

Docket No. 35307

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

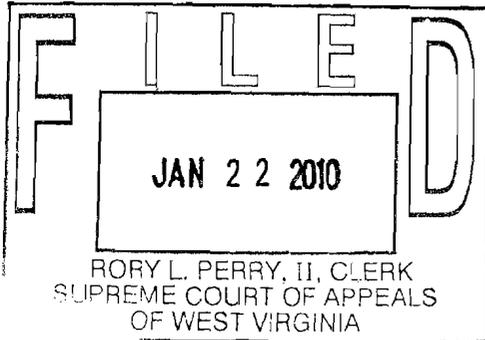
IN RE: NELSON B.

FROM THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

CASE NO. 08-JA-20

THE HONORABLE JUDGE LAWRENCE S. MILLER, PRESIDING

**BRIEF IN OPPOSITION TO PETITION FOR APPEAL
ON BEHALF OF NELSON B.
BY HIS GUARDIAN AD LITEM**



NATALIE J. SAL, ESQ.

(WVSB #6603)

Sal, Sellaro, Stephens, DeVall & Culpepper, PLLC

430 Spruce Street, Suite 3

Morgantown, WV 26505

Phone: (304) 599-5291

Fax: (304) 599-5294

Email: natalie.j.sal@ssdc.com

TABLE OF CONTENTS

Kind of Proceeding and Nature
of Ruling in the Lower Court 1

Statement of Facts 2

Assignment of Error 11

Points of Authority and Discussion of Law 11

 Standard of Review 11

 Argument 12

Conclusion 19

TABLE OF AUTHORITIES

Statutes:

W.Va. Code §49-6-5 2, 9, 12, 13, 14, 15

Case Law:

In re Charity H., 599 S.E.2d 631, 215 W.Va. 208 (2004) 18

In re Emily, 540 S.E.2d 542, 208 W.Va. 325 (2000) 18

In re: Katie S., 198 W.Va. 79, 479 S.E.2d 589 (1996) 18

In re: Maranda T., 223 W.Va. 512, 678 S.E.2d 18 (2009) 17-18

In re: Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996) 11-12

Matter of Abuse and Neglect of R.O., 375 S.E.2d 823, 180 W.Va. 190 (1988) 15

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: NELSON B.

**BRIEF IN OPPOSITION TO PETITION FOR APPEAL
ON BEHALF OF NELSON B. BY HIS GUARDIAN AD LITEM**

NOW comes the infant child, Nelson B. by his Guardian ad Litem, Natalie J. Sal, and hereby offers her brief in opposition to the Petition for Appeal and Brief in support thereof filed by Appellant Paul B., and further argues in support of the ruling of the Circuit Court of Preston County, West Virginia, as set forth in its Order Following Disposition Hearing entered on May 15, 2009.

**I. KIND OF PROCEEDING AND NATURE
OF RULING IN THE LOWER COURT**

On May 30, 2008, the West Virginia Department of Health and Human Resources (hereinafter "WVDHHR") filed a petition in the Circuit Court of Preston County alleging abuse and/or neglect of Nelson B. by his father, Paul B. on the basis that Nelson had been subjected to abuse and/or neglect by his father, Paul B., whose severe chronic mental illness and alcohol abuse rendered him unable to adequately provide for and parent Nelson, and further actively endangered Nelson during periods of hallucination caused by the mental illness. The Preliminary Hearing was held on June 10, 2008, at which time the Circuit Court appointed a Guardian ad Litem for Paul B. due to the fact that, given Paul B.'s history and current mental status, it was highly likely that he would have periods of incompetence during the course of the proceedings. Following the Preliminary Hearing, the Circuit Court made a finding of imminent danger to Nelson, continued

Nelson in the legal and physical custody of WVDHHR, and ratified Nelson's current temporary placement with his maternal aunt and uncle.

On July 17, 2008, the parties presented a Stipulated Adjudication to the Circuit Court whereby Paul B. stipulated to neglect of Nelson B. due to conduct resulting from his chronic mental illness. The Circuit Court accepted the Stipulated Adjudication, and granted Paul B.'s request for a Post-Adjudicatory Improvement Period. The Circuit Court conducted Status Review hearings on October 6, 2008 and on January 6, 2009, at which time the Court set the matter for Disposition.

