

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN THE INTEREST OF:

Case Numbers:

James M.  
Elizabeth F.  
Kyia F.  
Jebadia F.

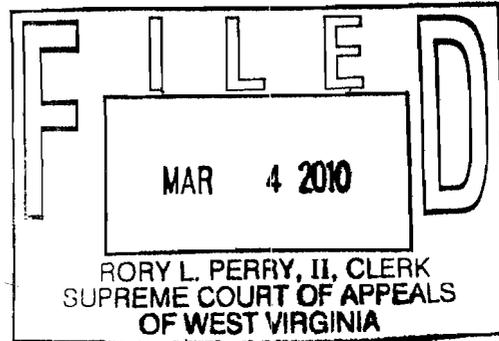
08-JA-15  
08-JA-16  
08-JA-17  
08-JA-40

Honorable Gary L. Johnson, Judge

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**BRIEF OF APPELLANT**  
**BY GUARDIAN AD LITEM ON BEHALF OF ELIZABETH R. AND KYIA F.**

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**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
TYPE OF PROCEEDING .....	1
STATEMENT OF FACTS .....	3
ASSIGNMENT OF ERROR .....	6
POINTS AND AUTHORITIES RELIED UPON .....	7
DISCUSSION OF LAW .....	7
Standard of Review.....	7
Argument.....	7
CONCLUSION .....	11
CERTIFICATE OF SERVICE .....	12

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**TABLE OF AUTHORITIES**

1. *West Virginia Code* § 49-6-1, *et seq.*
2. *West Virginia Code* § 49-3-1
3. *Burgess v. Peorterfield*, 196 W. Va. 178, 469 S. E. 2d 114 (1996)
4. *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S. E. 2d 801 (2005)

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**BRIEF OF APPELLANT**

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This Appeal is brought by the Guardian *ad litem* of Elizabeth F. and Kyia F. (hereinafter referred to by their first names<sup>1</sup>) pursuant to Rule 49 of the West Virginia Rules of Child Abuse and Neglect Proceedings and Rule 4A of the Rules of Appellate Procedure.

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

This proceeding is brought under the West Virginia Child Neglect or Abuse Act, *West Virginia Code* § 49-6-1 *et seq.*, in which the Guardian *ad Litem* for Elizabeth and Kyia seeks to appeal an Order of the Circuit Court of Nicholas County, West Virginia, entered on October 9, 2009, which ordered the gradual transition of James, Elizabeth, Kyia, and Jebadia (hereinafter collectively referred to as “the children”) into the home of Janice B. and Holly B., her husband, maternal grandparents of the infants, with a permanency plan of adoption in said home. The Circuit Court

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For the purpose of this brief, the Guardian *ad litem* will not disclose the last names of the parties pursuant to this Court’s past practice as set forth in *West Virginia Dep’t of Human Servs v. Cherge M.* 356 S.E.2d 181, 177 W. Va. 688.

stayed the placement while this appeal is pending. *See*, “Order Regarding Permanent Placement” entered on October 9, 2009. (Hereinafter referred to as “Order”) (See, Exhibit “A”)

The State of West Virginia through Department of Health and Human Resources (hereinafter “DHHR”) filed a petition alleging abuse and neglect of James \_\_\_\_\_), Elizabeth (born \_\_\_\_\_), and Kyia, ( \_\_\_\_\_ )<sup>2</sup> by their parents Mary F. (mother of all the children), Christopher F. (father of Elizabeth and Kyia) and Timothy F. (father of James). At the adjudicatory hearing held on April 29, 2008, each parent was found to be abusive and neglectful and was given an improvement period.

On November 2, 2008, Jebedia was born and a petition was filed against Mary F. At the time of the birth, the father of Jebedia was unknown.

Mary F. relinquished her parental and custodial rights to all four children on February 13, 2009. Soon thereafter, the father of Jebedia was found to be James H. James H. relinquished his parental and custodial rights to Jebedia on April 6, 2009. Timothy F. relinquished his parental and custodial rights to James on May 6, 2009. Christopher F. relinquished his parental and custodial rights to all four children<sup>3</sup> on July 23, 2009.

After the parents had relinquished their rights to these children, the Circuit Court allowed Janice and Holly B., the maternal grandparents of all of the children, and Elizabeth B., the paternal aunt of Elizabeth and Kyia, to intervene. The Circuit Court had previously appointed a Guardian

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At the time of the filing of the original petition, Jebedia F. was not yet born.

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Though Christopher F. is the biological father of Elizabeth F. and Kyia F., Christopher F. was married to Mary F. when Jebedia F. was born and was the step-father of James F. for most of the child's life.

