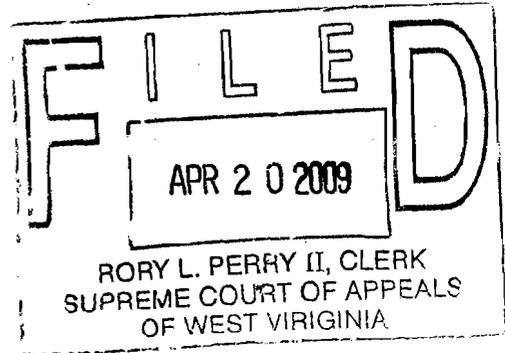

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON**

No.: 34751

IN RE: RICHARD P. and DEVON P.



**FROM THE CIRCUIT COURT OF
FAYETTE COUNTY, WEST VIRGINIA
CIVIL ACTION NO.: 08-CIGR-06**

APPELLANT'S BRIEF

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08-CIGR-6

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 12th of March, 2009, the following order was made and entered:

In Re: Richard P. and Devon P.

No. 34751

DANIEL E. WRIGHT
2009 MAR 19 A 10 3:55
FAYETTE COUNTY
CIRCUIT CLERK

On a former day, to-wit, December 30, 2008, came the petitioners, Cary P. and Jennifer P., by Vickie L. Hyton, their attorney, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Fayette County, rendered on the 14th day of August, 2008, with the record accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal. Justice Albright did not participate in the consideration or decision of this matter. Senior Status Justice McHugh sitting by temporary assignment.

It is hereby ordered that the above-captioned proceeding be heard, submitted and determined upon the original record, briefs of counsel and oral argument, if requested by the parties.

It is further ordered that the appellants file an original and nine copies of a brief within thirty days of receipt of this order; the appellees to file a like number of briefs within thirty days of receipt of the appellants' brief, with any reply brief deemed necessary to be filed within fifteen days of receipt of appellees' brief.

A True Copy

A TRUE COPY of an order entered Attest:

March 19, 2009
Teste: Daniel E. Wright
Circuit Clerk Fayette County, WV

Roy J. Perry II.
Clerk, Supreme Court of Appeals

MAR 20 REC'D

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KIND OF PROCEEDING AND NATURE OF RULING

Pursuant to West Virginia Code § 44-10-3(a)¹, the Appellants filed a *Petition For Appointment of a Legal Guardian and Request for Permanent Name Change* (“Petition”) on July 11, 2008 in the Family Court of Fayette County, West Virginia, by counsel for Petitioners² (Appellants herein), Vickie L. Hylton. The Petition requested that the Court appoint Cary Anna P. (“Cary”), long-time co-habitant and companion of both Jennifer Ellen P. (“Jennifer”) and the minor children herein, as Legal Guardian of the minor children. Said legal guardianship would supplement the natural rights of the biological mother, not negate them. The Circuit Court denied this request. In addition to said appointment, a request to change the name of one of the minor children was granted by the Circuit Court and is not at issue herein.

The minor children, Richard P. and Devon P., are in the care, *physical* custody, and control of both Cary and Jennifer. Additionally, Jennifer also has the sole *legal* custody of the minor children.

Jennifer gave Cary written authorization, via a Limited Power of Attorney, to provide the legal means by which Cary can care for the children during Jennifer’s brief absences. For

¹ W. Va. Code § 44-10-3(a) “The circuit court or family court of the county in which the minor resides, or if the minor is a nonresident of the state, the county in which the minor has an estate, may appoint as the minor's guardian a suitable person. The father or mother shall receive priority. However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.”

² In the matter below, the Petition to the Family Court of Fayette County was styled “In the Matter of the Legal Guardianship of Devon Franklin P. and Richard Lee P.” The case was transferred from the Family Court to the Circuit Court of Fayette County, the style of the case was changed to “In the Matter of: Richard Lee P. and Devon Franklin P., Minors under the Age of 18 Years.” Petitioners below, Appellants herein, are the biological mother of the two minor children, Jennifer Ellen P. and the mothers’ companion, Cary Anna P.. Because the mother, the companion, and the minor children all have the same last name, the parties herein will be referred to by their first names.

various reasons, medical providers are viewing this document as insufficient because it is not an Order of the Court and/or does not make Cary the equivalent of a “parent” or “Legal Guardian”. It has been difficult, at times, for Cary to obtain proper care from medical providers and educational authorities for the minor children because, although she has lived with the minor children and their biological mother since July 1999, she is neither the biological mother nor Legal Guardian of the minor children. Therefore, the Petition below requested the appointment of Cary as Legal Guardian because said legal guardianship would give Cary the *legal* authority to obtain legal and medical services, arrange for educational needs, and obtain other services for the minor children should Jennifer, the biological mother of the minor children, be unable to do so due to an emergency or temporary absence from the home.

