

NO: 35450

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

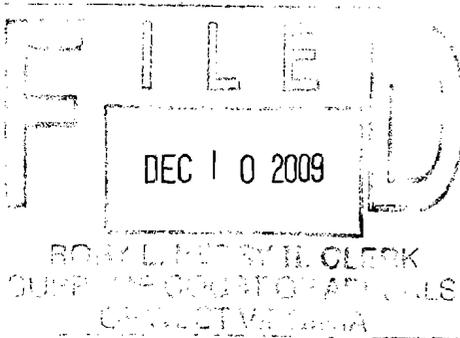
IN THE INTEREST OF
KAITLYN C., ARIANNA S.,
CHRISTOPHER C., RYAN E. C.,
AND MADYSEN C. BY THE
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN SERVICES

JUVENILE ABUSE AND
NEGLECT NO. 08-JA-135-K
08-JA-136-K
08-JA-137-K
08-JA-138-K
08-JA-145-K

V.

CHRISTOPHER C.
SAMANTHA C.

FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA



PETITION FOR LEAVE TO APPEAL AND BRIEF
BY THE RALEIGH COUNTY CHILD PROTECTIVE
SERVICE, A DIVISION OF THE WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, PETITIONER BY:

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JUDGE B. DAVID
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V.

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FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

PETITION FOR LEAVE TO APPEAL

Petitioner, Raleigh County Child Protective Service, a Division of the West Virginia Department of Health and Human Resources, petitions this Honorable Court for Leave to Appeal from the order of the Circuit Court of Raleigh County, West Virginia entered on the 24th day of September, 2009, which Order granted to Respondent Mother and Respondent Father a six month post adjudicatory improvement period.

INTRODUCTORY NOTE

For the purposes of this Petition and Brief, the Petitioner, the West Virginia Department of Health and Human Resources, which will hereinafter be referred to as "the Department", will not disclose the last names of the children, nor Respondent parents pursuant to this Court's past practice as set forth in West Virginia Dep't of Human Servs v. Charge M. 356 SE 2d 181 177 W.Va. 688; Chapter 49 of the West Virginia Code, Child Welfare, Chapter 49, Articles 1 through 10 will be referred to as "the Act"; Child Protective Services will be referred to as "CPS"; the Honorable H. L. Kirkpatrick, III, Judge of the Circuit Court of Raleigh County assigned to this case will be referred to as "the Court"; the children, Kaitlyn C. (D.O.B. 03-08-03), Arianna S. (D.O.B. 06-06-04), Christopher C. (D.O.B. 01-22-06), Ryan E. (D.O.B. 06-22-07), and Madysen (D.O.B. 10-02-08) will be referred to by first name or collectively as "the children"; the Respondent parents will be referred to as "Respondent Mother" or "Respondent Father"; and post adjudicatory improvement period will be referred to as "I.P.".

THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This petition arises out of a civil action in the Circuit Court of Raleigh County, West Virginia, filed by the Department originally in the Circuit Court of Raleigh County on the 10th day of September, 2008.

The Petition by the Department alleged that Ryan E. had been physically abused, which resulted in a spiral fracture of the child's right femur. The Respondent Mother and Father did not file an Answer, but denied that the child was abused.

The Court below after several hearings and continuances and the filing of all evidence, by Order dated the 26th day of August, 2009 found that Ryan E. was abused by clear and convincing evidence as were the other children in the home by statute.

A final hearing was scheduled on the 27th day of August, 2009, at which hearing the Court granted to both parents a post adjudicatory improvement period, which Order was entered on the 24th day of September, 2009.

It is from the Court's order of September 24, 2009 that the Department believes it is aggrieved and prosecutes this Petition for Leave to Appeal.

STATEMENT OF THE FACTS

On the evening of September 6, 2008, CPS received a hot line call that an infant child had been brought to the Raleigh General Hospital Emergency Room in Beckley, West Virginia, with a spiral fracture of his right femur. The CPS Workers responded to the hospital and the information and explanation of the injury received from the Mother was inconsistent with the type of injury that the child had and the Emergency Room Physician believed that this was non-accidental trauma. The child was transferred from the Raleigh General Hospital to Charleston Area Medical Center in Charleston, West Virginia to be treated by a pediatric orthopedic surgeon.