*ad litem* for Elizabeth and Kyia because their paternal family had indicated interest in adopting only Elizabeth and Kyia.

A hearing was held on September 24, 2009, regarding the placement of the children. A number of individuals had contacted the DHHR to be considered as a possible adoptive home(s) for the children; however, the September 24, 2009 hearing only concerned the placement of the children with the maternal grandparents.<sup>4</sup> The Circuit Court erred by determining that the grandparent preference was not overcome by the evidence that the maternal grandmother had provided for the needs of her substance abusing biological children over the needs of her adoptive children. *See* Order. Thereupon, the Circuit Court placed the children with the maternal grandparents, but stayed the placement until this appeal has been decided.

#### STATEMENT OF FACTS

Janice B., the maternal grandmother of all four children, is also the biological mother of four adult children, namely, Amy, Jennifer, Christopher George, and Mary. *See* Order ¶ 4. She is the adoptive mother of two children, Christopher, age seven (7) and Hollie, age nine (9). (Janice's oldest daughter, Amy, is the biological mother of these children, but relinquished her parental rights when she was convicted of third degree arson and was sentenced to the penitentiary.) *See* Order ¶ 6. Holly and Janice B. are in the process of adopting two children, Ashley, age sixteen (16) and Shantee, age thirteen (13). *See* Order ¶ 9. Ashley and Shantee are not biologically related to Janice and Holly B., however, they were referred to Janice and Holly B. through Holly's family. Not

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At that time, no other grandparent had stepped forward to be considered for possible placement.

including the children which are a part of these proceedings or the adult children, Janice and Holly currently have four children in their home. See, Family Tree (See, Exhibit "B").

Amy and Christopher George and Mary M. are well known in the halls of justice of the Circuit Court of Nicholas County, West Virginia. Each of them has or has had a severe drug abuse problem and extensive criminal history. See Order ¶¶ 11-15. Christopher George and his wife, Misty, lived in a house trailer in the backyard of Janice B. for many years. The backyard trailer is approximately fifty (50) feet from the back door of Janice's home. During the time Christopher George and his wife lived in the backyard trailer, Christopher George was convicted for battery, petit larceny, shoplifting and contributing to the delinquency of a minor. See Order ¶ 11. Also during this time, Christopher George and Misty were the subject of a child protective services case which was before the Circuit Court for substance abuse problems and domestic violence issues. See Order ¶ 24. Mary M. has a significant and long standing substance abuse problem and was recently charged with third degree sexual assault.<sup>5</sup> Mary M. lived in the home of Janice B, while she was abusing substances. See Order ¶ 14.

**Janice B. has demonstrated repeatedly that she places the needs of her biological children over the needs of adoptive children.** She has done this by allowing Mary M. to stay in her home with Janice's adoptive children even when she knew that Mary M. had a severe drug problem. At the same time, she also allowed Christopher George M. and his family to live in the backyard trailer during which time he was convicted of multiple criminal charges. Further, Christopher George M. and his wife were using various illegal substances while living there. Janice B. was aware of their substance abuse because at one point she notified the DHHR. See Order ¶ 24.

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The father of Jebadia was fourteen years old when Jebadia was conceived.

While helping and protecting her biological children, she exposed her adoptive children to individuals who were violent and abusing drugs – the biological children of Janice B.

Upon the relinquishment/termination of the biological parents of the children, Holly and Janice B. petitioned the Circuit Court to be considered an adoptive placement for these children. The DHHR caused a home study to be prepared. The home study indicated that the home was appropriate. However, the home study did not address Janice B.'s tendency to provide for her biological children needs while failing to protect her adoptive children. Further, the home study did not include an inspection of the backyard trailer or an investigation of Christopher George and Misty who were living there at the time.

At the hearing held on this issue, the Circuit Court relied heavily on testimony of Janice B. Janice B. testified from that point on, she would not allow her biological children to live in the backyard trailer. Janice B. further testified that if the Circuit Court ordered her not to allow her biological children around her adoptive children, then she would not allow them around. She admitted that she currently allowed her biological children to be around her adoptive children. The main concern of the Guardian *ad litem* is that Janice B. had to have a court order before she was willing to protect her adoptive children. Historically, she has been unwilling to sever her relationships with her biological children for the benefit of her adoptive children.

At the conclusion of the September 24, 2009 hearing, the Circuit Court of Nicholas County ordered that the children be placed with the maternal grandparents over the objection of the Department of Health and Human Resources, the Guardian *ad Litem* for James M. and Jebediah F., and the Guardian *ad Litem* for Elizabeth F. and Kyia F. The Circuit Court based its decision on West Virginia Code § 49-3-1 and *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801. The

Circuit Court specifically stated, "Absent the grandparent preference, the Court doubts his decision would be the same." See Order, Conclusion of Law.

