. 34704

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

IN RE: CAITLYN M., CARSON M., and STEVEN M.



**BRIEF ON BEHALF OF
RESPONDENT FATHER, STANLEY M.,
APPELLANT**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

In Re: Caitlyn M., Carson M., and Steven M.

BRIEF ON BEHALF OF
RESPONDENT FATHER, STANLEY M.,
APPELLANT

KIND OF PROCEEDING AND NATURE OF RULING BELOW

On or about March 3, 2008, an abuse and neglect petition (the "Petition") was filed in the Circuit Court of Harrison County, West Virginia. The Petition alleged that the respondent father, Stanley M., ("Respondent Father") sexually abused his daughter, Caitlyn M., during the summer of 2007. The Petition also alleged that Stanley M. had been charged criminally on October 1, 2007, with (1) one count of incest, (2) one count sexual abuse by parent or guardian, and (3) one count of first degree sexual abuse. Based on said allegations, the Petition also included Caitlyn M.'s siblings, Carson M. and Steven M. The Petition included the children's mother, Donna M., but did not include any allegations against her. At the time the Petition was filed, because Stanley M. and Donna M. were divorced and not living together, the children remained in the custody and home of Donna M.

On April 2, 2008, Donna M. was converted by the Court from a respondent parent to a party in interest. Also on April 2, 2008, Stanley M. executed before the Court a "Voluntary Relinquishment of Parental Rights" form, which was then accepted by the Court. Accepting Stanley M.'s voluntary relinquishment of parental rights, the Court, by order entered August 5, 2008, terminated his parental rights to Caitlyn M., Carson M., and Steven M. Although Stanley

M. requested that post-relinquishment child support be denied, the Court further ordered that the child support obligation of Stanley M., established by the Family Court of Harrison County, West Virginia, prior to the abuse and neglect petition being filed, continue without any modifications.

By order entered August 5, 2008, the Petition was dismissed.

The Respondent Father's appeal is taken from the Court's order accepting his voluntary relinquishment of parental rights and terminating the same, but requiring him to continue to pay child support for Caitlyn M., Carson M., and Steven M., post-relinquishment.

STATEMENT OF FACTS

The infant children, Caitlyn M., Carson M., and Steven M., are the biological children of Stanley M. and Donna M. Prior to the filing of the underlying abuse and neglect proceeding, Stanley M. and Donna M. were divorced, said divorce being entered by the Family Court of Harrison County, West Virginia, which placed a child support obligation on Stanley M. Subsequent to the divorce, Donna M. and Stanley M. resided separately and Donna M. retained custody of Caitlyn M., Carson M., and Steven M., with Stanley M. having visitation.

On or about March 3, 2008, an abuse and neglect petition was filed with the Court wherein the Respondent Father was alleged to have sexually abused Caitlyn M. at some point during the summer of 2007. At the time the Petition was filed, Stanley M. was in arrears on his child support.

On April 2, 2008, prior to adjudication on the merits, Stanley M. voluntarily relinquished his parental rights and responsibilities to the children Caitlyn M., Carson M., and Steven M., which the Court approved and accepted. While accepting the voluntary relinquishment, the Court questioned Stanley M. if he believed the relinquishment to be in the best interests of the

children which Stanley M. answered in the affirmative, and the Court found that to be the case. The Court accepted the voluntary relinquishment by questioning Stanley M. and accepting his executed "Voluntary Relinquishment of Parental Rights" form, which stated in paragraph 11, "I understand that, as a result of my relinquishment, the Court will enter an order terminating my parental rights, duties and responsibilities with my infant children, Caitlyn [M.], Carson [M.], and Steven [M.], and I understand that I am waiving notice as to any future adoption proceedings that may occur regarding these children, or petition to change their names." Said "Voluntary Relinquishment of Parental Rights" form was signed by Stanley M. in court, witnessed by his attorney, notarized by the Court Reporter, and accepted and executed by the Circuit Court judge.

By order entered August 5, 2008, the Court terminated Stanley M.'s parental rights to Caitlyn M., Carson M., and Steven M., and ordered Stanley M. to continue to pay child support to Donna M. post-relinquishment per the prior Family Court divorce decree.

ASSIGNMENT OF ERROR

The Circuit Court's finding that the Respondent Father's voluntary relinquishment of parental rights did not relieve him of his obligation to pay post-relinquishment child support is clearly erroneous because it is contrary to West Virginia law.

