

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
SUPREME COURT CASE NO. 35487**

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

**Petitioner Below/Appellee,**

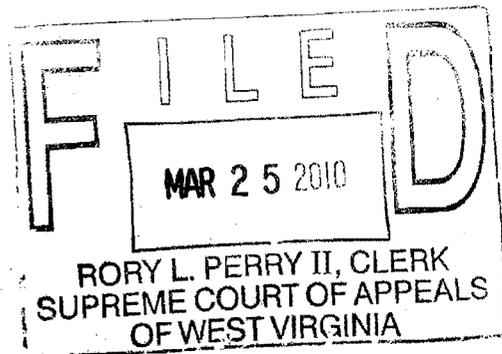
**(Underlying Case)  
Logan County Case No. 08-JA-33-0  
Honorable Eric H. O'Briant, Judge**

**MG,  
KG,**

**Respondents Below/Appellant.**

**In the Interest of:**

**JG DOB**



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**BRIEF OF APPELLEE  
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

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**March 25, 2010**

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### **Kind of Proceeding and Nature of Ruling in the Circuit Court**

This case arises out of an abuse and neglect proceeding filed by the Logan County Office of the West Virginia Department of Health and Human Resources (hereafter the "Department") in July 2, 2008, in the Circuit Court of Logan County, West Virginia, wherein the Department alleged that JG had overdosed on drugs, was in the hospital, and was unable to provide supervision and care for JG because of persistent drug abuse. During the pendency of that petition, MG requested and was granted a post-adjudicatory improvement period on August 6, 2008. However, that post-adjudicatory improvement period was later revoked for noncompliance. The parental rights of MG were terminated on June 9, 2009. MG appeals the order terminating his parental rights.

### **Statement of Facts**

The Department previously filed a petition on JG that involved allegations of drug abuse by JG leading to lack of supervision and neglect of JG in August 2007, wherein it was determined that JG, then eleven (11) years of age had been truant from school, as well as abusing marijuana.

The prior petition was resolved with a pre-adjudicatory improvement period, wherein MG agreed to seek help to conquer his addiction to drugs.

He completed that improvement period in November of 2007 and was given sole custody of JG.

Less than a year later in July 2008, the Department filed another petition, this time alleging that MG had overdosed on drugs, was on life support, and was thereby unable to parent his child due to drug abuse.

In August 2008, MG requested and was granted a post-adjudicatory improvement period requiring that he complete a drug treatment program, submit to drug screens, and submit to random pill counts, among other conditions.

MG did not comply with the terms of the post-adjudicatory improvement period.

MG would miss scheduled drug screens, would not submit to pill counts would sometimes miss hearings, and would at other times appear in an apparently intoxicated state.

MG did not appear for the hearing terminating his parental rights.

Nevertheless, the Circuit Court ordered post-termination visitation provided MG could pass two drug screens.

MG took one drug screen after the hearing terminating his parental rights, but has not presented to take another drug screen since 2009.

JG makes it clear that she cares for MG, but the relationship has taken its toll, as evidenced by her marijuana use starting at age 10, her truancy from school at a young age, and statements to her Department worker that she wishes she could be the child and not the parent.

### **Standard of Review**

This Supreme Court has set forth the standard of review in abuse and neglect cases, previously stating that:

"Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall . make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety."

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

### **Discussion of the Law**

For a termination of parental rights West Virginia Code requires that there be no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and that the termination be necessary for the welfare of the child. West Virginia Code § 49-6-5(a)(6).

In making this decision, the court shall also give consideration to the wishes of a child that is fourteen or older, or otherwise of an age of discretion. West Virginia Code § 49-6-5(a)(6).

Additionally, the court order memorializing this decision shall make explicit its findings in the following manner:

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. West Virginia Code § 49-6-5(a)(6).

However, this Court has also held that, "A circuit court's order that fails to track the language of subdivision (a)(6) of this section and is deficient in failing to state the required conclusions may still be upheld if review of the transcript of the dispositional hearing establishes that the court considered each of the statutory factors and reached the required conclusions prior to making its ruling of termination." *In re Jamie Nicole H.*, 205 W.Va. 176, 517 S.E.2d 41 (1999).