There are additional benefits to granting the legal guardianship. By making the appointment now, the biological mother would be able to state, unequivocally, whom she would want to raise the minor children should she become incapacitated or die unexpectedly.

The Family Court of Fayette County removed the matter to the Circuit Court on July 11, 2008, the date the Petition was filed, because there had been abuse and neglect of the minor children in the past which, as the Family Court Judge believed, required the Family Court to remove the case to Circuit Court. The abuse and neglect occurred at the hands of the minor children’s biological father many years earlier, and his rights had been terminated due to said abuse and neglect in the State of Indiana, the State wherein the abuse and neglect occurred. There was no pending or anticipated abuse and neglect matter before either the Family Court or Circuit Court of Fayette County. Thus, all issues related to the past abuse and neglect at the hands of the biological father had been resolved many years earlier in the State of Indiana. There was no “overlap” case or reason for the Family Court to transfer the matter to Circuit Court.

A hearing on the Petition was held in the Circuit Court of Fayette County on July 16, 2008. Petitioners and their counsel attended the hearing. At the request of the Circuit Court, Tom Steele, counsel for the West Virginia Department of Health and Human Resources (“DHHR”), and Robin Holland, Child Protective Services Worker with the DHHR, attended the hearing. The minor children waited outside the courtroom to provide testimony in favor of the Petition, if the Court so required.

During the hearing, the Court inquired why appointment of a Legal Guardian was necessary when the biological mother is the current Legal Guardian and has full custody of the two children. The Court stated that because the biological mother is alive and well, there is no impending emergency situation which currently requires the circuit court to appoint a Legal Guardian. There is no abuse and neglect action from which this request is being made and the minor children, the Court opined, are not at risk.

Petitioners argued that, while there is no current emergency requiring the requested appointment, it is not necessary that there be a current emergency situation or a pending abuse and neglect action for appointment of a Legal Guardian. Petitioners cited several examples of situations in which the biological mother had been unavailable, while performing her job as an Emergency Medical Technician, to be present when the children needed medical care or had educational needs. Because of her temporary absence from the home and unavailability to consent to medical treatment, hospital personnel denied the medical needs of the children. Had Cary’s authority to consent to the medical treatment, as extended by Jennifer via the Power of Attorney, been recognized by the medical providers, the children would have been treated. Jennifer’s job often requires her to be out of Fayette County, out of range of cell phones, and

unavailable to give permission for medical care when it is required. Because of this circumstance, the minor children have suffered significantly.

The DHHR and the CPS worker in attendance at the hearing agreed that there have been problems wherein proper medical care could not be obtained for the children when the biological mother was unavailable. They fully supported the request for appointment of Cary as Legal Guardian, demonstrated by a report from a recent home visit performed by the DHHR.

The Court determined that more time was required to review the Petition and took the matter under consideration. No testimony was presented. No party appeared to oppose the Petition.

On July 22, 2008, in response to the Court's request, Petitioners filed a *Response to the Court's Query* in which three recent incidents were presented to the Court in support of the Petition. In the first, one of the children fell and hurt his arm. When Cary took him to the hospital for treatment, treatment was refused because she was deemed to have no authority to consent to medical treatment. The next day when the biological mother returned, she took the child to the emergency room for treatment to his injured arm.

In the second example, one of the children was staying in a hospital. Cary and Jennifer had taken the child to the hospital for treatment. Jennifer gave the hospital personnel permission to speak with Cary, both written and verbal. Hospital personnel called the home making a request to remove the child from one of his medications because it was having an adverse affect on him. Cary was told that she could not authorize the request because she was not the Legal Guardian, despite the prior approval of Jennifer. The hospital continued to administer the medication throughout the night and when the biological mother returned home, she immediately called the hospital and stopped the medication.

