

NO.: 35443

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

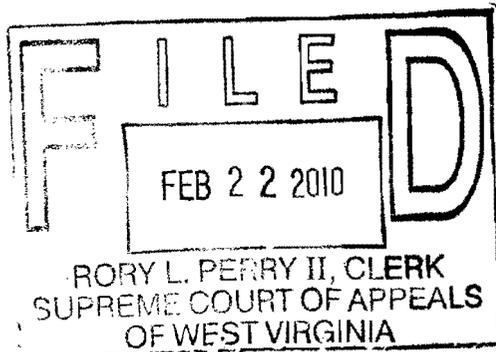
IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

IN RE: CHEVIE V.

CASE NO: 08-JA-46

Judge David W. Hummel, Jr.

APPEAL BRIEF OF THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN
RESOURCES



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

The West Virginia Department of Health and Human Resources, (“the Department”), appeals the Marshall County Circuit Court’s July 30, 2009 Order directing the Department to reimburse the respondent mother’s counsel, Patricia A. Kurelac, Esq. (“Ms. Kurelac”), \$6,810.63 paid to Dr. Mary Carrasco (“Dr. Carrasco”), an expert witness retained by Ms. Kurelac on behalf of the respondent mother.

On January 16, 2009, Ms. Kurelac filed an omnibus motion with the Marshall County Circuit Court in which she requested Court approval to hire a medical expert on behalf of her client. On February 23, 2009, the Circuit Court entered an order granting Ms. Kurelac’s motion for an expert medical witness and directing that the expert must accept the fees set by the West Virginia Public Defender Corporation (“PDC”). In a subsequent order, entered February 27, 2009, the Court approved the use of Dr. Carrasco as the respondent mother’s expert at the rates approved by the PDC to be paid by the PDC.

On July 30, 2009, without having a hearing to determine payment obligation, the Circuit Court entered an order directing the Department to reimburse Ms. Kurelac \$6,810.63 paid to Dr. Carrasco for her services. On August 18, 2009, the Department filed a motion asking the Circuit Court to reconsider its July 30, 2009 order. On August 24, 2009, the Circuit Court entered an order denying the Department’s motion for reconsideration and directing the Department to reimburse Ms. Kurelac. On September 17, 2009, the Department filed a motion with the Circuit Court requesting that the Circuit Court designate the payment issue as final and appealable and asking the Circuit Court

to stay the enforcement of its August 24, 2009 order until the matter can be resolved on appeal. On October 1, 2009, the Circuit Court granted the Department's motion and designated its ruling on the issue of payment for Dr. Carrasco's services as final and appealable. The Circuit Court also granted a thirty (30) day stay of its payment order.

The Department appeals the Circuit Court's determination that it must reimburse Ms. Kurelac for the expenses paid to Dr. Carrasco because Dr. Carrasco is a defense witness. Therefore, pursuant to West Virginia Code § 29-21-13a(e), any expenses incurred for Dr. Carrasco's services should be paid by the West Virginia Public Defender Corporation.

II.

STATEMENT OF FACTS

On November 21, 2008, the Department filed a petition with the Marshall County Circuit Court alleging that Chevie V. had been abused and/or neglected by her parents. Specifically, the petition alleged that Chevie's mother had burned her with cigarettes, using the burns to spell the word "WIMP" on Chevie's neck. The Department filed an Amended Petition on December 3, 2008, indicating that a medical examination of Chevie uncovered more cigarette burns on Chevie's back, arm, and ankles. Chevie's mother denied causing Chevie's injuries and questioned whether the wounds were actually cigarette burns.

On January 20, 2009, Chevie's mother filed "Respondent Mother's Omnibus Motions." In her motion, the respondent mother requested the opportunity to hire an expert to refute the Department's contention that Chevie's wounds were cigarette burns.

