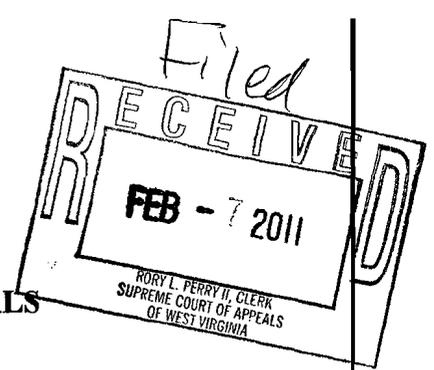


# ARGUMENT DOCKET

No. 35660



IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

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CHARLESTON, WEST VIRGINIA

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CIRCUIT COURT OF WOOD COUNTY

IN RE: EMILY G. and KALEB D.      JUVENILE NEGLECT AND  
ABUSE NOS: 08-JA-64 AND 10-JA-02

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BRIEF OF GUARDIAN AD LITEM

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## BRIEF OF GUARDIAN AD LITEM

Come now Emily Grace G. and Kaleb Allen D., by and through their Guardian Ad Litem, Michael D. Farnsworth, Jr., and, in response to the petition previously filed on April 16, 2010, say as follows:

### ASSIGNMENTS OF ERROR

Emily and Kaleb do not assign any error to the Circuit Court's ruling that they were not abuse or neglected at the time of the filing of the Petition.

### STATEMENT OF THE CASE

This matter originally came before the Circuit Court of Wood County, West Virginia, upon the filing of a Petition pursuant to § 49-6-1 et seq. of the *West Virginia Code* by Donna J. M. and John E. M., credible and reputable persons who are the maternal grandmother and step-grandfather of Emily and Kaleb and present guardians of Emily pursuant to an Order of the Wood County Family Court. In their Petition they allege that Emily and Kaleb are abused and/or neglected by their parents. Emily is the infant daughter of Sylvia Marie G. and Carl B., who are named as Respondents in this matter. Kaleb is the son of Sylvia and his paternity has yet to be established, although Carl has been excluded as a potential father of Kaleb. The Petition was subsequently amended on or about the 18<sup>th</sup> day of November 2009, and again on or about the 18<sup>th</sup> day of January 2010. The Circuit Court conducted hearings regarding said petition pursuant to § 49-6-2 of the *West Virginia Code* on January 14 and February 9, 2010. At the conclusion of said proceedings the Court made the finding, "[T]here has been no abuse and neglect at the time the Petition was filed because at the time the Petition was filed there was in place a Family Court Order that provided that Emily G

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was in the custody of the maternal grandparents, and also because none of the domestic violence occurred in the presence of the children or in the home of the children.” Adjudication Order, p.4, February 22, 2010. Donna and John appeal this final ruling of the Circuit Court.

### **SUMMARY OF ARGUMENT**

The Petitioner’s have alleged that the children’s health or welfare is harmed or threatened by domestic violence, but proof of domestic violence alone does not constitute abuse or neglect. Before a Court can grant a petition to institute child abuse and neglect proceedings, the Petitioner has the obligation to prove, by clear and convincing evidence, both that domestic violence does exist and that a child’s health or welfare is harmed or threatened by the domestic violence. If it cannot be demonstrated that the conduct of the parents at the very minimum threatens the health or welfare of a child, then the Court has no authority to institute proceedings that may forever terminate the relationship that a child has with his or her natural parents.

An appointment of guardians by a Court does not in and of itself constitute abuse or neglect on the part of a child’s parents. Even though such an appointment or allocation of custody remains open to modification by a Court, it does not necessarily mean that such a placement of the child is not in the best interest of the child. For a child to be abused, a child’s health or welfare must be harmed or threatened by a parent. For a child to be neglected, a child’s physical or mental health must be harmed or threatened with harm due to the failure of a parent to provide the child with basic necessities such as food, clothing, shelter, supervision, medical care or education. Absent clear and convincing evidence of abuse or neglect, children are entitled to

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establish and maintain relationships with their natural parents even when a Court places them in the physical custody of third party guardians.

**CURRENT STATUS OF THE MINOR CHILDREN, PLANS FOR  
PERMANENT PLACEMENT, AND CURRENT STATUS OF THE PARENTAL  
RIGHTS OF THE CHILDREN'S PARENTS**

**Emily**

Emily's mother is Sylvia G. and her father is Carl B. Pursuant to an Order of the Wood County Family Court entered on or about the 29<sup>th</sup> day of January 2007, Emily is residing with the Petitioners who were designated as her primary residential custodians and guardians. Placement with the Petitioners is the plan for permanent placement of Emily. The parental rights of Emily's parents have not been terminated.