In a third example, Cary had been refused a visit with one of the children while he was in the hospital because she was not “immediate family”. Moreover, she was unable to obtain information regarding his treatment, care, and progress, and was unable to speak with him. The hospital stated that she was not his Legal Guardian and, without a court order, they could not honor her requests. This was in spite of the fact that the hospital had the biological mothers’ written permission, oral permission, and Jennifer was present at the hospital when Cary wanted to visit with the child. Cary became understandably emotional at the refusal of hospital personnel to allow her to see the child she loves and for whom she has cared for many years.

In said Response, Petitioners further argued that granting the request to appoint a Legal Guardian at this time would be in the best interest of the minor children. Citing twenty-six reasons for granting said legal guardianship, the Response also noted that there was no opposition to the Circuit Court’s granting of said Petition.

On August 14, 2008, the Circuit Court entered an Order denying the request for appointment of Cary as Legal Guardian of the minor children, finding: 1) the minor children are not presently in danger or at risk of immediate physical or mental harm; 2) the biological mother resides in the same household as the minor children; 3) there are no substantiated allegations of abuse, neglect, or abandonment against the biological mother, who is capable and willing to care for the minor children; and 4) though the biological mother consents to the appointment of Cary as Legal Guardian, she does not wish to be relieved of her parental rights and responsibilities as a result of such an appointment.

STATEMENT OF FACTS

1. Jennifer is the natural mother of the minor children.
2. Appellants (Petitioner's below) have resided together in a home with the minor children since July 1999 and the biological mother has had physical and legal custody of the children since their birth.
3. Appellants have resided in the city of Fayetteville, County of Fayette, West Virginia, for more than three years.
4. Jennifer is employed as an Emergency Medical Technician.
5. Cary is a homemaker, residing with and caring for the minor children.
6. Cary cares for and loves the minor children, as if they were her natural children.
7. Cary is more than 15 years older than the minor children and was born in South Bend, Indiana, on November 8, 1973.
8. The minor children herein named possess no real or personal property of their own of any value.
9. The minor children, at their births, had the last name "Arnold", but that name was changed to their mothers' maiden name by Order of an Indiana Court.
10. Jennifer, the natural mother of the minor children, consents to the appointment of Cary as Legal Guardian. Said legal guardianship will not replace nor remove Jennifer's natural guardianship, as biological and custodial mother of the minor children, but will be in addition to the same.
11. Jennifer named Cary as her Medical Power of Attorney and her Durable Power of Attorney in new documents on February 29, 2008. Said Powers of Attorney take effect upon the incapacity of Jennifer to make decisions or provide for herself.

12. Jennifer named Cary as her Limited Power of Attorney in a written document in Indiana with Cary having the ability to make medical and educational decisions for the children in the absence of Jennifer. Furthermore, Jennifer, when presenting the Limited Power of Attorney, reaffirms her desires orally to the hospitals and/or schools. However, the Limited Power of Attorney is consistently refused by the personnel, remarking that Cary is not the biological mother nor a close relative.
13. Richard Lee Arnold, Sr. is the biological father of the minor children and the children were born during the marriage of Jennifer and Richard Lee Arnold, Sr.
14. The Final Dissolution Decree for the marriage of Richard Lee Arnold, Sr. and Jennifer was issued on July 22, 2002.
15. On or about March 15, 2005, the biological father, Richard Lee Arnold, Sr., was charged with Child Molesting, a Class A Felony, and the Dissemination of Matter Harmful To Minors, a Class D Felony, by the Dubois County Prosecutor in Jasper, Indiana (Cause No. 19C01-0503-FA-0043). The victims of these crimes were the minor children named in herein.
16. On June 9, 2005, Richard Lee Arnold, Sr., was convicted in Washington County, Indiana, for molestation of a thirteen (13) year old girl (Cause No. 88C01-0410-FC-428) and incarcerated for several years.
17. On October 10, 2006, Richard Lee Arnold, Sr. entered into a plea of guilty to the offense of Dissemination of Matter Harmful to Minors, and the Court found that he fully understood the nature of the crime charged and the possible sentences. The Court accepted his plea of guilty to said crime and sentenced him to 340 days in the Dubois County Security Center. As part of the plea agreement, an additional count alleging child molesting was dismissed.