Respondent mother asserted, in her motion, that the West Virginia Public Defender Corporation ("PDC") would pay for the expert:

Counsel for Respondent has explored case and statutory law regarding expert fees in abuse and neglect cases and found nothing directly on point except that state expert witnesses in abuse and neglect and juvenile proceedings are treated the same and are paid in the same manner i.e., via the DHHR. As for Respondent parents' experts, counsel for Respondent received a response from Jack Rogers of the Public Defender Corporation who advises that throughout the state of West Virginia experts as well as investigative services are routinely employed by Respondent parents and paid for by the Public Defender Corporation. All that is required is a Circuit Court Judge's approval and Order for payment.

Respondent Mother's Omnibus Motions, p.1. In requesting the medical expert, the respondent mother said:

Respondent Mother is requesting that she be given the opportunity to hire an expert to determine whether or not the injuries or markings on the subject child's body are in fact cigarette burns. Respondent Mother's request is contingent upon whether or not the State is introducing an expert on said subject. It appears from the records provided thus far that the emergency room physician does not render an opinion per se but in fact is relying solely on the child's history or child's representations. If the State agrees on the record not to present an expert or expert opinion on the issue of the origin of said injuries, wounds or markings on the subject child's body then Respondent will withdraw her request for an expert.

Respondent Mother's Omnibus Motions, p.1. The Department filed a response to the Omnibus Motion in which it did not object to respondent mother hiring an expert and receiving payment or reimbursement from the PDC as long as the respondent mother showed a compelling need to justify her requests. State's and Department's Joint Response to Motions and Report, p.1.

The Circuit Court held a hearing on February 19, 2009 at which it considered respondent mother's omnibus motions. By order entered February 23, 2009, the Circuit

Court granted the respondent mother's motion for an expert medical witness to determine whether Chevie's wounds were cigarette burns. The Circuit Court ordered:

Further, the Court GRANTED the respondent mother's motion for an expert medical witness, said witness shall be limited to a physical examination of the alleged burned areas only and said expert witness must accept the fee as set forth by Public Defender Corporation fee schedule. Further, the medical expert shall review the alleged burns in Marshall County, West Virginia. It shall be a visual physical examination only, with not [sic] history to be taken. Photograph's are permitted but must be shared with all counsel. Once a medical expert has been secured, counsel for the respondent mother is DIRECTED to notify the Court.

February 23, 2009 Court Order, p.2.

On February 27, 2009, respondent mother informed the Circuit Court that she had retained Dr. Carrasco as an expert to examine Chevie's wounds. Respondent mother requested that the Circuit Court approve Dr. Carrasco as the respondent's witness to be paid from and by the PDC. By order that same day, the Circuit Court approved the use of Dr. Carrasco as the respondent mother's medical expert and stated that the PDC would pay for Dr. Carrasco.

Accordingly it is ORDERED that Respondent Mother's expert, Dr. Mary Carrasco, shall be paid by and from West Virginia Public Defender Corporation at an hourly out of court fee of \$325.00 per hour and in court fee of \$350.00 per hour; it is further ORDERED that said expert's mileage shall be paid at 44.5 cents per mile and hotel and car rental with itemized invoices attached.

February 27, 2009 Court Order, p.1.

Despite the Circuit Court's previous order that the PDC would pay for Dr. Carrasco's services, on July 30, 2009, the Circuit Court entered an order directing the Department, and not the PDC, to reimburse Ms. Kurelac for Dr. Carrasco's services. The Circuit Court stated:

WHEREAS counsel has provided this Court with an Affidavit and copy of said bill and evidence of payment of said bill which are attached hereto and referenced herein; and

WHEREAS this Court has reviewed the billing invoice and Affidavit and approves same; and

Accordingly ORDERS that the West Virginia Department of Health and Human Resources reimburse Patricia A. Kurelac, Esq. the amount of \$6,810.63 paid by Patricia A. Kurelac for services and expenses rendered and incurred by Dr. Mary Carrasco.

July 30, 2009 Court Order.