The Disposition Hearing was held on February 19, 2009, at which time the Court heard evidence and argument regarding disposition. At the conclusion of the hearing, the Court ruled that a disposition under W.Va. Code §49-6-5(a)(5) would be appropriate and in the best interests of Nelson B., that the Court did not terminate parental rights, that the permanency plan for Nelson B. is legal guardianship by a fit and willing relative, specifically his maternal aunt with whom he had been placed upon removal from his father's home, and that visitation between Paul B. and Nelson B. should continue. It is from this Order that the Appellant appealed.

II. STATEMENT OF FACTS

Nelson B. is a bright, friendly, energetic six year old child who currently attends Kindergarten. He is well-behaved, outgoing, and imaginative, and appears to be thriving in his current placement with his maternal Aunt Patricia "Dee" B. and Uncle Joseph "Joe" B. on their farm in Preston County.

On July 16, 2005, when Nelson was just under three years old, his mother died, leaving him in the custody of his father, Paul B. Paul B. has a long history of chronic mental illness. He has

multiple diagnoses, including bipolar disorder and depression. He suffers from frequent and unpredictable exacerbations of his mental illness which often result in hallucinations, complete breaks with reality, and suicidal and homicidal ideations. Additionally, Paul B. has great difficulty in maintaining his own activities of daily living, such as personal hygiene, maintaining a minimally clean living space appropriate for a child, keeping basic utilities available in his living space, managing money, and providing the basic necessities to Nelson B., even when he is not experiencing a mental illness exacerbation severe enough to result in temporary incompetence.

Nelson B. has been legally placed with his Aunt Dee and Uncle Joe Bittinger since May 21, 2008. However, in reality, Nelson has lived with the Bittingers for the majority of his life since his mother's death, including periods of time that both Paul B. and Nelson B. lived in the Bittingers' home and the Bittingers provided child care for Nelson while Paul worked after the death of Nelson's mother.

In 2007, WVDHHR filed a Petition alleging abuse and neglect of Nelson B. This Petition was heard and dismissed by the Circuit Court of Preston County, and intensive services were initiated by WVDHHR for Paul B., including mental health services through Valley Healthcare in Kingwood, West Virginia.

In addition to the psychiatric and psychological treatment provided by Valley HealthCare to Paul B., WVDHHR arranged for Homebase, Inc. to provide in-home services to Paul B. Mary Wyckoff, a provider with Homebase, testified at the Preliminary Hearing that Homebase had been providing intensive in-home services to Paul B. two times a week since December of 2007. Those services included individualized parenting skills training, appropriate discipline techniques, communication skills, life skills training, and general case management. Ms. Wyckoff testified that

she did not observe any intellectual limitations that would prevent Paul B. from benefitting from her services. She further testified that the danger to Nelson is not in the frequency of Paul's mental break-downs, but in the unpredictability of them, and that Paul B. sometimes fails to take his medications as prescribed.

On May 21, 2008, Paul B. experienced an exacerbation of his mental health condition while he was at home alone with Nelson B. He hallucinated that someone had broken into his home and was threatening him with a knife. On that day, Ms. Wyckoff received a phone call from Paul B. reporting that someone was in his home, and asking how much trouble he would be in if he sent the intruder away in a stretcher, according to Ms. Wyckoff's testimony at the Preliminary Hearing. She directed Paul B. to call the police, then she called the police to report the incident. Paul B. then called 911 reporting that a man with a knife had broken into his home and was threatening him. Ms. Wyckoff then resumed her phone call with Paul B., and remained on the line with him until the Preston County Sheriff's Department arrived. When Sgt. Wotring arrived on scene, he took the phone from Paul B. and informed Ms. Wyckoff that she needed to come to Paul B.'s home and get Nelson B. immediately because Paul B. was hallucinating and needed to go to the hospital. A mental hygiene proceeding was held, and Paul B. ultimately was in in-patient treatment in Valley HealthCare's crisis unit for approximately 8 days. During this time, Nelson B. stayed with his maternal aunt, Dee Bittinger.

On May 30, 2008, the West Virginia Department of Health and Human Resources ("WVDHHR") filed a petition in the Circuit Court of Preston County alleging abuse and/or neglect of Nelson B. The Petition alleged that Nelson B. was in the sole custody of Paul B., and that Paul B. had a chronic history of mental illness and alcohol abuse severe enough to have required

hospitalizations several times. The Petition further alleged that Paul B.'s mental illness regularly reached levels rendering him not competent to direct his own actions or correctly perceive reality, which impaired his ability to adequately parent a child. WVDHHR alleged that services had been provided to Paul B. in the past, but that Paul B. had been unable to improve the conditions in the home even with the provision of services. WVDHHR alleged that the incident on May 21, 2008, taken with the chronic history of mental illness, constituted imminent danger to five-year-old Nelson.