ARGUMENTS AND DISCUSSIONS OF LAW

It is well established law in this State, and it has been consistently held, that the standard of review to be employed by this Court in an abuse and neglect action is as follows:

"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 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 had 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.

Syl. Pt. 1, *In the interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

I. THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA, ERRED WHEN IT DID NOT RELIEVE THE RESPONDENT FATHER'S OBLIGATION TO PAY POST-VOLUNTARY RELINQUISHMENT CHILD SUPPORT

After a parent's parental rights have been terminated by a Circuit Court, either by involuntary termination or voluntary relinquishment, the parent is no longer a "parent" within the meaning of the law and cannot be responsible for subsequent child support. A "parent" is defined as "a legal parent as defined in section 1-232 [§ 48-1-232] unless otherwise specified." *West Virginia Code* § 48-1-235.1. A "legal parent" is "an individual defined as a parent, by law, on the basis of biological relationship, presumed biological relationship, legal adoption, or other recognized grounds." *West Virginia Code* § 48-1-232. A "basic child support obligation," pursuant to *West Virginia Code* § 48-1-207, is "the base amount of child support due by both *parents* as determined by the table of basic child support obligations set forth in section 13-301 of this chapter [Chapter 48 of the *West Virginia Code*], based upon the combined adjusted gross income of the *parents* and the number of children to whom support is due." (Emphasis added.) However, "[a] final order terminating a person's parental rights, as the result of either an involuntary termination or a *voluntary relinquishment* of parental rights, completely severs the parent-child relationship, and, as a consequence of such order of termination, *the law no longer recognizes* such person as a 'parent' with regard to the child(ren) involved in the particular termination proceeding." (Emphasis added.) Syl. Pt. 4, *In re Cesar L.*, ___ W.Va. ___, 654 S.E.2d 373 (2007). Accordingly, the Circuit Court erred when it did not relieve the Respondent

Father's obligation to pay child support post-relinquishment, even though he is no longer recognized by law as a parent.

A. Pursuant to relevant statutory law and *In re Cesar L.*, ___ W.Va. ___, 654 S.E.2d 373 (2007), when parental rights are terminated through voluntary relinquishment, parental obligations are terminated as well.

Respondent Father's obligation to pay child support should have been terminated when his parental rights were terminated through his voluntary relinquishment. A respondent parent to an abuse and neglect proceeding may voluntarily relinquish or terminate their "parental rights" to their child(ren) pursuant to *West Virginia Code* § 49-6-7. "Parental rights" are defined as "any and all rights and *duties* regarding a parent to a minor child, including, *but not limited to*, custodial rights and visitational rights and rights to participate in the decisions affecting a minor child." (Emphasis added.) *West Virginia Code* § 49-1-3(q). Such relinquishment, which can occur without an adjudication of the respondent parent on the merits, allows for the involved child(ren) to be subsequently adopted, achieving permanency for the child(ren).

The mechanism guiding the voluntary relinquishment of parental rights in an abuse and neglect proceeding is controlled by *West Virginia Code* § 49-3-1, which requires the voluntary relinquishment in an abuse and neglect proceeding to conform to the requirements in a West Virginia adoption proceeding. Specifically, *West Virginia Code* § 49-3-1(a)(2) states that "... any relinquishment so required shall conform as nearly as practicable to the requirements established in section three hundred three, article twenty-two, chapter forty-eight [§ 48-22-303], and all other provisions of that article providing for relinquishment for adoption shall govern the proceedings herein." The West Virginia adoption statute in turn requires the form to be executed by a respondent parent who is voluntarily relinquishing his or her parental rights to include the following:

- (6) If a relinquishment, that the person executing the relinquishment voluntarily consents to the permanent transfer of legal and physical custody of the child to the agency for the purpose of adoption.
- ...
- (9) That the adoption will forever terminate all parental rights, including any right to visit or communicate with the child and any right of inheritance;
- (10) That the adoption will forever terminate all **parental obligations** of the person executing the consent or relinquishment.

(Emphasis added.) *West Virginia Code* § 48-22-303(a).¹

Accordingly, both the statute that encompasses abuse and neglect proceedings and the statute that encompasses adoption proceedings contemplates that when there is a voluntary relinquishment of parental rights, parental duties and obligations are terminated in addition to the parental rights.