18. By statute, in the State of Indiana, Richard Lee Arnold, Sr. was deemed to be an unfit parent, having committed heinous crimes against his biological children. He was required to, and has, registered as a sex offender. As further mandated by statute, his rights as a biological father of the minor children herein were terminated. (This termination was affirmed by the Fayette County Circuit Court in the hearing on this matter.)
19. An Order for Protection was issued by the State of Indiana, County of Dubois, on December 20, 2004, preventing the biological father from having any contact with Jennifer and the minor children. The Order, having found by a preponderance of the evidence that (1) domestic or family violence, stalking or a sex offense had occurred sufficiently to justify the issuance of the order, (2) that Richard Lee Arnold, Sr. represented a credible threat to the safety of Jennifer or a member of her household, and (3) that this relief was necessary to bring about a cessation of the violence or the threat of violence. Pursuant to the extended Order, Richard Lee Arnold, Sr. despite having had his parental rights terminated in Indiana, is enjoined from threatening to commit or committing acts of domestic violence against the protected persons, is prohibited from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with the protected persons, is excluded from the protected persons residence, and is further ordered to stay away from the residence, school, and/or place of employment of the protected persons. The Order for Protection remains in effect today.
20. Richard Lee Arnold, Sr. has not paid and is not required to pay child support, effective October 5, 2004.
21. Appellants are able to properly care for, support, and educate said minor children and both have participated in these functions together since July 1999.

22. Appellants have disclosed all that they know and all that can be determined through the exercise of reasonable diligence about the parentage of the minor children.
23. Appellants, as Petitioners, requested appointment of Cary as a Legal Guardian for the minor children. Their request was based, in part, based upon their belief that a legal guardianship would give Cary the authority to obtain legal and medical services, arrange for educational needs, and obtain other services for the children should Jennifer be unable to do so due to an emergency or temporary absence from the home.
24. Though Cary produced the Limited Power of Attorney, allowing her to make medical decisions for the minor children, she was denied the authority granted her by Jennifer in that document.
25. On at least three recent occasions, Jennifer was unavailable to give consent to medical care for the minor children, and said children suffered as a result. In each instance, the hospital was aware that Cary had Jennifer's permission to consent to medical treatment. In each instance, Cary was denied the authority to consent to medical treatment because she is not the Legal Guardian or biological mother of the child at issue. As evidenced by the examples below, detrimental effects were occasioned upon the minor children:
 - a. One child fell and hurt his arm. Cary rushed him to the emergency room for treatment. The hospital refused to treat the child because Cary was not the Legal Guardian and could not consent to medical treatment. The next day, when Jennifer returned from transporting a patient to Morgantown, West Virginia, the child was treated at the hospital for the injuries to his arm. Thus, the minor child had to suffer throughout the night with the pain in his arm;

- b. One child was placed in River Park Hospital for psychological treatment related to the sexual abuse by his father. While there, he was prescribed medications that had an adverse affect on him and caused him to shake. Hospital personnel called the home to obtain consent to take the child off the medication. Jennifer was on an emergency call in her capacity as EMT and unavailable to approve the change. The hospital would not discontinue the medication on Cary's consent because she was not the Legal Guardian of the minor child. The child was administered the medication throughout the night and Jennifer contacted the hospital to discontinue the medication as soon as she was notified of the problem. Unfortunately, the child had already received another dose of the medication and continued to suffer therefrom;
- c. Both Cary and Jennifer placed one child in a local hospital. The hospital personnel refused Cary's request to visit with him and said personnel would not provide her information regarding his treatment, care, and progress. Cary was unable to speak with the child and was told she could not do so because she was not his Legal Guardian or an immediate family member. Jennifer was present at the hospital, giving her consent, when this occurred.

26. Since the Circuit Court's denial of the Petition seeking Cary's appointment, Jennifer's mother, who resides in Indiana, has become seriously ill, requiring Jennifer to travel to Indiana to provide in-home care and to stay in Indiana for an extended period. In fact, Jennifer has obtained temporary employment in Indiana while caring for her ailing mother. This was necessary because she is the sole financial supporter of the minor children herein.

27. Cary faces the day-to-day fear that something will happen to one of the children in her care and medical treatment for the child will be again denied. Should she receive a call that one

of the children is injured or needs a parent's permission, Cary knows that she will be unable to obtain information, give permission, or consent to medical care because she is not a Legal Guardian for these children, and she believes the written and oral permission from Jennifer will again be refused.

28. Jennifer, and her ailing mother in Indiana, are the only relatives of the minor children. There are no other relatives in Indiana or West Virginia. In the event that Jennifer becomes incapacitated, deceased, or, as has recently occurred, be out-of-town for an extended period of time, Cary is the only person that can provide the care the children require and has successfully and lovingly done so for the past nine (9) years.