The Preliminary Hearing was held on June 10, 2008. Counsel for Paul B. moved the Court to appoint a Guardian ad Litem for Paul B. The Court granted the motion by Order entered June 10, 2008, noting that Paul B. has a chronic history of mental illness, has regularly reached levels when he is not competent to direct his own actions or correctly perceive reality, has been hospitalized previously, and currently receives services with Valley Mental Health Care. After considering the testimony of Ms. Wyckoff and Melissa McCabe of WVDHHR, the Court found that an emergency situation resulting in imminent danger to Nelson existed; that there was no reasonable, available, or less drastic alternative to removal of the child from Paul B.'s home that could ensure Nelson's safety; and that return of Nelson to Paul's home was contrary to Nelson's best interest and welfare for reasons including Paul's recent mental instability and the need for ongoing assessment and treatment. The Court further Ordered that Nelson remain in his relative placement with his aunt and uncle, that he remain in the legal custody of WVDHHR until further proceedings, that visitation be initiated between Paul and Nelson, and that mental health assessment and services be immediately provided to Paul B.

Following the Preliminary Hearing, a Multidisciplinary Team (MDT) meeting was convened to discuss services for Paul B. Supervised visits three hours in length were set up between Nelson

B. and Paul B., as well as daily telephone contact. Paul B. continued in the care of Valley Health Care, and Homebase continued to provide intensive services to Paul B. Nelson remained in his placement with his maternal aunt and uncle.

On July 17, 2008, the parties presented a Stipulated Adjudication to the Circuit Court whereby Paul B. stipulated to neglect of Nelson B. Specifically, Paul B. stipulated to his chronic history of mental illness requiring hospitalization in the past, and the fact that WVDHHR has provided services to him in the past. He further stipulated to the fact that the May 21, 2008 events alleged in the Petition were true, and that his conduct on that date constituted neglect of Nelson. The parties agreed that proper diagnosis and treatment of Paul B.'s mental illness was of paramount importance, and that Paul B. requires in-home services and parenting skills training to assist him in learning appropriate adult life skills and safety planning for Nelson during re-occurrences of mental illness episodes. Upon recommendation by the MDT, the Court further granted Paul B. a six-month post-adjudicatory improvement period with terms and conditions consistent with recitation of Paul B.'s deficiencies in the Stipulation.

Paul B. continued treatment at Valley HealthCare through the duration of his improvement period, including psychiatric services, weekly individual counseling¹, and targeted case management. Bill Hale took over Paul B.'s case with Homebase, and continued to provide intensive services which included adult living skills, employment assistance, money management, parenting skills, obtaining steady income, and supervision of visits.

The Court conducted a Status Review Hearing on October 6, 2008. At that time, at the

¹ The individual counseling at Valley HealthCare was not initiated until October of 2008 due to the length of the wait list.

request of the parties, the Court Ordered WVDHHR to provide transportation for Paul B. to and from Valley HealthCare for his appointments. The Court found that Paul B. was making progress, and allowed the improvement period to continue. The next day, Paul B. suffered an exacerbation of his mental illness and had to be hospitalized in the in-patient crisis unit at Valley HealthCare for approximately seven days. Upon his release from Valley HealthCare, visitation between Paul B. and Nelson B. was increased to twice per week for a total of four hours, with a continuation of daily telephone contact. The Court conducted another Status Review Hearing on January 6, 2009, at which time the Court set the matter for disposition.

The Disposition Hearing was held on February 19, 2009. The Court heard the testimony of Melissa McCabe of WVDHHR regarding Paul B.'s progress during his improvement period. During the course of the improvement period, Paul B. received psychiatric services, psychological counseling and services, case management of his mental health issues through Valley HealthCare; case management, adult life skills, and parenting services through Homebase Inc.; and transportation to and from mental health treatment as arranged by WVDHHR. Ms. McCabe testified that Paul B. was generally compliant with services, was fully participating in services offered, appeared to be taking his medication as prescribed, was participating in visits with Nelson, and was appropriately seeking additional mental health treatment when he had a severe episode. However, Ms. McCabe testified that even with ongoing intensive psychiatric, psychological, case management, and in-home services, Paul B. is still not able to provide adequate care for Nelson. Between May of 2008 and January of 2009, Paul B. had been hospitalized four times for severe exacerbations of his mental illness. Ms. McCabe testified that during that time period, Paul B. had periods when he was suicidal and when he made a homicidal threat to Ms. McCabe. Despite the provision of intensive, frequent,