Child support is a duty and obligation of a parent. *Wyatt v. Wyatt*, 185 W.Va. 472, 408 S.E.2d 51 (1991) held that the “duty of a parent to support a child is a basic duty owed by the **parent** to the child....” (Emphasis added). *Wyatt* further expanded on this duty by holding that the “provision of shelter and financial support for children is one of the most basic components of **parental** responsibility.” (Emphasis added). *Foster v. Foster*, ___ W.Va. ___, 655 S.E.2d 172 (2007), quoting *In re Jamie Nicole H.*, 205 W.Va. 176, 517 S.E.2d 41, 48 (1999). However, within the context of abuse and neglect proceedings, this Court has recognized that there are situations where it is paramount that such an obligation should be terminated. Specifically, Syllabus Point 4 of *In re Cesar L.*, ___ W.Va. ___, 654 S.E.2d 373 (2007), stated that “[a] final order terminating a person’s parental rights, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, completely severs the parent-child relationship, and, as a consequence of such order of termination, **the law no longer recognizes such person as a**

¹ It should be noted that Stanley M. did not relinquish specifically to the WVDHHR. Because Donna M. already had custody of the children, the voluntary relinquishment effectively terminated Stanley M.’s visitation rights, giving full and sole custody of the children to Donna M. This in turn frees the children to be adopted by a step-father without Stanley M.’s involvement should Donna M. ever re-marry.

'parent' with regard to the child(ren) involved in the particular termination proceeding." (Emphasis added). Further in Syllabus Point 5 in *In re Cesar L.* "[a] valid voluntary relinquishment of parental rights, effectuated in accordance with *West Virginia Code* § 49-6-7 (1977) (Repl. Vol. 2004), includes a relinquishment of 'rights to participate in the decisions affecting a minor child,' *W. Va. Code* § 49-1-3(o) (1999) (Repl. Vol. 2004), and causes the person relinquishing his/her parental rights to lose his/her status as a parent of that child"; and in dicta in *In re Cesar L.* that "an involuntary termination or a voluntary relinquishment of parental rights permanently severs the parent-child relationship and relieves such person of all the rights and privileges, **as well as duties and obligations**, considered to be 'parental rights,' *W. Va. Code* § 49-1-3(o) (1999)." (Emphasis added).

In the case *sub judice*, the Respondent Father voluntarily relinquished his parental rights to his three children, asserting that such relinquishment was in the children's best interest, which the Circuit Court found credible and accepted. Accordingly, the Respondent Father's post-voluntary relinquishment child support obligation should have been terminated pursuant to both West Virginia statutory law and case law.

B. The authority of the Circuit Court to terminate parental rights while maintaining a post-termination child support obligation pursuant to *In re Stephen Tyler R.*, 213 W.Va. 725, 584 S.E.2d 581 (2003) is not applicable to the case *sub judice*.

Prior to *In re Cesar L.*, in an abuse and neglect proceeding, a parent's parental rights could be terminated, yet the parent could still be responsible for future child support. Specifically, this Court held that:

7. Pursuant to the plain language of *W. Va. Code* § 49-6-5(a)(6) (1998) (Repl. Vol. 2001), a circuit court **may** enter a dispositional order in an abuse and neglect case that simultaneously terminates a parent's parental rights while also requiring said parent to continue paying child support for the child(ren) subject thereto.

8. A circuit court **may**, in the course of modifying a previously-entered dispositional order in an abuse and neglect case in accordance with *W.Va. Code* § 49-6-6 (1977) (Repl. Vol. 2001), amend a parent's continuing child support obligation or the amount thereof. The court may not, however, modify said dispositional order to cancel accrued child support or decretal judgments resulting from child support arrearages.

Syllabus Points 7 and 8, *In re Stephen Tyler R.*, 213 W.Va. 725, 584 S.E.2d 581 (2003)

(Emphasis added). This determination was made almost solely on the wording of the applicable statute², *W.Va. Code* § 49-6-5(a)(6) (1998) (Repl. Vol. 2001), which was written at the time as:

(6) Upon a finding that there is not reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, **terminate the parental, custodial, or guardianship rights and/or responsibilities** of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency

In re Stephen Tyler R., *supra*. (Emphasis added). To support this holding, this Court reasoned that *West Virginia Code* § 49-6-5(a)(6) (1998) (Repl. Vol. 2001) granted a circuit court the authority to choose between terminating parental rights and/or parental responsibilities in a particular case. *In re Stephen Tyler R.*, *supra*.