The Department proceeded to Magistrate's Court on September 7, 2008 to seek emergency custody of the children and Circuit Judge John Hutchison confirmed the Juvenile Referee's Ratification of Emergency taking by Order dated September 8, 2008 and the children were placed in Foster Care by the Department.

The child Ryan was released from the Charleston Area Medical Center on Sunday, September 7, 2008 in a partial body cast and placed in Foster Care.

The Department filed its petition on September 10, 2008, with the medical records attached thereto from Raleigh General Hospital and Charleston Area Medical Center.

A preliminary hearing was held before the Circuit Court Judge H. L. Kirkpatrick, III, on September 19, 2008 and both parents waived the preliminary and, based upon the waivers, the Court found that probable cause to proceed was established and that the placement by the Department was proper by Order entered on September 29, 2008. In addition, the Court, by separate HIPPA Orders, ordered that all medical records with respect to the child Ryan and all x-rays be furnished to the Court by the Raleigh General Hospital and the Charleston Area Medical Center as ordered on the 29th day of September, 2008.

The Respondent Mother gave birth to a new child on October 20, 2008 and the Department filed its Amended Petition to include the new child under date of October 20, 2008 and a new preliminary hearing was scheduled on October 22, 2008 at 2:30 p.m.

On October 22, 2008 the Adjudicatory Hearing on the original Petition was started and the Department presented three of its five witnesses, who were called and testified, but the Department moved to continue as two subpoenaed witnesses were unavailable, which Motion was granted by the Court. This Hearing presented the testimony of Dr. Fred Patrick Tzystuck, the Raleigh General Hospital Emergency Room Physician, Michelle Neupane, CPS Worker; and Katrina Grant, CPS Worker.

The case was reset for continuation of the adjudicatory hearing on November 18, 2008. At the hearing the Department took the testimony of Dr. David E. Ede, Orthopedic Surgeon of Charleston, who practices at the Charleston Area Medical Center and was the treating physician for Ryan E. at the Charleston Area Medical Center.

After Dr. Ede's testimony was concluded the counsel for Respondent Mother moved to have the Court approve her employment of a pediatric orthopedic specialist for possible rebuttal to the Department's physicians' opinions regarding whether Ryan E.'s spiral fracture was the result of child abuse. The Court agreed to check with Charleston to determine if such expense could be approved after Respondent Mother's counsel advised him of more specific cost information and the case was continued to December 29, 2008 for completion of the adjudicatory evidence.

At the December 29, 2008 hearing the Department presented its last witness and rested its case and no further evidence by the Guardian ad Litem or Respondents were offered, however, Respondent Mother's counsel again moved for Court approval to allow employment of a pediatric orthopedic specialist in rebuttal to the Department's evidence, which Motion was granted and the case continued on Respondent Mother's Motion.

At a hearing scheduled on June 4, 2009 the case was continued to allow the Respondent Mother's expert witness to prepare his report to the Court.

At the hearing scheduled on August 7, 2009, counsel for Respondent Mother filed the two page report of Donald D. Getz, M.D. dated June 26, 2009 tendered to the Court as rebuttal evidence on behalf of Respondent Mother and the Department by counsel and the Guardian ad Litem waived cross examination of Dr. Getz on his report and the adjudication of this case was submitted for decision by the Court.

By Adjudicatory Order dated the 26th day of August, 2009 the Court found that by clear and convincing evidence that the spiral fracture of the right femur of Ryan E. was inconsistent with the explanations given by Respondent Mother as to the nature of the injury the child sustained based upon the medical evidence and the conclusions of the child's treating physicians and that clear and convincing medical evidence established

that Ryan E.'s subject injury was the result of non-accidental trauma and concluded that, therefore, Ryan E. and the other children in the home are abused children pursuant to statute.

At the hearing on the 27th day of August, 2009 the Respondent Mother, by counsel filed a written motion for a six month improvement period and over the objection of the Department on legal grounds and without the presentation of any evidence to prove to the Court by clear and convincing evidence that Respondent Mother could or would benefit from an improvement period, the Motion was granted by the Court for a six month improvement period.

Thereafter, Respondent Father, by counsel, orally moved for a six month post adjudicatory period, which the Court granted over the objection of the Department, without requiring the Motion to be written or requiring any clear and convincing evidence that Respondent Father could or would benefit from a six month improvement period.