29. The minor children consider Cary to be their second mother, and Cary has certainly become their "psychological parent". The children refer to her lovingly as "mom".

ASSIGNMENT OF ERROR

1. The Family Court of Fayette County erred in transferring the case to Circuit Court as an overlap case. No abuse and neglect action is pending or anticipated.
2. The Circuit Court erred in denying the appointment of a Legal Guardian, finding that a Legal Guardian should only be appointed:
 - a. where there is present danger or risk of immediate physical or mental harm, or
 - b. as a result of an abuse and neglect action, or
 - c. where the biological mother is not capable or willing to care for the children, or
 - d. where the biological mother is relinquishing her parental rights and responsibilities.

POINTS AND AUTHORITIES

Cases

<u>Appalachian Power Co. v. State Tax Dep't</u> , 195 W. Va. 573, 466 S.E.2d 424 (1995).....	16
<u>Chrystal R.M. v. Charlie A.L.</u> , 194 W. Va. 138, 459 S.E.2d 415 (1995).....	16
<u>Cloud v. Cloud</u> , 161 W. Va. 45, 239 S.E.2d 669 (1977).....	21
<u>Glen Falls Ins. Co. v. Smith</u> , 217 W. Va. 213 (2005).....	20
<u>In the Interest of Brandon L.E.</u> , 183 W. Va. 113, 394 S.E.2d 515 (1990)	23
<u>In re Katie S.</u> , 198 W. Va. 79, 479 S.E.2d 589 (1996)	21
<u>In re Visitation & Custody of Senturi N.S.V.</u> , 652 S.E.2d 490 (2007).....	20, 21
<u>In re: Clifford K.</u> , 217 W.Va. 625, 619 S.E.2d 138 (2005)	16, 19, 20
<u>Lemley v. Barr</u> , 176 W. Va. 378, 343 S.E.2d 101 (1986)	23
<u>Snyder v. Scheerer</u> , 190 W. Va. 64, 436 S.E.2d 299 (1993)	22
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Attachments

In the Family Court of Fayette County, West Virginia:

“Order of Removal of Infant Guardianship Case to Circuit Court”

In the Circuit Court of Fayette County, West Virginia:

“Order Denying Petition for Appointment of a Legal Guardian and Conditionally Granting Request for Permanent Name Change”

DISCUSSION OF LAW

The issue before this Court is an undecided issue of Law. The questions presented are 1) whether the Family Court is required to transfer a Petition for legal guardianship to the Circuit Court as an overlap case where no abuse and neglect is pending or anticipated, though abuse and neglect occurred years earlier in another State, and 2) whether a Legal Guardian can be appointed where the natural parent, who is also a single parent, is alive, well, and only temporarily unable to consent to treatment or educational needs of her minor children.

Where the issue on an appeal from the circuit court is a question of law or involving an interpretation of a statute, the West Virginia Supreme Court of Appeals applies a *de novo* standard of review. In re: Clifford K v. Paul S. ex rel. Z.B.S., 217 W.Va. 625, 619 S.E.2d 138 (2005) (citing Syl. pt. 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995) and Appalachian Power Co. v. State Tax Dep't, 195 W. Va. 573, 466 S.E.2d 424 (1995)). In reviewing challenges to the findings and conclusions of the circuit court, “the welfare of the child is the polar star by which the discretion of the Court will be guided.” Syl. Pt. 2, State ex rel. Lipscomb v. Joplin, 131 W.Va. 302, 47 S.E.2d 221 (1948).

The Family Court of Fayette County erred in transferring the Petition to the Circuit Court as an “overlap” case. Believing the prior abuse and neglect required transfer, the Family Court Judge did not consider the merits of the case nor review the Petition. The case was transferred to Circuit Court on the day the Family Court received the Petition.

The Circuit Court of Fayette County erred in its decision not to grant the Petition seeking to have Cary appointed Legal Guardian for two minor children for whom she cares every day. Cary has provided care for these children for the past nine years on a continual, day-to-day basis, through interaction, companionship, interplay, and mutuality. She fulfills the children's

psychological and physical needs and provides for their emotional support. Cary has done so with the consent and support of the biological mother. Cary has undoubtedly become, at a minimum, a psychological parent of the children. Neither Jennifer nor Cary wish to terminate or interfere Jennifer's rights but wish to enable Cary to promote and protect the children in a manner allowed by law and consistent with the best interests of these children.