Since the holding in *In re Stephen Tyler R.* in 2003, the West Virginia Legislature has rewritten *West Virginia Code* § 49-6-5(a)(6) to read as follows:

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, **terminate the parental, custodial and guardianship and responsibilities** of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. The court may award sole custody of the child to a non-abusing battered parent. ***

² *West Virginia Code* § 49-6-5(a)(6) was the applicable statute in *In re Stephen Tyler R.*, *supra*, because the termination of the parental rights was an involuntary termination as opposed to a voluntary relinquishment.

(2006) (Emphasis added). Where *In re Stephen Tyler R.* held that a circuit court had the authority under the statute to choose whether to simultaneously terminate a person's parental rights and have them pay child support, the West Virginia Legislature has amended the statute so that a circuit court no longer has that choice; to-wit, the statute now requires that if parental rights are terminated, the parent's responsibilities are terminated as well. Accordingly, the West Virginia Legislature's amendment of the statute and the holding in *In re Cesar L, supra*, wherein the termination of a person's parental rights caused that person to be no longer recognized by the law as a parent to that child, has effectively modified *In re Stephen Tyler R.* so that it is no longer discretionary for a circuit court to award child support while involuntarily terminating parental rights, but mandatory that parental obligations are simultaneously terminated.

In the case *sub judice*, the Respondent Father voluntarily relinquished his parental rights prior to adjudication, which the Circuit Court accepted as in the best interest of the children. Because the Respondent Father's termination of parental rights was not through involuntary termination, *In re Stephen Tyler R., supra*, is not directly applicable. However, it is important to note that *In re Stephen Tyler R., supra*, and the current version of *West Virginia Code* § 49-6-5(a)(6) would require that Stanley M.'s post-termination child support obligation be terminated if his parental rights had been involuntarily terminated. Therefore, the same should hold true for a voluntary relinquishment under *West Virginia Code* § 49-6-7.

C. The Circuit Court's finding that the Respondent Father's voluntary relinquishment of parental rights is an agreement to get out of paying child support and violates established law is clearly erroneous.

During the confines of an abuse and neglect proceeding, a parent may voluntarily relinquish his or her parental rights³ pursuant to *West Virginia Code* § 49-6-7. This ability to voluntarily relinquish said rights may be executed prior to his or her parental rights being involuntarily terminated, or even prior to the respondent parent being adjudicated as an abusing or neglectful parent. See Syl. Pt. 3, *In re James G. and Emmett M.L., III*, 211 W.Va. 339, 556 S.E.2d 226 (2002) (“In the context of an abuse and neglect proceeding, a court may accept a parent’s voluntary relinquishment of parental rights without the consent of the West Virginia Department of Health and Human Resources, provided that the agreement meets the requirements of *West Virginia Code* § 49-6-7 (1977)⁴, where applicable, and the relevant provisions of the Rules of Procedure for Abuse and Neglect Proceedings.”⁵) See also *In re Kristopher E. and Kenneth C.E.*, 212 W.Va. 393, 572 S.E.2d 916 (2002) (per curiam) (“recognizing that a court can accept a parent’s voluntary relinquishment of parental rights and dispose of an abuse and neglect proceeding without adjudicating the abuse and neglect question.”)

The overall distinction between accepting a voluntary relinquishment of parental rights as opposed to involuntarily terminating those parental rights is if it is in the best interest of the child. See Syl. Pt. 4, *In re James G., supra* (“A circuit court has discretion in an abuse and neglect proceeding to accept a proffered voluntary termination of parental rights, or to reject it

³ *West Virginia Code* § 49-1-3(q) defines “parental rights” as “any and all rights and duties regarding a parent to a minor child, including, but not limited to, custodial rights and visitational rights and rights to participate in the decisions affecting a minor child.” (Emphasis added).

⁴ *West Virginia Code* § 49-6-7 requires the voluntary relinquishment to be an acknowledged writing “entered into under circumstances free from duress and fraud.”