### **Argument**

Review of the transcript of the dispositional hearing in this case reveals that all parties had an opportunity to present evidence and address the court through their lawyers and that the court did consider their arguments and made appropriate findings of fact. MG did not appear at the hearing. KG did not appear at the hearing. The Department worker appeared and requested that parental rights be terminated to the thirteen year old daughter because of the history of failed attempts at rehabilitation. The Department worker further testified that, pursuant to a post-adjudicatory improvement period MG had attended an in-patient detox program at Highland Hospital MG and was discharged successfully. However, upon discharge MG was supposed to enter the FUTURES program, a ninety day in-patient drug treatment program in Logan, and did

not. As of the date of the termination hearing in June 2009, the worker testified that MG had not submitted to any drug screens since January 2009.

As a result of the testimony of those present, the Judge considered the history of the case and made findings as follows:

"Well, [in] JG's best interest we all have hoped that KG and MG would deal with their substance abuse issues. Early on it was recognized and recommended that they avail themselves voluntarily of in-patient treatment programs to help them get clean in order that we could work keeping them clean so that they could properly parent their *teenage* daughter.

The Department did not object to post-adjudicatory improvement period for either parent. However, *the parents have failed to respond or follow through with recommended treatment which would have improved their capacity for parenting. They have willfully refused and are presently unwilling to cooperate in the development of a reasonable family case plan to lead to the child's return to their care, custody, and control.*

We have had MDTs and formulated preliminary plans to let them rehabilitate themselves but they again have refused and are presently unwilling to cooperate. Their attendance at hearings has been sporadic. They *have not followed through with their drug screens* as they promised they would do, which can only lead to the *conclusion that they are continuing to use drugs*. There is no doubt that each of them loves their daughter, that their daughter loves them; and their daughter yearns for them to clean up their act so that they can be a family unit.

However, the Court finds by clear and convincing evidence in this case that there is *no reasonable likelihood that the conditions of MG and KG being addicted to controlled substances can be substantially corrected*; and therefore, the Court grants the petition to terminate both the parental and custodial rights of each of the biological parents."

While the Order from the hearing might have lacked some information, it can be determined from the transcript of the hearing that the judge specifically linked the parents inability or unwillingness to resolve their drug addiction with a lack of improvement in their

capacity to parent JG, their teenage daughter, and as such that their failure to improve their capacity necessitated the termination of their parental rights.

Currently, the permanency plan for JG remains permanent legal guardianship until the age of eighteen (18), with continued visitation with MG, provided he can demonstrate two consecutive negative drug screens and remain sober in the presence of JG.

Wherefore, the Appellee, the West Virginia Department of Health and Human Resources, requests that the order of the Circuit Court of Logan County terminating parental rights be upheld or, in the alternative this matter be sent back for further proceedings consistent with this Court's decision that custody of JG does not return to MG.

Respectfully submitted by

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Respondents Below/Appellant.

In the Interest of:

JG

**CERTIFICATE OF SERVICE**

I, Michael L. Jackson, Assistant Attorney General, and counsel for the West Virginia Department of Health and Human Resources, do hereby certify that on this 25<sup>th</sup> day of March, 2010, I served a copy of the foregoing "**BRIEF OF APPELLEE THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES**" by United States Mail, postage prepaid, addressed as follows:

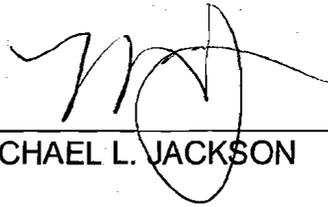
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And the original and nine (9) copies of said Appellee's Brief was hand delivered to the following:

West Virginia Supreme Court of Appeals  
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building 1, Room E-317  
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A handwritten signature in black ink, appearing to be 'MJ', is written above a horizontal line.

MICHAEL L. JACKSON