and ongoing services, Paul B. still did not have a source of income², and was in jeopardy of losing his home. Ms. McCabe pointed out that, had Nelson been in Paul's home between May 30, 2008 and the date of the Disposition Hearing, he would have been subject to four separate emergency removals to placement during that time period because of Paul's mental health issues. Ms. McCabe also noted that, although in-home services have been provided for a substantial period of time, there are no means available to continue to provide in-home services on a long-term or permanent basis.

Bill Hale, Paul B.'s caseworker from Homebase, Inc., also testified at the Disposition hearing. Mr. Hale testified that he provided in-home services to Paul B. during the course of the improvement period, including parenting education, crisis services and family crisis response, adult life skills training, supervision of visits, and financial management. Mr. Hale testified that Paul becomes overwhelmed when there are expectations of him. Paul B. made attempts to gain employment and budget his money, but that he was unable to budget with such a low income, and that Paul became so agitated when accompanying Mr. Hale to the Sheltered Workshop to inquire about employment that he had to instead seek immediate crisis services at Valley HealthCare. Mr. Hale testified that Paul attempted to keep his home in a condition appropriate for a child during the improvement period, while Nelson was out of the home, but was unable to maintain a minimum level of cleanliness in the home, and the utilities were in danger of being shut off. Mr. Hale noted that the intensive in-patient services that had been provided by Homebase could not be provided indefinitely, and recommended that case management functions be transferred to Valley HealthCare.

² Arrangements had been made for Paul B. to apply to work at the Sheltered Workshop, and his case manager had offered to assist him with the application on several occasions, as well as offering to drive him to the Sheltered Workshop, but as of the date of the Disposition Hearing, Paul had not taken advantage of this opportunity. Subsequent to the Disposition Hearing, Paul B. eventually did obtain part-time employment with the Sheltered Workshop.

After over six months of intensive in-home services by Mr. Hale of Homebase, which followed months of similar intensive in-home services by Ms. Wyckoff of Homebase, Mr. Hale recommended that the Court place Nelson in the legal guardianship of his aunt and uncle and order continuing visitation between Paul and Nelson.

The Court then asked for the comments and recommendations of counsel and CASA on the issue of disposition. WVDHHR, the Guardian ad Litem, CASA, and Paul's Guardian ad Litem Cheryl Warman all recommended that the Court impose a disposition under W.Va. Code §49-6-5(a)(5), whereby Nelson's Aunt Dee and Uncle Joe would eventually be granted legal guardianship of Nelson, and there would be ongoing and frequent visitation and contact between Nelson and Paul. The undersigned Guardian ad Litem further proffered to the Court her opinion that Paul B. had fully participated in his improvement period, and that he had genuinely put forth an effort to remedy the conditions that led to the neglect of Nelson, but that the severity of Paul's mental illness, even in the face of intensive, regular, and frequent treatment and services, made it clear that Paul is not capable of safely parenting six-year-old Nelson by himself now or in the foreseeable future.

Upon hearing the evidence, comments, and arguments of counsel and CASA, the Court ruled that a disposition under W.Va. Code §49-6-5(a)(5) would be appropriate and in the best interests of Nelson B. The Court acknowledged that Paul loves Nelson and wants to take care of him, but that disposition must be decided based upon Nelson's best interest. The Court made a specific finding that there was no reasonable, viable, less drastic alternative than placement of Nelson in a kinship placement with his aunt and uncle. Following the recommendations of the parties, the Court did not terminate Paul B.'s parental rights, but did rule that the permanency plan for Nelson B. would be legal guardianship by a fit and willing relative, specifically his maternal aunt

with whom he had been placed upon removal from his father's home. The Court further issued its Order without prejudice so as to permit Paul B. to later file a petition with this Court seeking return of custody of Nelson if the circumstances were appropriate.

The Court further Ordered that visitation between Paul and Nelson was to continue at a location accessible to Paul a minimum of twice per week, and that the visitation may be supervised by Aunt Dee, Uncle Joe, or any other responsible adult approved by them. The Court directed that daily telephone contact between Paul and Nelson continue. The Court also specifically Ordered that the parties were to attempt to increase the contact between Paul and Nelson as Nelson gets older, and that unsupervised visitation between Paul and Nelson, without any Court-imposed limitation, is permitted when it becomes safe and appropriate given Nelson's age and Paul's mental health status.