It is from the Court's granting to Respondent Mother and Respondent Father a six month post adjudicatory improvement period that the Department believes it is aggrieved and Petitions this Honorable Court for Leave to Appeal.

THE ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

The Court erred in not requiring the Respondent Mother and Respondent Father to present evidence by clear and convincing evidence that the Respondent Mother and Respondent Father were likely to fully participate in the improvement period pursuant to

Chapter 49, Article 6, Section 12(b)(2) prior to granting a post adjudicatory improvement period and to make findings on the record of the terms of the improvement period.

POINTS AND AUTHORITIES RELIED UPON BY THE PETITIONER

Chapter 49, Article 6, Section 5b(3);

Chapter 49, Article 6, Section 12(b)(2);

West Virginia Dept. of Health and Human Resources, ex. rel. Brenda Wright, Social Service Worker vs. Doris S. and Rosalee S. 475 SE 2d 865, 197 W.Va. 489;

In re: Jeffrey R.L. 190 W.Va. 24, 435 SE2d 162 (W.Va. 1993)

ARGUMENT

It should be first noted that the Department of Health and Human Resources is only petitioning to appeal the lower Court's granting of improvement periods of Samantha C. and Christopher C., even though there were other rulings of the Court contained in the September 24, 2009 Order.

The Department asserts that the Court erred in granting to Respondent Mother and Respondent Father a six month post adjudicatory improvement period over the objection of the Department without requiring said respondents to prove by clear and convincing evidence as required by Article 6, Section 12(b)(2). The record shows that the Court by Order dated August 26, 2009 found that the child, Ryan C., was proven to be abused by clear and convincing evidence and that the explanations by Respondent Mother are inconsistent with the medical evidence and that the evidence establishes that the spiral fracture of Ryan C.'s right leg was the result of non-accidental trauma and the child was

under the control, care, and supervision of Samantha C. on the date the injury occurred to Ryan C.

The record further shows that neither parent admits to committing the non-accidental trauma to Ryan C. and neither parent has aided in the identification of the abuser and, in fact, have provided false information to hide or cover up the identification of the abuser to authorities or medical providers.

This Honorable Court has specifically held in the case of Doris S. and Rosalee S. vs. West Virginia Department of Health and Human Resources ex rel. Brenda Wight, Social Service Worker, et seq. 197 W.Va. 489, 475 SE2d 865 (W.Va. 1996) that “in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child’s expense.” This Court went on to state, citing syllabus point three of In re: Jeffrey R.L. 190 W.Va. 24, 435 SE2d 162 (W.Va. 1993), that “parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of abuse have taken no action to identify the abuser.”

Here in this case both parents have not only denied that the child’s injury is the result of physical abuse, but have also denied that either of them committed the abuse or

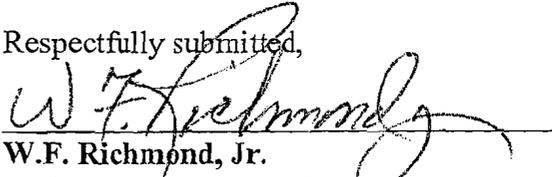
made any attempt to aide in the identification of the perpetrator of the abuse, irregardless of the medical inconsistency of their explanations of how the injury occurred.

It was, therefore, clear and reversible error for the Court to grant a post adjudicatory improvement period to either of these parents without requiring them to present clear and convincing evidence that the abuse or failure to protect could be substantially corrected in view of their complete denials that abuse has occurred or failure to come forward and aide in the identification of the perpetrator.

CONCLUSION

It is respectfully submitted that the Court erred in not requiring the Respondent Mother and Respondent Father to present evidence by clear and convincing evidence that the Respondent Mother and Respondent Father were likely to fully participate in the improvement period pursuant to Chapter 49, Article 6, Section 12(b)(2) prior to granting a post adjudicatory improvement period and to make findings on the record of the terms of the improvement period, therefore, the Petitioner prays that this Honorable Court shall grant its petition for leave to appeal and reverse the lower Court's granting of a six month post adjudicatory improvement period and remand the case for disposition as to both Samantha C. and Christopher C. and such other relief as this Court finds is required by the circumstances of this case.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Leave to Appeal and Docketing Statement for same, has been served on the following parties, by forwarding a true copy thereof to them, by U. S. Mail, first class, postage prepaid, this 18th day of November, 2009:

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