On August 21, 2009, the Department filed a motion asking the Circuit Court to reconsider its order directing the Department to reimburse Ms. Kurelac. Without holding a hearing on the Department's motion for reconsideration, the Circuit Court denied the Department's motion and continued to order the Department to reimburse Ms. Kurelac. In denying the Department's motion, the Circuit Court cited West Virginia Trial Court Rule ("WVTCR") 27.02 and determined that payment for the respondent mother's expert was the Department's responsibility and not the responsibility of the PDC. In its August 24, 2009 order denying the Department's Motion for Reconsideration, the Circuit Court stated:

Furthermore, it is the **ORDER** of this Court that to the extent that this Court's order of February 27, 2009, is in contravention of the foregoing, same is hereby **AMENDED** to direct that payment of Dr. Mary Carrasco's fees and expenses are the responsibility of the West Virginia Department of Health and Human Resources and not the West Virginia Public Defender Corporation.

August 24, 2009 Court Order, p.4.

The Department appeals the Circuit Court's August 24, 2009 Order denying its Motion for Reconsideration and amending the February 27, 2009 Court Order because the Department believes that the expense for expert witnesses for respondent parents

in abuse and neglect cases does not fall under WVTCR 27.01 and 27.02; rather respondent parents' experts are covered by West Virginia Code § 29-21-13a(e) and are paid for by the PDC.

III.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in directing the Department to reimburse Ms. Kurelac \$6,810.63 for services rendered by Dr. Carrasco because Dr. Carrasco is a rebuttal witness for the respondent mother, and therefore, should be paid for by the West Virginia Public Defender Corporation.
2. The Circuit Court erred in applying West Virginia Trial Court Rules 27.01 and 27.02 because payment for expert witnesses retained by respondent parents to present rebuttal evidence does not fall within the purview of West Virginia Trial Court Rules 27.01 and 27.02 because such experts are not appointed by the Court.
3. The Circuit Court erred in allowing the Public Defender Corporation to set the fee schedule for Dr. Carrasco and then requiring the Department to pay for Dr. Carrasco's services.

IV.

ARGUMENTS AND DISCUSSIONS OF LAW

1. The Circuit Court erred in directing the Department to reimburse Ms. Kurelac \$6,810.63 for services rendered by Dr. Carrasco because Dr. Carrasco is a rebuttal witness for the respondent mother, and therefore, should be paid for by the Public Defender Corporation.

On January 20, 2009, the respondent mother filed a motion requesting that the Circuit Court allow her "to hire an expert to determine whether or not the injuries or markings on the subject child's body are in fact cigarette burns." Respondent Mother's

Omnibus Motions, p.1. The respondent mother characterized her request for an expert as a “respondent parents’ expert” and clearly stated that she wanted to hire an expert to contradict the Department’s evidence that Chevie’s wounds were cigarette burns. In her motion, respondent mother stated:

Respondent Mother’s request is contingent upon whether or not the State is introducing an expert on said subject . . . If the State agrees on the record not to present an expert or expert opinion on the issue of the origin of said injuries, wounds or markings on the subject child’s body then Respondent will withdraw her request for an expert.

Respondent Mother’s Omnibus Motions, p.1. Black’s Law Dictionary defines rebuttal witness as “a witness who contradicts or attempts to contradict evidence previously presented.” Black’s Law Dictionary (8th ed. 2004). Dr. Carrasco is a rebuttal witness because the respondent mother hired her to contradict the Department’s evidence that Chevie’s wounds were cigarette burns.

In requesting court approval for her rebuttal witness, the respondent mother stated that, although she could not find any law directly on point regarding who would pay for the expert witness, the West Virginia Public Defender Corporation (“PDC”) advised her that experts employed by respondent parents are routinely paid for by the PDC. West Virginia Code § 29-21-1 *et seq.* governs representation of indigent clients and the costs of their cases. W.Va. Code § 29-21-2(1) defines an “eligible client” as “any person who meets the requirements established by this article to receive publicly funded legal representation in an eligible proceeding as define herein.” “Eligible proceeding” is defined to include

Criminal chares which may result in incarceration; juvenile proceedings; proceedings to revoke parole or probation if the revocation may result in incarceration; contempt of court; **child abuse and neglect proceedings which may result in a termination of parental rights**; mental hygiene

commitment proceedings; extradition proceedings; proceedings which are ancillary to an eligible proceeding . . .