Finally, the Court Ordered that WVDHHR was to assist Paul in requesting outreach coordination services through Valley HealthCare, and that WVDHHR was to continue to provide Paul with necessary services until legal guardianship of Nelson was finalized.

As per the Court's Order, the MDT met and, with the input of Paul B., Aunt Dee, and Uncle Joe, developed a specific visitation plan that would control if visitation was not occurring frequently enough by agreement between Paul and Aunt Dee and Uncle Joe. Under the final visitation plan, agreed to by the MDT and later ratified by the Court, Paul is permitted to visit with Nelson anytime he wishes at his aunt and uncle's home. A specific visitation time is set aside one evening per week from 5:00 p.m. until 6:00 p.m. at the aunt and uncle's home. Paul is responsible for transportation, and he has transportation available to and from the visits through the VACT program at Valley HealthCare. As of the most recent Permanency Review Hearing on January 11, 2010, the proffers to the Court were that weekly visits at the aunt and uncle's home had been going well, that Paul is

consistently visiting Nelson weekly, and that Paul calls Nelson only rarely. The Court further heard that Paul is now staying with a friend in an apartment in Kingwood, he is working part-time in the Preston County Sheltered Workshop, and that he is compliant with his mental health treatment at this time.

III. ASSIGNMENT OF ERROR

The Appellant's assignment of error is set forth below, followed by the Guardian ad Litem's response.

THE CIRCUIT COURT ERRED IN TRANSFERRING LEGAL GUARDIANSHIP OF THE MINOR CHILD TO THE MATERNAL AUNT AND UNCLE BECAUSE THERE WAS A LESS DRASTIC ALTERNATIVE AVAILABLE.

Guardian ad Litem's Response:

The Circuit Court did not err in ordering that the minor child should remain in placement with the maternal aunt and uncle pending an order granting them legal guardianship. There was no reasonable, viable, less drastic alternative available that could have reasonably ensured the child's safety in light of the Respondent Father's severe chronic mental illness, and the permanency decision reached by the Circuit Court was in the best interest of the child.

IV. POINTS OF AUTHORITY AND DISCUSSION OF LAW

A. STANDARD OF REVIEW

In cases involving child abuse and neglect proceedings, the appropriate standard of review is a "clearly erroneous" standard, as directed by this Court in the case of In re: Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996):

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.

Syl. Pt. 1, In re: Tiffany Marie S., *supra*.

B. ARGUMENT

The Appellant contends that the Circuit Court erred in imposing a disposition under W.Va. Code §49-6-5(a)(5) in this matter and Ordering that the child, Nelson B., remain in the legal and physical custody of WVDHHR pending proceedings to place him in the legal guardianship of his maternal aunt and uncle. The Appellant further argues that the Circuit Court had the option of returning Nelson B. to the home of Paul B. under the supervision of WVDHHR as a less restrictive alternative, but did not consider that least restrictive alternative.

W.Va. Code §49-6-5(a) states, in pertinent part:

(a) Following a determination pursuant to section two of this article wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. The term case plan means a written document that includes, where applicable, the requirements of the family case plan as provided for in section three, article six-d of this chapter and that also includes at least the following: A description of the type of home or institution in which the child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child and foster parents in order to improve the conditions in the parent(s) home; facilitate return of the child to his or her own home or the permanent placement of the child; and address the needs of the child while in foster care,

including a discussion of the appropriateness of the services that have been provided to the child. The term "permanency plan" refers to that part of the case plan which is designed to achieve a permanent home for the child in the least restrictive setting available. The plan must document efforts to ensure that the child is returned home within approximate time lines for reunification as set out in the plan. Reasonable efforts to place a child for adoption or with a legal guardian may be made at the same time reasonable efforts are made to prevent removal or to make it possible for a child to safely return home. If reunification is not the permanency plan for the child, the plan must state why reunification is not appropriate and detail the alternative placement for the child to include approximate time lines for when such placement is expected to become a permanent placement. This case plan shall serve as the family case plan for parents of abused or neglected children. Copies of the child's case plan shall be sent to the child's attorney and parent, guardian or custodian or their counsel at least five days prior to the dispositional hearing. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard. The court shall give precedence to dispositions in the following sequence:

- (1) Dismiss the petition;
- (2) Refer the child, the abusing parent, the battered parent or other family members to a community agency for needed assistance and dismiss the petition;
- (3) Return the child to his or her own home under supervision of the department;
- (4) Order terms of supervision calculated to assist the child and any abusing parent or battered parent or parents or custodian which prescribe the manner of supervision and care of the child and which are within the ability of any parent or parents or custodian to perform;
- (5) Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court. The court order shall state: (A) That continuation in the home is contrary to the best interests of the child and why; (B) whether or not the department has made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent or eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home; (C) what efforts were made or that the emergency situation made such efforts unreasonable or impossible; and (D) the specific circumstances of the situation which made such efforts unreasonable if services were not offered by the department. The court order shall also determine under what circumstances the child's commitment

to the department shall continue. Considerations pertinent to the determination include whether the child should: (i) Be continued in foster care for a specified period; (ii) be considered for adoption; (iii) be considered for legal guardianship; (iv) be considered for permanent placement with a fit and willing relative; or (v) be placed in another planned permanent living arrangement, but only in cases where the department has documented to the circuit court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options set forth in subparagraphs (i), (ii), (iii) or (iv) of this paragraph. The court may order services to meet the special needs of the child. Whenever the court transfers custody of a youth to the department, an appropriate order of financial support by the parents or guardians shall be entered in accordance with section five, article seven of this chapter; or

(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 rights 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. . . .

Contrary to the assertions of the Appellant, the Circuit Court did, in fact, consider the less restrictive alternatives in this matter, and reached the conclusion, with some reluctance, that the only way to eliminate an unacceptable level of risk to Nelson B. was to Order his permanent placement out of Paul B.'s custody. At that point, the Court had two options available: permanent legal guardianship in a kinship placement with Nelson's maternal aunt and uncle, with whom he had already lived and spent a considerable amount of time in his young life, whereby Paul B. could have the opportunity to petition the Circuit Court for a return of custody if his mental illness ever sufficiently stabilized to allow him to resume caring for his son; or, termination of Paul B.'s parental rights³. The Circuit Court chose the option of ultimately placing Nelson B. in the legal guardianship

³ The Circuit Court actually had a sufficient legal basis for termination of Paul B.'s parental rights pursuant to W.Va. Code §49-6-5(a)(6) and (b)(6), had the Circuit Court felt that such an action was necessary to Nelson B.'s welfare and in his best interest. Paul B.'s mental illness was of such duration or nature as to render him incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills, and further made him an active

of his aunt and uncle, which was the least restrictive alternative.

The Appellant suggests to this Court that the least drastic alternative available to the Circuit Court in this matter was the return of Nelson B. to the home of Paul B. under the supervision of WVDHHR pursuant to W.Va. Code §49-6-5(a)(2). However, this option had been attempted by WVDHHR and the Circuit Court prior to the filing of the Petition in the instant matter, and had failed.

Paul B. had been relying on family, specifically the Bittings, to help provide him and Nelson B. with a home and basic necessities following the death of Nelson's mother in 2005. When Paul B. attempted to raise Nelson independently, substantiated referrals ultimately resulted in a Petition being filed before the Circuit Court in 2007 alleging neglect of Nelson B. At that time, the Circuit Court dismissed the petition and WVDHHR initiated intensive services through Valley HealthCare, under WVDHHR supervision, to assist Paul B. with his mental health and other issues ultimately leading to his neglect of Nelson B. In December of 2007, while Nelson B. was still living with Paul B. and under the supervision of WVDHHR, Homebase, Inc. began providing intensive in-home services to Paul B. two times a week, including individualized parenting skills training,

danger to his son during periods of exacerbation of the mental illness. This Court has held that the existence of mental illness which renders parent incapable of exercising proper parenting skills or of improving the adequacy of those skills, and failure of parent to respond to rehabilitative efforts of the Department of Human Services, are circumstances warranting a finding of no reasonable likelihood that the condition of neglect or abuse can be substantially corrected. Matter of Abuse and Neglect of R.O., 375 S.E.2d 823, 180 W.Va. 190 (1988). However, the Circuit Court, and the MDT, agreed that Paul B. loves his son, that Paul and Nelson are bonded to each other, that Paul B. fully complied with the terms and conditions of his improvement period, and that he made a good faith effort to utilize the services available to him to try and put himself in a position where he could safely parent Nelson B. Only the severity of Paul B.'s mental illness prevented his success, and accordingly none of the members of the MDT, nor the Circuit Court, felt that termination of parental rights was the appropriate option, or in Nelson B.'s best interest.

appropriate discipline techniques, communication skills, life skills training, and general case management. Despite the provision of these services for significant periods of time, all under the supervision of WVDHHR while Nelson B. remained in the home, Paul B.'s mental health condition continued to be uncontrolled, unpredictable, and a danger to Nelson B., as evidenced by the events of May 21, 2008 which led to the filing of the instant Petition.