Since the conclusion of the September 24, 2009 hearing, the Adoption Worker reported to the Guardians *ad litem* that Janice bonded Christopher George out of jail and encumbered her home. See, Notice of Bond Encumbrance, Exhibit "C". He was arrested for delivery of methamphetamine. On his Public Defender application, he used Janice's address for his mailing address. See, Affidavit, Exhibit "D". On January 22, 2010, she withdrew her bond. See Bail Piece, Exhibit "E". The real property is still encumbered because her son has not bonded through another source or has been arrested.

The Adoption Worker also reported that another worker had made a home visit to Janice's home and found her biological children having dinner with her adoptive children. Although the children that are the subject of this petition were not at the home, Janice is still exposing her adoptive children to her biological children even after the Circuit Court has expressly told her not to.

#### ASSIGNMENT OF ERROR

**The Circuit Court of Nicholas County erred in ordering the adoptive placement of the children in the home of their maternal grandparents based upon (i) the Conclusion of Law that the Circuit Court had no other alternative than to place the children with the maternal grandparents pursuant to *Napoleon v. Walker, supra.*, and (ii) the Finding of Fact that DHHR and the Guardians *ad litem* did not prove by clear and convincing evidence that the maternal grandparents would not protect the children from harm and that it was not in the best interest of the children to be placed in the home of the maternal grandparent because the Circuit Court did not consider the evidence of the history of Janice exposing her adoptive children to her biological children.**

## POINTS AND AUTHORITIES RELIED UPON

### Case Law

*Burgess v. Peorterfield*, 196 W. Va. 178, 469 S. E. 2d 114 (1996)

*Napoleon S. v. Walker*, 217 W. Va. 254, 617 S. E. 2d 801 (2005)

### Statutes

*West Virginia Code* § 49-6-1, *et seq.*

*West Virginia Code* § 49-3-1

## DISCUSSION OF LAW

### STANDARD OF REVIEW

“This Court reviews the Circuit Court’s final order and ultimate disposition under an abuse of discretion standard. [This Court] review[s] challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syl. Pt. 4 *Burgess v. Peorterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

**THE CIRCUIT COURT ERRED IN RULING THAT BASED UPON *NAPOLEON V. WALKER, SUPRA*, IT HAD NO OTHER ALTERNATIVE THAN TO PLACE THE CHILDREN WITH THE MATERNAL GRANDPARENTS IN LIGHT OF THE OVERWHELMING EVIDENCE PRESENTED TO THE COURT THAT IT IS NOT IN THE BEST INTEREST OF THE CHILDREN TO BE PLACED IN THAT HOME.**

The Circuit Court erred in ruling that based upon *Napoleon v. Walker, supra*, it had no other alternative than to place the children with the maternal grandparents in light of the overwhelming evidence presented to the court that it is not in the best interest of the children to be placed in that home. In Syllabus Point 4 of *Napoleon v. Walker, supra*, this Court held that:

West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination

by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child.

The facts in *Napoleon v. Walker, supra*, are significantly different than the facts in the present case. In *Napoleon v. Walker, supra*, the underlying abuse was committed by the child's father. The father had inflicted a spiral fracture to the child's left femur while giving the child a bath. Once at the hospital, the health care providers found that the two month old child had twenty bruises on his body. Both parent's parental rights were terminated. *Id.* 217 W. Va. at 257, 617 S.E. 2d at 804. Prior to the termination of parental rights, the paternal grandparents notified DHHR of their desire to adopt the child. The paternal grandparents lived in Florida and previous to the filing of the petition, had had little contact with the infant. The Florida Department of Children and Families completed a home study which concluded that the grandparents could provide a safe and loving home. *Id.* The overall concern in this case was whether the grandparents would protect the child from their son. They had some difficulty in believing that their son would abuse his child and this fact caused the Guardian *ad litem* and case worker to believe that they would allow their son to visit with the child. *Id.* 217 W. Va. at 258, 617 S.E. 2d at 805. However, this Court determined that given the totality of the evidence presented, the grandparents would protect the child from his father. *Id.* 217 W. Va. at 258, 617 S.E. 2d at 806. The Court in *Napoleon v. Walker, supra*, had very little evidence upon which to make its decision. There was the home study, a psychological evaluation, and an affidavit by the grandparents. Each piece of evidence indicated that the grandparents would protect the child. There was no evidence of how the grandparents had reacted in a similar situation because the situation had not previously occurred.