W.Va. Code § 29-21-2(2) (emphasis added). There is no dispute that the respondent mother qualifies for representation under W.Va. Code § 29-21-2 and that Ms. Kurelac was appointed as her counsel pursuant to W.Va. Code § 29-21-9(b).

West Virginia Code § 29-21-13a(e) provides for the payment of expert witnesses retained on behalf of indigent clients represented by panel attorneys appointed pursuant to W.Va. Code § 29-21-9. W.Va. Code § 29-21-13a(e), states, in part,

. . . For all other eligible proceedings, actual and necessary expenses incurred in providing legal representation, including, but not limited to, expenses for travel, transcripts, salaried or contracted investigative services and expert witnesses, shall be reimbursed to a maximum of one thousand five hundred dollars unless the court, for good cause shown, approves reimbursement of a larger sum.

W.Va. Code § 29-21-13a(e) (emphasis added). W.Va. Code § 29-21-13a(e) specifically states that expert witnesses retained on behalf of indigent clients represented under W.Va. Code § 29-21-2 *et seq.* are actual and necessary expenses incurred in providing legal representation to respondent parents. Consequently, the expense for expert witnesses, such as Dr. Carrasco, should be reimbursed by the PDC and not the Department.

2. The Circuit Court erred in applying West Virginia Trial Court Rules 27.01 and 27.02 because payment for expert witnesses retained by respondent parents to present rebuttal evidence does not fall within the purview of West Virginia Trial Court Rules 27.01 and 27.02 because such experts are not appointed by the Court.

Despite the plain language of W.Va. Code § 29-21-13a(e) providing for the PDC's reimbursement for expert witnesses and the Circuit Court's own previous court orders indicating that the PDC would pay for Dr. Carrasco's services, in its August 24,

2009 Order denying the Department's motion for reconsideration, the Circuit Court stated that the Department was responsible for Dr. Carrasco's services pursuant to WVTCR 27.01 and 27.02. WVTCR 27.01 states

Upon motion by a party or upon its own motion, the court may **appoint** an expert to perform a medical or psychological evaluation and may require such expert to testify, pursuant to West Virginia Code § 49-6-4.

(Emphasis added). WVTCR 27.02 says

The court shall by order establish in advance the reasonable fees and expenses to be paid to an expert. Payment shall be as follows: Upon completion of services by an expert, the court shall, by order, direct the State Department of Health and Human Resources to pay for the expert's evaluation, report writing, consultation, or other preparation; and the court shall, by order, direct payment by the Supreme Court's Administrative Office for the expert's fee and expenses entailed in appearing to testify as a witness.

The Department understands that it is responsible for the payment of experts in abuse and neglect cases pursuant to WVTCR 27.01 and 27.02. However, the Department contends that WVTCR 27.01 and 27.02 only apply to Court appointed experts and do not apply to rebuttal experts for respondent parents.

W.Va. Code § 49-6-4, cited in WVTCR 27.01, allows the Court to order that parties in abuse and neglect cases undergo medical and mental examinations. It also allows the Court to require an expert to testify regarding the mental examinations.

W.Va. Code § 49-6-4, however, does not require that the Department pay for all medical and mental examinations. The statute specifically states

If the child, parent or custodian is indigent, such witnesses shall be compensated out of **the Treasury of the State**, upon certificate of the court wherein the case is pending.