⁵ Rule 35(a)(3) of the *West Virginia Rules of Procedure for Child Abuse and Neglect* states that the Court shall make the following inquiry at the disposition hearing: “If the parent(s) is/are present in court and voluntarily has/have signed a relinquishment of parental rights, the court shall determine whether the parent(s) fully understand(s) the consequences of a termination of parental rights, is/are aware of possible less drastic alternatives than termination, and was/were informed of the right to a hearing and to representation by counsel.

and proceed to a decision on involuntary termination. Such discretion must be exercised after an independent review of all relevant factors, and the court is not obliged to adopt any position advocated by the Department of Health and Human Resources.”) *See also State ex rel. Cash v. Lively*, 155 W.Va. 801, 804, 187 S.E.2d 601, 604 (1972) (“First and foremost in a contest involving the custody of a child is the consideration of that child’s welfare. It has been held repeatedly by this Court that the welfare of the child is the polar star by which the discretion of the court will be guided.”) Accordingly, a court should accept a voluntarily relinquishment of parental rights over involuntarily terminating those rights if it is in the best interest of the child(ren).

The Circuit Court’s acceptance of a Respondent Father’s voluntary relinquishment of parental rights is not akin to the contracting away or waiver of a child support obligation as indicated by the Circuit Court and contemplated by *Rebecca Lynn C. v. Michael Joseph B.*, 213 W.Va. 744, 584, S.E.2d 600 (2003) and *Kimble v. Kimble*, 176 W.Va. 45, 341 S.E.2d 420 (1986). Both cases contemplate an agreement between the two parents of the children, and neither were in an abuse and neglect proceeding. Furthermore, the Voluntary Relinquishment of Parental Rights form executed by Stanley M. was signed by Stanley M., witnessed by his attorney, notarized by the Court Reporter, and then executed by the Circuit Judge acknowledging his acceptance of the relinquishment; there was no signature thereon to establish that Stanley M. was receiving something in return. The relinquishment was simply an acknowledgement that Stanley M. was relinquishing his parental rights, which then had to be approved by the Court.⁶ Therefore, the voluntary relinquishment of parental rights is not an agreement whereby subsequent child support is contracted away or waived, but an acknowledgement approved by

⁶ The mother/ex-wife, Donna M., although content with the relinquishment, objected on the record to the termination of Stanley M.’s post-voluntary relinquishment child support obligation.

the Court that it is in the best interest of the children for the relinquishing parent to have **NO** contact with the children whatsoever in the future.

CONCLUSION

A “final order terminating a person’s parental rights, as the result of either an involuntary termination or a *voluntary relinquishment* of parental rights, completely severs the parent-child relationship, and, as a consequence of such order of termination, *the law no longer recognizes* such person as a ‘parent’ with regard to the child(ren) involved in the particular termination proceeding.” (Emphasis added.) Syl. Pt. 4, *In re Cesar L.*, ___ W.Va. ___, 654 S.E.2d 373 (2007). Furthermore, *West Virginia Code* § 49-6-5(a)(6) states that the court under an involuntary termination is to “terminate the parental, custodial **and** responsibilities of the abusing parent.”

In the instant case, after Stanley M.’s voluntary relinquishment was accepted terminating his parental rights, his parental responsibilities, duties, and obligations pursuant to law were terminated as well; the law no longer recognizes him as a parent. Moreover, had Stanley M. had not voluntarily relinquished his parental rights, but had his parental rights involuntarily terminated pursuant to *West Virginia Code* § 49-6-5(a)(6), his responsibilities, duties and obligations would have been terminated as well. The consequences of a termination, whether involuntary or voluntary, should be the same.

Accordingly, the Circuit Court of Harrison County, West Virginia, erred when it did not relieve the respondent father’s obligation to pay post-voluntary relinquishment child support.

PRAYER FOR RELIEF

For the foregoing reasons, your Petitioner respectfully requests that the portion of the Circuit Court order that did not relieve Stanley M. of his post-voluntary relinquishment

termination child support obligation be found as clearly erroneous; that said portion of the order be reversed and the circuit court be directed to amend the order accordingly; and any such other and further relief as the Supreme Court of Appeals deems appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, John S. Lanham, do hereby certify that on the 2nd day of March, 2009, I served the foregoing **Brief on Behalf of Respondent Father, Stanley M., Appellant** upon the following by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed to them as follows:

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