

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

**WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,**

Petitioner Below/Appellee,

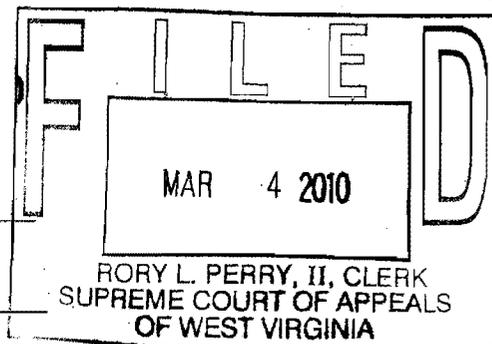
**vs: Logan County Case No. 08-JA-33-O
Judge Eric H. O'Briant
Supreme Court Case No. 35487**

Respondents Below/Appellant.

In the Interest of:

JESSICA

APPELLANT'S BRIEF



**FROM THE CIRCUIT COURT OF
LOGAN COUNTY, WEST VIRGINIA**

**TO THE HONORABLE JUSTICES
OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

**Mark Hobbs, Bar No. 1744
Professional Building
Post Office Box 974
Chapmanville, West Virginia 25508
(304) 855-4878**

Counsel for Appellant,

**THE KIND OF PROCEEDING AND NATURE OF
RULING IN THE CIRCUIT COURT**

NOW COMES THE Respondent, _____, who at all times hereinafter mentioned shall be referred to as "Appellant", by Counsel, Mark Hobbs, pursuant to Logan County Case No. 08-JA-33-O, and submits the following Appellant's Brief concerning the Petition for Appeal of a Final Order entered in this matter on June 9, 2009. This case involves an abuse and neglect proceeding which was filed July 2, 2008, in the Circuit Court of Logan County, West Virginia, and wherein the Parental Rights of the Appellant were terminated pursuant to the aforesaid Order entered on June 9, 2009. The Appellant is the father of the infant child, namely, Jessica

STATEMENT OF FACTS

Civil Action No. 08-JA-33-O began with a filing of a verified Petition for Immediate Custody of Minor Children in Imminent Danger in the Circuit Court of Logan County, West Virginia, on July 2, 2008. The Petition was filed by the Department and alleged, inter alia, that the Appellant, _____, had overdosed on benzodiazepines and opiates and was on a ventilator. Said Petition further alleged extensive law enforcement intervention with the family.

A Preliminary Hearing was held in this matter on July 11, 2008, wherein it was Ordered that the infant, Jessica _____, shall remain in the physical and legal custody of the Department. At the Adjudicatory Hearing held on August 6, 2008, the Appellant, _____, moved and was granted a post-adjudicatory improvement period. Furthermore, the Appellant was granted visitation with the infant child.

It is undisputed that sometime after the Preliminary Hearing on July 11, 2008, the Appellant, _____, incurred a difficult time trying to beat his addiction to prescription medication. It should be clear from the reading of the record that the Appellant made several

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

attempts to conquer this addiction but was unsuccessful in his endeavors. It should also be remembered that it is undisputed that the infant child in this matter, namely, Jessica , who is now thirteen (13) years of age has consistently indicated an unequivocal desire to live with her father, the Appellant herein.

On June 5, 2009, a Dispositional Hearing was held wherein the parental rights of the Appellant, , were terminated. Unfortunately, the Appellant, , was not present for this hearing. The Appellant's absence from this hearing should not be construed as an admission that he was willing to forego his daughter. The Appellant had always desired to have his daughter returned to him. It is to the Order from that June 5, 2009, hearing to which the Appellant appeals.