W.Va. Code § 49-6-4, in part, emphasis added. The statute does not specify which part of the Treasury of the State is to pay for the examinations. The Department contends

that WVTCR 27.01, providing that the Department pay for experts ordered pursuant to W.Va. Code § 49-6-4, applies only to those experts appointed by the Court and that experts retained by respondent parents should be paid for by the PDC pursuant to W.Va. Code § 29-21-13a(e). If the legislature intended that the Department should pay for all experts in abuse and neglect cases, the language of W.Va. Code § 49-6-4 should have read that such witnesses shall be compensated by the Department of Health and Human Resources, rather than the current language that "such witnesses shall be compensated out of the Treasury of the State." As an executive agency, funds dispensed by the PDC also come from the Treasury of the State.

WVTCR 27.01 addresses experts that are appointed by the Court in abuse and neglect cases. Black's Law Dictionary defines "appointment" as "the act of designating a person, such as a nonelected public official, for a job or duty." Black's Law Dictionary (8th ed. 2004). In the case *sub judice*, the Circuit Court did not appoint Dr. Carrasco to examine Chevie; rather, the Circuit Court approved the respondent mother's request to hire her own expert. The expert was not requested by the Circuit Court or chosen by the Circuit Court. The respondent mother chose the medical expert and asked the Circuit Court to allow her to use Dr. Carrasco to contradict any experts the Department would present. Respondent Mother's Omnibus Motions, p.1. WVTCR 27.01 does not mention experts hired on behalf of respondent parents and merely approved for payment by the Circuit Court. Because the Circuit Court did not appoint Dr. Carrasco the Department is not responsible for paying for Dr. Carrasco's services.

WVTCR 35.05 governs the compensation of experts in criminal matters. That rule says that experts retained on behalf of indigent defendants are paid for by the PDC. WVTCR 35.05 states:

(b) Expert Requested by Indigent Defendant. Upon completion of services by such expert, the court shall, by order, direct payment of Public Defender Services pursuant to W.Va. Code, Chapter 29.

WVTCR 27.02, governing the compensation of experts in abuse and neglect matters, does not distinguish between experts hired on behalf of the State, the Court, or the respondent parents. However, W.Va. Code § 29-21-2 specifically includes abuse and neglect proceedings as proceedings in which counsel must be provided by the PDC. It follows that all expenses paid by the PDC for an indigent defendant in a criminal case should also be paid by the PDC for a respondent parent provided counsel by the PDC in an abuse and neglect proceeding.

3. The Circuit Court erred in allowing the Public Defender Corporation to set the fee schedule for Dr. Carrasco and then requiring the Department to pay for Dr. Carrasco's services.

In its July 30, 2009 Court Order, the Circuit Court directed the Department to reimburse Ms. Kurelac \$6,810.63 for Dr. Carrasco's services. According to the invoice and affidavit attached to the Circuit Court's July 30, 2009 Order, the \$6,810.63 represented 20.75 hours of out of court work and 152 miles of driving. Dr. Carrasco arrived at the sum of \$6,810.63 by charging her time and miles at the rate set by the PDC and approved by the Circuit Court in its February 27, 2009 order. The Circuit Court ordered:

WHEREAS Public Defender Corporation has approved Dr. Carrasco's rates of \$325.00 per hour out of court and \$350.00 per hour in court; and mileage [sic] at 44.5 cents per mile; and hotel or car rental with itemized invoices attached;

Accordingly it is ORDERED that Respondent Mother's expert, Dr. Mary Carrasco, shall be paid by and from West Virginia Public Defender Corporation at an hourly out of court fee of \$325.00 per hour and in court fee of \$350.00 per hour; it is further

ORDERED that said expert's mileage shall be paid at 44.5 cents per mile and hotel and car rental with itemized invoices attached.

February 27, 2009 Court Order, p.1.

Expert fees required to be paid by the PDC on behalf of its clients are set by standards developed by the Indigent Defense Commission:

[The Indigent Defense Commission] has the following powers and duties:
(4) To develop standards for providing and compensating expert witnesses, investigators and other persons who provide services related to legal representation under this article.