While this case is a legal guardianship case, it also contains aspects of psychological parenting and exposes the struggles faced by many single parents in West Virginia. It stands, in part, for the proposition that a Legal Guardian need not be a person that comes into a child's life only after the severing of the parent/child relationship, whether by devastating event or legal consequence. It seeks to give voice and result to the importance of providing suitable care for the children now. This goal may be accomplished via legal guardianship.

The issue before this Court is whether the laws of the State of West Virginia allow appointment of a Legal Guardian:

- 1) where there is no present danger or risk of immediate physical or mental harm, even though there are documented instances where danger of risk of immediate physical or mental harm have existed and harm to the children could have been prevented by said appointment,
- 2) where there is no pending or anticipated abuse and neglect action,
- 3) where the biological mother is alive, capable, and willing to care for her children, even though she is required to travel long distances and is, at times, unavailable to provide the needed consent for treatment or perform other duties that a Legal Guardian would be allowed to perform, and,
- 4) where the appointment of the Legal Guardian will supplement, not negate, the rights of the biological mother.

W.Va. Code § 44-10-3(a)³ is plain and unambiguous. There is simply no statutory or legal authority that requires the conditions set forth by the Circuit Court for appointment of a Legal Guardian in this case. As evidenced by this statute, more than just exigent circumstances or emergency situations allow for the appointment of a Legal Guardian. Moreover, the statute grants the father or mother priority over other appointments. Clearly, W.Va. Code § 44-10-3(a) gives the “best interest of the child” precedence over the appointment.

West Virginia Code § 44-10-3(a) does not require the death or incapacity of the biological parent as a condition precedent to the appointment of a Legal Guardian nor does it require that an abuse and neglect case be pending. “[T]he welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.” W.Va. Code § 44-10-3(a). All that is required is that the minor’s guardian be a suitable person. This statute is not found in the sections of the West Virginia Code regarding custody or abuse and neglect cases and, in opposition to the Circuit Court’s Order, specifically states that the child need not be deceased nor that the parents be deceased in order that a Legal Guardian be appointed.

This statute does not require the existence of some present danger or risk of imminent physical harm, as required by the Circuit Court, nor does the statute require that Jennifer relinquish her parental rights in order for Cary to be appointed as legal guardian.

The appointment of the Legal Guardian can be terminated. The court, the guardian, the minor, or an interested person may revoke or terminate the guardianship. West Virginia Code §

³ W. Va. Code § 44-10-3(a) “The circuit court or family court of the county in which the minor resides, or if the minor is a nonresident of the state, the county in which the minor has an estate, may appoint as the minor's guardian a suitable person. The father or mother shall receive priority. However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.”

44-10-3(c)⁴. Interested persons could include the natural mother. Thus, a legal guardianship is not permanent, like an adoption, and can be terminated.

In Chapter 49 of the West Virginia Code, the Legislature set forth the provisions for subsidized legal guardianship and understood there would be instances in which parental rights would not be terminated even though a Legal Guardian was appointed. “A legal guardianship subsidy shall not require the surrender or termination of parental rights.” W. Va. Code § 49-2-17. While this portion of the West Virginia Code applies to abuse and neglect cases, it shows that the statutes regarding the appointment of a Legal Guardian are not inconsistent and both examples provide for a living biological parent with parental rights.

In today’s world, the issues of cohabitation and/or single-parenthood, in which children are involved, requires the ability of a natural parent to legally entrust the care of his or her children to suitable persons, even though the “family” does not resemble traditional notions. Justice Starcher, in a concurring opinion, defined a family as “a collection of people composed of parents and children” and explained further that “not all families are composed of parents and children who are related by blood. Many families have stepparents, stepchildren, foster children, adopted children, or are composed of *guardians* and wards.” In re: Clifford K v. Paul S. ex rel. Z.B.S., 217 W. Va. 625, 650, 619 S.E.2d 138, 163 (2005) (emphasis added.) Further, Justice Starcher wrote that “we should never say that mere blood relations should trump a relationship based upon love and trust”. Id.

⁴ (c) The court, the guardian or the minor may revoke or terminate the guardianship appointment when: (1) The minor reaches the age of eighteen and executes a release stating that the guardian estate was properly administered and that the minor has received the assets of the estate from the guardian; (2) The guardian or the minor dies; (3) The guardian petitions the court to resign and the court enters an order approving the resignation; or (4) A petition is filed by the guardian, the minor, an interested person or upon the motion of the court stating that the minor is no longer in need of the assistance or protection of a guardian.

