

NO.: 35443

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

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IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

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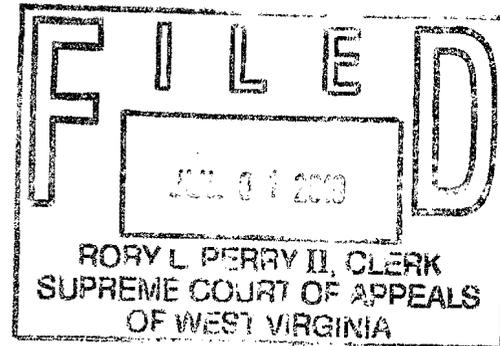
IN RE: CHEVIE V.

CASE NO: 08-JA-46  
Judge David W. Hummel, Jr.

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APPEAL BRIEF OF GUARDIAN *AD LITEM* FOR THE RESPONDENT CHILD

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**I.**

**APPELLEE'S STATEMENT OF FACTS**

In accordance with *Rule 10 of The West Virginia Rules of Appellate Procedure*, the appellee does not contend that the appellant's statement of the case, as set forth within its brief, contains any omissions or inaccuracies with regard to the facts of the case.

## II.

### ARGUMENT AND DISCUSSIONS OF LAW

As the appellant correctly points out, when the respondent mother filed her “Omnibus Motion” on January 20, 2009, she requested, as it relates to this appeal, leave of the Trial Court to retain the services of an expert witness to investigate and testify on her behalf, with such services to be paid for by the “Public Defender Corporation” (Public Defender Services). Respondent Mother’s Omnibus Motion, p.1. By Order emanating from the February 19, 2009 hearing, entered on February 23, 2009, the Trial Court “...GRANTED the respondent mother’s motion for an expert witness...”, with certain limitations as to the scope of the witness’ examination of the respondent Child, if the expert would adhere to the fee schedule set by the Public Defender Corporation. February 23, 2009 Court Order, p.2. By subsequent Order entered February 27, 2009, the Trial Court approved the respondent mother’s designation of Dr. Mary Carrasco as its expert and ordered that the Public Defender Corporation pay the fees for this expert witness at agreed upon rates. February 27, 2009 Court Order.

“...For all other eligible proceedings [other than felonies for which a penalty of life imprisonment may be imposed], actual and necessary expenses incurred in providing legal representation, including, but not limited to expenses for ...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).*

Both the respondent mother and the Trial Court contemplated that this transaction as being subject to payment by the Public Defender Services under the provisions of §29-21-13a(e) of the *West Virginia Code* as a “reasonable and necessary expense” for an “expert witness”. Clearly, the respondent mother was an “eligible client” as that term is defined by *W.Va. Code §29-21-2(1)*, and as well, this child abuse and neglect proceeding, which could result in the

termination of her parental rights was an “eligible proceeding” as that term is defined by *W.Va. Code §29-21-2(2)*.

When counsel for the respondent mother subsequently submitted a copy of Dr. Carrasco’s bill and affidavit showing payment thereof by counsel, the Trial Court ordered that the West Virginia Department of Health and Human Resources to be responsible for the expense. July 30, 2009 Court Order. When the Department subsequently filed its “Motion for Reconsideration of Payment Order”, the Trial Court denied the same, relying upon *W.Va. Code §49-6-4*, and *Rules 27.01* and *27.02* of the *West Virginia Trial Court Rules*. August 24, 2009 Court Order.

Although *Trial Court Rules 27.01* and *27.02* propose a different methodology for the appointment of experts pursuant to *W.Va. Code §49-6-4*, and for the payment thereof, by the language utilized, that methodology is distinguishable from the factual situation in the instant case.

“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 an expert to testify...”

*Rule 27.01, West Virginia Trial Court Rules.* (emphasis added).

In the instant case, counsel sought and the Trial Court approved the designation of an expert witness for the respondent mother, who, incidental thereto, would perform a medical examination, among other things. The Trial Court did not **appoint** Dr. Carrasco to perform an exam, but rather approved her designation by the respondent mother as an expert witness, and ordered her compensation by the Public Defender Corporation. Therefore, *Rules 27.01* and *27.02* do not apply to this situation.