W.Va. Code § 29-21-3b(f)(4). The Department does not contend that it has a right to set the fee schedule for experts retained by the PDC on behalf of its clients if the PDC will be paying for those experts. However, if the Department is required to pay for experts retained by respondent parents, then it is only just that the Department be allowed to set the fees for those experts.

West Virginia Code § 49-7-33 states that the Department, and not the PDC, sets the fee schedule for expert witnesses for which the Department is required to pay:

At any time during any proceedings brought pursuant to articles five and six of this chapter, the court may upon its own motion, or upon a motion of any party, order the West Virginia department of health and human resources to pay for professional services rendered by a psychologist, psychiatrist, physician, therapist or other health care professional to a child or other party to the proceedings. Professional services include, but are not limited to, treatment, therapy, counseling, evaluation, report preparation, consultation and preparation of expert testimony. ***The West Virginia department of health and human resources shall set the fee schedule for such services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate.*** Every such psychologist, psychiatrist, physician, therapist or other health

care professional shall be paid by the West Virginia department of health and human resources upon completion of services and submission of a final report or other information and documentation as required by the policies and procedures implemented by the West Virginia department of health and human resources.

W.Va. Code § 49-7-33 (emphasis added).

In Hewitt v. State of West Virginia Department of Health and Human Resources, 212 W.Va. 698, 575 S.E.2d 308 (2002), the West Virginia Supreme Court examined the Department's obligation to pay for expert witnesses in abuse and neglect cases. The West Virginia Supreme Court stated that, although a circuit court has a right to direct the Department to pay for expert witnesses in abuse and neglect cases under W.Va. Code § 49-6-4 and WVTCR 27.02, W.Va. Code § 49-7-33 allows the Department to determine the fee it will pay experts in abuse and neglect cases. Hewitt at 740, 314. Although *Hewitt* stated that the Department is obligated to pay for expert witnesses in abuse and neglect cases, the case did not address whether the Department's obligation under WVTCR 27.01 and 27.02 applies only to court appointed experts or if it extends to cover rebuttal experts retained on behalf of respondent parents.

The West Virginia Supreme Court reiterated its *Hewitt* decision in the case of In Re: Bobby Lee B., 218 W.Va. 689, S.E.2d 748 (2006). In that case, the Circuit Court directed the Department to pay an expert \$1000.00 for a sexual offender evaluation. The Department appealed the payment order contending that it should only have to pay the expert at the Medicaid rate. The West Virginia Supreme Court held for the Department and found that W.Va. Code § 49-7-33 clearly states that the Department is to set the rate for expert payment at the Medicaid rate unless the Department determines that another rate is appropriate. Bobby Lee B. at 692, 751.

In the case *sub judice*, the Circuit Court complied with WVTGR 27.02's provision that the court establish, in advance, the fees and expenses to be paid to an expert. However, when the Circuit Court set the fees and expenses for the expert witness in its February 27, 2009 Order, all parties were under the impression that the cost would be paid by the PDC. Only after the bill was received at the rates set by the PDC did the Circuit Court order the Department to reimburse Ms. Kurelac. If the Department were responsible for paying for Dr. Carrasco's services, the Department, and not the PDC, should have been allowed to set the fee schedule for Dr. Carrasco's services as provided in W.Va. Code § 49-7-33.

V.

PRAYER FOR RELIEF

WHEREFORE the Department prays that this Court vacate the Circuit Court's July 30, 2009 Order directing the Department to reimburse Ms. Kurelac \$6,810.63 for Dr. Carrasco's services. The Department asks for any other relief this Court deems fit.

Respectfully Submitted,

WEST VIRGINIA DEPARTMENT OF
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IN RE: CHEVIE V.

CASE NO: 08-JA-46

Judge David W. Hummel, Jr.

CERTIFICATE OF SERVICE

I certify that I have, on this 21st day of February 2010, served a true and accurate copy of the foregoing APPEAL BRIEF OF THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES on each of the following counsel by mailing a copy via U.S. first-class mail to the following addresses:

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