A psychological parent is “a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support”. Id. at 644. Cary, at a minimum, has long been a psychological parent to the minor children and has provided continuing day-to-day parental support to the minor children. She is certainly a “suitable person.”

The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian”. Id. “[A] psychological parent is one who essentially serves as a second parent to a child and is a relationship to which the child's parent has consented”. In re Visitation & Custody of Senturi N.S.V., 652 S.E.2d 490, 498 (2007). Without doubt, the relationship between Cary and the minor children is substantial. Beginning in or about 1999, Jennifer, the biological mother of the minor children, fully consents to and encourages said relationship fully.

But “a psychological parent is not a legal parent within the contemplation of W. Va. Code § 48-1-232.” Glen Falls Ins. Co. v. Smith, 217 W. Va. 213, 230 (2005). Pursuant to W. Va. Code § 48-1-232 (2001) (Repl. Vol. 2004), “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*”. (emphasis added.) This Court defines the phrase 'other recognized grounds' as “those individuals or entities who have been formally accorded parental status or the functional equivalent thereof by way of statute or judicial decree. Such parental status is comparable to the rights and responsibilities of a biological or adoptive parent and includes, but is not limited to, the right to care, control, and custody of the minor child; the right

to consent or object to the child's adoption by another person; and the duty to support the child."

In re Visitation & Custody of Senturi N.S.V., 652 S.E.2d 490, 496 (2007).

By granting the legal guardianship, the Circuit Court could have accorded Cary the functional equivalent of "parent" in a manner which could have allowed her to continue the care, legal custody, and control of the children for whom she already exercises care, physical custody, and control. By denying the legal guardianship, the Circuit Court has denied the children the care, custody, and control they so readily desire and require.

Even though parents have substantial rights in guardianship matters, so do the children involved. In fact, this Honorable Court held that, "[a]lthough parents have substantial rights that must be protected, the primary goal . . . in all family law matters . . . must be the health and welfare of the children." Syl. pt. 3, in part, In re Katie S., 198 W. Va. 79, 479 S.E.2d 589 (1996). "To justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child. Syl. pt. 2, Cloud v. Cloud, 161 W. Va. 45, 239 S.E.2d 669 (1977) (per curiam). Here, the minor children have resided with Petitioners continuously since 1999 and the West Virginia Department of Health and Human Resources agrees that granting the legal guardianship to Cary would promote the health and welfare of the children. Moreover, there would not be a change in custody, *per se*, that would be evident to the children. The change would be a legal one, a change in circumstances, granting Cary the ability to properly care for the minor children.

The West Virginia Legislature has recognized the functional equivalent of "parent" to exist in certain circumstances. For example, one who is appointed or nominated as a guardian upon the death of a minor child's parent(s) is formally accorded rights and responsibilities that are substantially the same as those that would have been enjoyed by the child's parent(s). See W.

Va. Code § 44-10-1 (1923) (Repl. Vol. 2004) (describing "testamentary guardians"); W. Va. Code § 44-10-3 (2004) (Repl. Vol. 2004) (concerning judicial appointment of guardian); W. Va. Code § 44-10-4 (2004) (Repl. Vol. 2004) (addressing ability of older child to nominate his/her guardian upon death of child's parent(s)). Under such circumstances, the guardian essentially steps into the shoes of the deceased parent to fulfill the parental role as a result of the inability of the parent to do so.

Appellants fully understand that "a guardian appointed or nominated upon the death of a minor child's parent(s) shall have the possession, care and management of his ward's estate, real and personal, and out of the proceeds of such estate shall provide for his maintenance and education; and shall have also, except as otherwise provided in this article, the custody of his ward." W. Va. Code § 44-10-7 (1996) (Repl. Vol. 2004). However, and as an additional factor to be considered by this Court, by appointing a Legal Guardian now, the Circuit Court is eliminating the need for appointment of a Legal Guardian upon the death of the minor children's biological mother, Jennifer.