ASSIGNMENTS OF ERROR

- 1. THE CIRCUIT COURT FAILED TO FOLLOW THE MANDATES OF CHAPTER 49-6-5(a)(6) AS IT FAILED TO MAKE CERTAIN FINDINGS IN ITS ORDER ON THE TERMINATION OF PARENTAL RIGHTS AS REQUIRED BY THIS SUBDIVISION.**
- 2. THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE PARENTAL RIGHTS OF THE APPELLANT SHOULD BE TERMINATED.**

POINTS AND AUTHORITIES

STATUTORY LAW:

1. West Virginia Code § 49-6-5(a)(6).

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

CASE LAW:

1. Syl. Pt. 1, McCormick v. Allstate Insurance Company, 197 W.Va. 415, 475 S.E.2d 507 (1996).
2. Syl. Pt. 1, In the Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996).
3. Syllabus Point 1, State ex rel Virginia M. v. Virgil Eugene S. II, 197 W.Va. 456, 476 S.E.2d 548 (1996).
4. In re Jamie Nicole H., 205 W.Va. 176, 517 S.E.2d 41 (1999).
5. Syllabus Pt. 6, In Re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973).
6. Syllabus Point 1, Matter of Adoption of Schoffstall, 179 W.Va. 350, 368 S.E.2d 720 (1988).

DISCUSSION OF LAW

"When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. 'Syl. Pt. 1, McCormick v. Allstate Insurance Company, 197 W.Va. 415, 475 S.E.2d 507(1996)."

"Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

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 the Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syllabus Point 1, State ex rel Virginia M. v. Virgil Eugene S. II, 197 W.Va. 456, 476 S.E.2d 548 (1996).

THE CIRCUIT COURT FAILED TO FOLLOW THE MANDATES OF CHAPTER 49-6-5(a)(6) AS IT FAILED TO MAKE CERTAIN FINDINGS IN ITS ORDER ON THE TERMINATION OF PARENTAL RIGHTS AS REQUIRED BY THIS SUBDIVISION.

West Virginia Code 49-6-5(a)(6) states as follows:

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 non-abusing parent, if there be one, or, if not, to either the permanent

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

guardianship of the department or a licensed child welfare agency. The Court may award sole custody of the child to a non-abusing battered parent. If the court shall so find, then in fixing its dispositional order the court shall consider the following factors: (A) The child's need for continuity of care and caretakers; (B) the amount of time required for the child to be integrated into a stable and permanent home environment; and (C) other factors as the court considers necessary and proper. ***Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights.*** No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final. In determining whether or not parental rights should be terminated, the Court shall consider the efforts made by the department to provide remedial and reunification services to the parent. The Court order shall state: (i) That continuation in the home is not in the best interest of the child and why; (ii) why reunification is not in the best interests of the child; (iii) whether or not the department 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 the placement or to eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home, or that the emergency situation made such efforts unreasonable or impossible; and (iv) whether or not the department made reasonable efforts to preserve and reunify the family, or some portion thereof, including a description of what efforts were made or that such efforts were unreasonable due to specific circumstances.

The above section and subdivision require the Court to make very specific findings before it draws its conclusions to terminate.

A review of the Order from the June 5, 2009, hearing from which this Appeal is taken clearly shows that the Judge did not follow the

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

mandates of Chapter 49, Article 6, Section 5, Subsection (a),
Subdivision (6). The Court simply drew its conclusions without
making any specific findings of fact which would comply with this
subdivision. More specifically, the Court found and Ordered as
follows:

1. That it remains contrary to the best interest of the child to return home; and
2. That the WVDHHR has used all reasonable efforts to reunify the family and they have failed; and
3. That there is no reasonable likelihood that the allegations that led to the filing of this case can ever be corrected; and
4. That the infant shall remain in the legal and physical custody of the WVDHHR; and
5. That the WVDHHR has made reasonable efforts to prevent termination of the Parental and Custodial Rights of Respondent, _____; and
6. That the WVDHHR has made reasonable efforts to prevent termination of the Parental and Custodial Rights of Respondent, _____; and
7. That no lesser alternative exists to the termination of Respondent, _____; and
8. That no lesser alternative exists to the termination of Respondent, _____; and
9. The Infant shall remain in the legal and physical custody of the WVDHHR; and
10. That Respondent, _____, Parental and Custodial Rights to the Infant Respondent is hereby and forever Terminated; and
11. That Respondent, _____, Parental and Custodial Rights to the Infant Respondent is hereby and forever Terminated.