Another avenue providing for the payment for the professional services of a physician, rendered to a child or other party in an abuse and neglect proceeding is through §49-7-33 of the *West Virginia Code*.

“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.*

This Court has previously observed that “A significant and lingering issue...arises from the conflicting statutory provisions now in effect that address the award of expert fees in abuse and neglect cases.” *Hewitt v. State Dept. of Health and Human Resources*, 212 *W.Va. 698, 575 S.E.2d 308, 312 (2002)*. This is readily apparent. That case involved a Circuit Court Order requiring the Department to pay previously-awarded fees for psychological services rendered by the appellant in various juvenile and abuse and neglect case, which fees were awarded prior to the enactment of *W.Va. Code §49-7-33*. The Department appealed that order on the basis that the fees awarded exceeded the rate established by Medicaid for the payment of such services. Since the fees were awarded prior to the effective date, §49-7-33 was not a consideration in this Court’s ruling upholding the court below. However, this Court did go on to state that:

“Any payment orders pertaining to abuse and/or neglect proceedings entered following the effective date of *West Virginia Code §49-7-33*, shall be paid by DHHR at the rate established by Medicaid and adopted by DHHR for such services.”

*212 W.Va. 698, 575 S.E.2d at 310.*

Subsequently, this Court stated:

“With regard to abuse and neglect cases, the *Hewitt I* Court resolved that issue on appeal by addressing the DHHR’s authority to establish fees for services of experts in abuse and neglect cases and the authority of the trial courts to set and approve fees for services of expert services and testimony. This Court held that the DHHR was liable for the payment orders in abuse and neglect cases and that it was required to pay for the services at the rate established by the trial court, **unless the order under consideration was entered after June 7, 2002**, the effective date of *West Virginia Code §49-7-33 (2002) (Repl.Vol.2004)*. That statute provides that the DHHR ‘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.’ *West Virginia Code §49-7-33*. Consequently, the *Hewitt I* Court concluded the abuse and neglect fee issue by upholding the fees in underlying payment orders entered before June 7, 2002, and explaining that the payment orders entered after June 7, 2002, were subject to the statute’s provisions regarding the Medicaid rate. *212 W.Va. at 703, 575 S.E.2d at 313.*”

*State ex. Rel. Artimez v. Recht, 216 W.Va. 709, 613 S.E.2d 76, 78 (2005)* (emphasis added).

This Court in *Hewitt I* and *Artimez* did not describe the nature of the services rendered by Dr. Hewitt, insofar as the role he played in the underlying cases for which payment orders were considered in *Hewitt I*. If Dr. Hewitt was merely an expert providing psychological services in those cases, as opposed to being an expert witness for one of the parties, then the distinction between payment by Public Defender Services under *§29-21-13a*, and by DHHR under *§49-7-33* is logical, and the holding of *Hewitt I*, as restated in *Artimez* can be distinguished from the case *sub judice*.

Where, as here, the Trial Court approves the actions of a party in designating an expert witness to testify for the party, compensation in any "eligible" proceeding should be ordered under the provisions of §49-7-33 is appropriate.

In the event that this Court should determine that the Court below was correct in ruling that the fee in question be paid by the West Virginia Department of Health and Human Resources, the matter should be remanded for a determination as to whether or not that fee was computed in accordance with the provisions of *W.Va. Code §49-7-33*, and in the event that the fee so awarded exceeds the amount computed under that section, the Trial Court should be directed to order that Public Defender Services be responsible for such excess.

Respectfully submitted,

Respondent Child, by counsel.



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**CERTIFICATE OF SERVICES**

I certify that I have, on this 29<sup>th</sup> day of June, 2010, served a true and correct copy of the foregoing **APPEAL BRIEF OF GUARDIAN AD LITEM FOR THE RESPONDENT CHILD** on each of the following counsel by either hand-delivery or by mailing a copy via U.S. first-class mail to the following addresses:

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