The West Virginia Legislature's aim in the Legal Guardian statutes, wherever they may be located in the West Virginia Code, is to secure the best interests of the children whose custody is to be determined upon the death of a natural parent and to promote stability and certainty in their young lives. "The primary objective of this article is to serve the child's best interests, by facilitating . . . stability of the child . . . [and] . . . continuity of existing parent-child attachments[.]" W. Va. Code §§ 48-9-102(a)(1,3). "[S]tability in a child's life is a major concern when formulating custody arrangements." Snyder v. Scheerer, 190 W. Va. 64, 72-73, 436 S.E.2d 299, 307-08 (1993) (per curiam). Therefore, "in cases where a child has been in one home for a substantial period, 'his environment and sense of security should not be disturbed without a

clear showing of significant benefit to him." In the Interest of Brandon L.E., 183 W. Va. 113, 121, 394 S.E.2d 515, 523 (1990) (quoting Lemley v. Barr, 176 W. Va. 378, 386, 343 S.E.2d 101, 110 (1986) (overruled on other grounds). Stability is the key for the minor children herein. The minor children have been residents of Fayette County for more than three years and have been residing with Appellants for more than nine years. A sense of security is important for the children, especially in light of the difficult time they have had overcoming the abuse of their father. Moreover, security and stability, in this case, includes the ability of Cary to obtain legal, educational, and medical services for the children as the children's Legal Guardian. Granting the legal guardianship will not change the custody arrangement, per se, but will enhance it to the benefit of the minor children.

Thus, there unquestionably exists a relationship of significant duration between Cary and the minor children. Cary has provided for their physical, psychological, financial, and emotional needs in such a manner that they regard Cary as a parental figure in their lives. Moreover, Jennifer not only consented to the formation of this strong relationship between Cary and the minor children, she actively fostered and nurtured this bond. She acquiesced in the development of secure ties between Cary and the minor children and purposefully encouraged such a familial relationship. Without doubt, Cary has become the psychological parent of the minor children and now requires the legal authority, through a legal guardianship, to continue in this capacity, with all the rights and duties afforded her by law. This legal guardianship should be granted and is not subject to the non-statutory conditions placed upon the appointment by the Circuit Court.

CONCLUSION

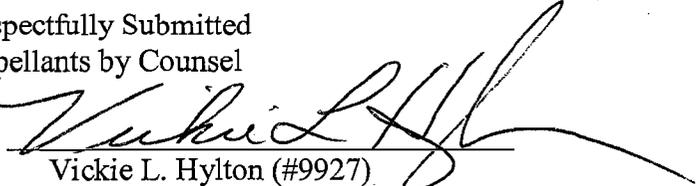
1. The Family Court of Fayette County erred in transferring the case to the Circuit Court as an overlap case. No abuse and neglect action is pending or anticipated.
2. The Circuit Court erred in denying the appointment of a Legal Guardian, finding that a Legal Guardian should only be appointed:
 - a. where there is present danger or risk of immediate physical or mental harm, or
 - b. as a result of an abuse and neglect action, or
 - c. where the biological mother is not capable or willing to care for the children, or
 - d. where the biological mother is relinquishing her parental rights and responsibilities.

Cary is a suitable person who is ready, willing, and able to provide the children with the care, custody, and control allowed by law. It is in the best interest of the minor children for the Circuit Court to grant the appointment of Cary as Legal Guardian. Doing so will have many substantial benefits for the family and grant Cary the ability to provide stability, security, and proper care for the children.

PRAYER FOR RELIEF

WHEREFORE, the Appellants respectfully request that their Appeal be granted; that this Honorable Court reverse the decision of the Circuit Court of Fayette County and Order that the legal guardianship of Richard P. and Devon P. be awarded to Cary Anna P. as a supplement to, not as a replacement for, the duties, rights, and responsibilities of the biological mother, Jennifer Ellen P..

Respectfully Submitted
Appellants by Counsel

By: 

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

No.: 34751

IN RE: RICHARD P. and DEVON P.

CERTIFICATE OF SERVICE

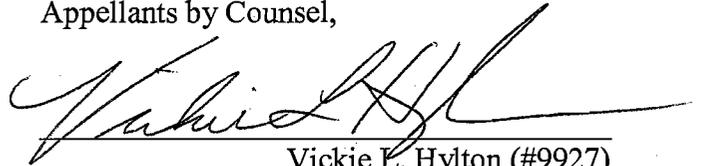
I, Vickie L. Hylton, of HYLTON LAW OFFICE, PLLC, counsel for Richard P. and Devon P., hereby certify that I served the foregoing "APPELLANT'S BRIEF" upon the following by hand-delivering a true and correct copy of the same, on the 17th day of April, 2009:

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Fayetteville, West Virginia 25840

Honorable Janet Frye-Steele
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