Obviously, the Court's Order attempted to address some of the requirements of the Statute but never made specific findings on why it was drawing the conclusions on its findings.

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

Furthermore, the Appellant is mindful of the case of In re Jamie Nicole H., 205 W.Va. 176, 517 S.E.2d 41 (1999). However, a review of the transcript of June 5, 2009, does not indicate why the Court made its specific findings and why it was reaching its conclusions.

If the Supreme Court reviews Chapter 49, Article 6, Section 5, Subsection (a), Subdivision (6), it will find that the Court Order terminating parental rights shall state why continuation in the home is not in the best interest of the child and shall state why reunification is not in the best interest of the child. It is clear that the Order entered on June 9, 2009, from the hearing held on June 5, 2009, to which this Appeal is taken does not spell out specific findings by the Court as to why continuation in the home is not in the best interest of the child and why reunification of the child to her parents or parent is not in the best interest of the child. Once again, it appears that the conclusions made by the Court are not supported by appropriate findings.

THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE PARENTAL RIGHTS OF THE APPELLANT SHOULD BE TERMINATED.

The standard of proof required to support a court order limiting or terminating parental rights to custody of minor children is clear, cogent and convincing proof. Syllabus Pt. 6, In Re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973). Syllabus Point 1, Matter of Adoption of Schoffstall, 179 W.Va. 350, 368 S.E.2d 720 (1988).

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

Appellant reminds this Honorable Court that clear and convincing evidence is a very strong burden to which the Department did not prove. Furthermore, why didn't the Department or the Court make reasonable efforts to preserve the family and to prevent the ultimate need for removing the children from Appellant's care?

Be it remembered that the child in this matter is thirteen (13) years of age and will be fourteen (14) on January 26, 2010.

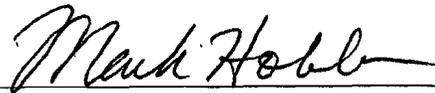
Appellant reminds this Court that when considering parental termination ***the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights.*** As discussed earlier, the thirteen (13) year old child in this matter has consistently expressed an unequivocal desire to return home to the Appellant. Consequently, there is no specific finding by the Court as to why the wishes of the thirteen (13) year old child were ignored and there was no determination by the Court as to whether the child was of an age of discretion. Therefore, the Department failed to meet its burden of proof.

CONCLUSION

Based upon the above, the Appellant, hereby submits to this Court that sufficient grounds have been

established to remand this matter back to the Circuit Court of Logan County, West Virginia, for further proceedings that are consistent with the Court's decision; and that upon full hearing, that the parental rights of the Appellant be reinstated.

By Counsel



Mark Hobbs, Bar No. 1744
Professional Building
Post Office Box 974
Chapmanville, West Virginia 25508
(304) 855-4878

Counsel for Appellant,

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

CERTIFICATE OF SERVICE

I, Mark Hobbs, Counsel for Appellant, , do hereby certify that a true and accurate copy of the foregoing Appellant's Brief was sent by United States Mail, postage prepaid, to the following:

Sabrina Amick
Assistant Prosecuting Attorney
420 Main Street
Logan, West Virginia 25601
Counsel for WV DHHR

Erica Barker Cook, Esquire
Law Office of George Partain
Post Office Box 808
Logan, West Virginia 25601
Counsel for Infant Respondent, Jessica

Marvin Joel Baker, Esquire
Cook & Cook
62 Avenue C
Madison, West Virginia 25130
Counsel for Adult Respondent,

And the original and nine (9) copies of said Appellant's Brief was hand delivered to the following:

West Virginia Supreme Court of Appeals
1900 Kanawha Boulevard, East
Building 1, Room E-317
Charleston, West Virginia 25305

On this the 4th day of March, 2010.

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508


Mark Hobbs