The Appellant further contends that the stress of the proceedings in the Circuit Court contributed to Paul B.'s multiple severe mental illness exacerbations during the course of the case. Although there is no evidence to either support or refute that assertion, the reality is that Paul B. had been suffering from these same types of mental illness episodes since prior to 2007 despite family assistance, despite intensive mental health and case management services through Valley HealthCare, despite intensive in-home services to assist him with life skills, and despite supervision by WVDHHR.

The instant Petition was filed on May 30, 2008, and twenty-one months later, Paul B. is still suffering from a severe, chronic mental illness which has prevented him from functioning independently himself, let alone raising a six-year old child. He does not have a stable home, a stable income, independent transportation, or any substantial period of stability in his mental health condition. In short, despite the continuous provision of all of the services previously listed, under the supervision of WVDHHR and the Circuit Court, and with the direction of his counsel and his Guardian ad Litem for the past twenty months⁴, Paul B. has not substantially changed his circumstances from what they were at the time of the filing of the Petition. In short, the less drastic

⁴ If the time period that services were offered prior to Court intervention, Paul B. has had the benefit of WVDHHR supervision, mental health services, and intensive in-home services for over two years.

alternative suggested by the Appellant has been attempted, and failed.

This Court has dealt with similar circumstances in the case of In re: Maranda T., 223 W.Va. 512, 678 S.E.2d 18 (2009), although the parent at issue in that case suffered from low intellectual functioning rather than mental illness⁵. In the Maranda T. case, the Circuit Court actually terminated the respondent mother's parental rights⁶ upon making a finding that the respondent mother had attempted to follow the Family Case Plan, but had limitations which would not improve to a point where she could care for the infant child. The Circuit Court concluded after fourteen months of intensive services, which were no more invasive or intense than those provided to Paul B., that basically the respondent mother would need somebody present in the home to actually fulfill the role of the parent for her child. In re: Maranda T., *supra*. Although Paul B.'s limitations result from his mental illness rather than from intellectual limitation, and the Circuit Court in the instant case elected to choose a disposition less drastic than termination of parental rights, the clear message from Maranda T. is that neither the Circuit Court nor WVDHHR is required to employ remedial or rehabilitative services so intensive that they replace the parental role of the respondent in order to

⁵ In both the Maranda T. case and the instant case, the circumstances were such that there was no reasonable likelihood that conditions of neglect could be substantially corrected because neglectful parents have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help due to the factor set forth in W.Va. Code §49-6-5(b)(6):

(6) The abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills.

However, for reasons set forth herein, the Circuit Court in the instant case chose to employ the less drastic alternative of permanent legal guardianship for Nelson B. rather than termination of Paul B.'s parental rights.

⁶ The Circuit Court did Order post-termination visitation.

attempt to return a neglected child to the family home, or to unreasonably delay the permanency of a child when chances are slim that the respondent parent will be capable of improvement in the foreseeable future.

The primary goal in this case is and must be the health and welfare of Nelson B. See Syl. Pt. 2, In re: Maranda T., 223 W.Va. 512, 678 S.E.2d 18 (2009) (citing In re: Katie S., 198 W.Va. 79, 479 S.E.2d 589 (1996)); In re Charity H., 599 S.E.2d 631, 215 W.Va. 208 (2004); and In re Emily, 540 S.E.2d 542, 208 W.Va. 325 (2000) (Reiterating that the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody). The Circuit Court's ruling created a situation that is unquestionably in the best interest of Nelson B., and that consideration is the overriding factor in all cases involving abused or neglected children. Nelson B. is in a permanent placement with an aunt and uncle, with whom he has had extensive contact, in a home where he and his father previously resided. The Bittinger's home is approximately twenty minutes away from the town in which Paul B. currently resides, and Paul B. has free, reliable transportation to visit with Nelson B. every week⁷. If Paul B. can obtain additional transportation, he literally has unlimited access to Nelson B., subject only to the presence of one of the Bittingers during the visit. Paul B. has unlimited telephone contact with Nelson B.⁸ The parties, and the Bittingers, all specifically contemplated that Paul B. and Nelson B. would be able to spend

⁷ Upon Order of the Circuit Court, the MDT's negotiated minimum visitation schedule was made part of the disposition in the case, and complying with the visitation schedule will be one of the required conditions of legal guardianship.