In the present case, there is a home study, a psychological evaluation and testimony which indicate that Janice B. will keep her biological children away from these children *if it is court ordered*. However, because Janice B. previously adopted her oldest daughter's children, we are able to review her past behavior and determine if she has protected her adoptive children from her biological children. The Court in *Napoleon v. Walker, supra*, did not have this luxury. Even after Janice B. adopted Christopher and Hollie, she continued to allow Christopher George and Misty to live in the backyard trailer. She allowed them to live there even after Christopher George had been arrested and plead guilty to violent crimes. She allowed them to live there after she herself had turned them into Child Protective Services for abusing drugs. She allowed them to live there even when she knew there was domestic violence in their home.

Janice B. allowed Mary F. to live in the same home as her adoptive children. She allowed Mary to live there even though she was well aware Mary's drug abuse problem. It was only after the multi-disciplinary team met and the Guardians *ad litem* and DHHR indicated they would not recommend Janice as an adoptive placement that Janice ask Christopher George and Misty to move. What troubles the Guardian *ad litem* the most is the fact, Janice needs a court to order her to keep these drug addicts away from her adoptive children.

What shocks the Guardian *ad litem* is that after the hearing placing these children with her<sup>6</sup>, she continues to enable her drug addicted son, Christopher George, by taking a lien against her own home, in order to get a surety bond for Christopher George following his most recent arrest for delivery of methamphetamine. On January 22, 2010, Janice B. executed a bail piece. However, to

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The children are not living at her home, but do have weekly visitation, due to the order to stay the placement.

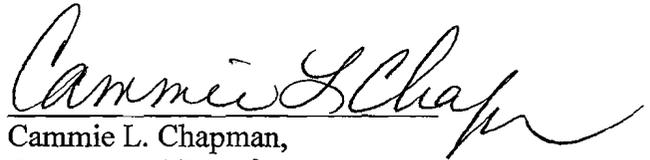
date Christopher George has not been arrested and the lien has not been released. The address that Christopher George uses in all of his arrest documents is his mother's address, even his affidavit for public defender services. (This arrest occurred after the ruling at issue.) Even after the Circuit Court told Janice that he had grave concerns about her biological children being around her adoptive children, she invites her biological children to dinner with her adoptive children. She allowed Christopher George in her home even though he was out on bond for delivering methamphetamine. Janice B. is unable or unwilling to "cut off" ties with her biological children to protect her adoptive children. Based on Janice's history, she apparently does not understand what the Circuit Court is telling her.

In *Napoleon v. Walker, supra*, this Court only had the promise of the grandparents to protect the child and the comfort of the miles between Florida and West Virginia. The Court had no history of how the grandparents would react when faced with enabling their son or protecting their adoptive son. In the present case, we have that history. We know what Janice B. had done when faced with this predicament. Janice B. has chosen to enable her biological children to the detriment of her adoptive children. She continues to choose the needs of her biological children over her adoptive children by jeopardizing the ownership of her home in order to make sure her son is out of jail.

Therefore, the Circuit Court erred in relying solely on the testimony of Janice B., the home study, and the psychological evaluation of Janice and Holly B. However, this Court requires that the record in its entirety to determine the best interest of the children. Once the Court considers the repeated history of Janice B. choosing to enable her drug addicted biological children to the detriment of adoptive children, then it is clear that the best interest of James M., Elizabeth F., Kyia F., and Jebadiah F., is not in the home of Janice and Holly B.

**WHEREFORE**, the Guardian *ad litem* respectfully request that this Court find the Circuit erred in placing the children with the maternal grandparents and allow the multi-disciplinary team to conduct a nationwide search for an adoptive home for these children.

Respectfully submitted,

A handwritten signature in cursive script that reads "Cammie L. Chapman". The signature is written in black ink and is positioned above the printed name.

Cammie L. Chapman,  
Guardian *ad litem* for  
Elizabeth F. and Kyia F.

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served a true and accurate copy of the foregoing **Brief of Appellant** upon the parties in the above-styled civil action, via United States mail and/or hand delivery, upon all parties, counsel of record, this the 3<sup>rd</sup> day of March, 2010, addressed as follows:

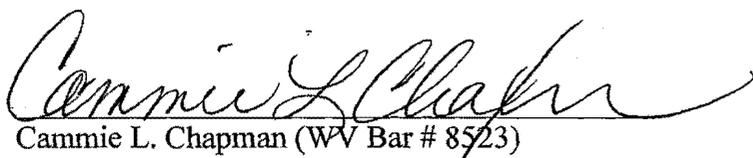
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**EXHIBITS**  
**ON**  
**FILE IN THE**  
**CLERK'S OFFICE**