⁸ As of early January, 2010, Paul B. was not frequently exercising his right to telephone contact with Nelson, and had even called the Bittingers almost daily for a period of time to let them know that school had been canceled due to the weather without even asking to speak with Nelson. Nonetheless, Paul B. has been exercising his right to visitation with Nelson, which they both appear to enjoy.

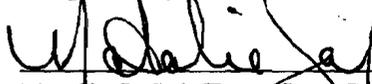
increasing periods of time together, eventually including unsupervised time, as Nelson ages and becomes better able to care for himself and alert the appropriate adults if Paul's mental illness creates a hazardous situation for them. Finally, the Circuit Court made it clear that it would entertain a motion to return Nelson to Paul B.'s care if at some point Paul B. achieves longer-term stability in his life and control over his mental illness, and Nelson's aunt and uncle have indicated that they would facilitate a transfer of custody under those circumstances, so long as it was in Nelson's best interest. In short, the Circuit Court in this case granted Nelson B. the permanency he so desperately needs while providing the maximum opportunity for Paul B. to maintain the best possible relationship with his son given the limitations of his mental illness and to potentially regain custody of Nelson if at some point he is able to control the mental illness that prompted the filing of the Petition. This solution is clearly in the best interest of Nelson B., and is frankly is probably in the best interest of Paul B. as well.

VI. CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Preston County should be affirmed by this Honorable Court.

Dated: January 21, 2010

Respectfully submitted,



Natalie J. Sal, Esq. (State Bar No. 6603)

Sal, Sellaro, Stephens, DeVall & Culpepper, PLLC

430 Spruce Street, Suite 3

Morgantown, WV 26505

Phone (304) 599-5291 / Fax (304) 599-5294

Guardian ad Litem for the child, Nelson B.

Docket No. 35307

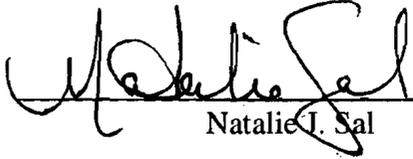
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: NELSON B.

FROM THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA
CASE NO. 08-JA-20
THE HONORABLE JUDGE LAWRENCE S. MILLER, PRESIDING

CERTIFICATE OF GUARDIAN AD LITEM

I, Natalie J. Sal, pursuant to Rule 4A(c) of the West Virginia Rules of Appellate Procedure, hereby certify that the facts alleged in this "Brief in Opposition to Petition for Appeal on Behalf of Nelson B. by his Guardian ad Litem" are faithfully represented and that they are accurately presented to the best of my ability.


Natalie J. Sal

Docket No. 35307

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: NELSON B.

FROM THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA
CASE NO. 08-JA-20
THE HONORABLE JUDGE LAWRENCE S. MILLER, PRESIDING

CERTIFICATE OF SERVICE

I, Natalie J. Sal, hereby certify that I served the foregoing "Brief in Opposition to Petition for Appeal on Behalf of Nelson B. by his Guardian ad Litem" upon the parties, this 21st day of January, 2010, by first class mail, postage prepaid:

C. Carter Williams, Esq.
Assistant Attorney General
112 Beans Lane
Moorefield, WV 26836

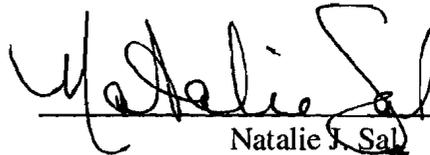
Chaelyn Casteel, Esq.
Casteel & Poling, PLLC
P.O. Box 26
Kingwood, WV 26537

Anne Armstrong, Esq.
Assistant Prosecuting Attorney
106 W. Main Street, Rm 201
Kingwood, WV 26537

Cheryl Warman, Esq.
P.O. Box 1258
Morgantown, WV 26507-1258

Mary S. Nelson, Esq.
P.O. Box 654
Grafton, WV 26354

CASA for Kids
P.O. Box 531
Kingwood, WV 26537


Natalie J. Sal