**Kaleb**

Kaleb's mother is Sylvia G. and the identity of his father is not known. Carl B. has been excluded as a potential father of Kaleb by genetic testing. Pursuant to an Order of the Wood County Circuit Court entered on or about the 22<sup>nd</sup> day of February 2010, Kaleb is residing with the Petitioners who were designated as his custodians until otherwise ordered by Family Court. Placement with his sibling Emily in the home of the Petitioners is the plan for permanent placement of Kaleb at this time. The parental rights of Kaleb's parents have not been terminated.

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## ARGUMENT

§ 49-1-3(a) of the *West Virginia Code* sets forth the definition of the phrase “abused child” as the phrase is to be used in proceedings instituted pursuant to § 49-6-1 et seq. of the *West Virginia Code* (hereinafter referred to as Abuse and Neglect Proceedings). It states in pertinent part, “‘Abused child’ means a child whose health or welfare is harmed or threatened by”...(4) Domestic Violence as defined in section two hundred two, article twenty-seven, chapter forty-eight of this code.”

No party is disputing the finding of the Circuit Court that “the relationship between the Respondent Father and the Respondent Mother can adequately be described as a history that is replete with acts of physical violence and threats of physical violence.” Adjudication Order, p.3.

Furthermore, it appears that the Petitioners are accurate in their assertion that:

Fortunately for EMILY and KALEB, they have never been subjected to the violence in which EMILY’S parents/KALEB’S mother engage on a fairly constant basis. That is because shortly after her birth, her mother placed EMILY in the care of the Petitioners. That single protective act has enabled the Petitioners to protect EMILY. Although the Petitioners have battled to keep EMILY safe and now KALEB as well, and they have been successful to date.

Opening Brief On Behalf Of Donna and John [M.], p. 12.

Although it is undisputed that the Respondents have committed Domestic Violence, the Petitioners failed to prove by clear and convincing evidence that the health or welfare of either child had been harmed or threatened by the Domestic Violence. In fact, the evidence indicates that the maternal grandmother and step-grandfather, availing themselves of the relief available through the Family Court, have taken all steps necessary to shield Emily and Kaleb from the actions of the

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Respondents and ensure that they are safe and neither harmed nor threatened with harm by the Respondents.

One example that the limiting factors put in place by the Family Court have been successful in protecting Emily (and now Kaleb as well) while at the same time permitting Emily to establish and maintain a relationship with her father and paternal grandparents is that Sylvia, Carl and the paternal grandparents have been faithfully attending their supervised visits at the Kids First Visitation Center. Opening Brief On Behalf Of Donna and John [M.], p. 4.

As the Department noted on p. 5 of its Brief to the Court, in Syllabus Point 1 of Henry v. Johnson, 192 W.Va. 82, 450 S.E.2d 779 (1994), the Supreme Court held:

Children are often physically assaulted or witness violence against one of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence; consequently, a family law master should take domestic violence into account when making an award of temporary custody.

Clearly, the history of Domestic Violence between the Respondents was considered in the Family Court's allocation of custody of Emily and the subsequent development of limiting factors that will prevent the children from being assaulted or witnessing Domestic Violence.

The very effectiveness of the Family Court's efforts to protect Emily serves to undermine the foundation of the Petitioners' second argument on appeal that allocation of custody as Ordered by the Family Court is somehow deficient or lacking in permanency and unable to "provide permanent safety and stability for EMILY and KALEB. Accordingly, it is now up to the Circuit Court to do so." Opening Brief On Behalf Of Donna and John [M.], p. 8-9.

In support thereof the Petitioners cite In re Cesar L., 221 W.Va. 249, 258, 654 S.E.2d 373, 382 (2007), "Ensuring finality for these children is vital to safeguarding their best interests so that they may have permanency and not be continually shuttled from placement to placement."

The instant case, however, does not involve any shuffling of children from placement to placement. Both children have resided with the Petitioners since shortly following their birth, and there is nothing in the record to suggest that that placement will change unless it can be demonstrated that the parents are fit and that such a change would be in the best interest of the children. Moreover, the Petitioners have failed to present clear and convincing evidence that the children are somehow abused or neglected by the present custody arrangement which places Emily and, most likely eventually Kaleb as well, in the guardianship of the maternal grandmother and step-grandfather.

### CONCLUSION

Wherefore, the Guardian Ad Litem, respectfully requests the following relief:

1. That the Petition for Appeal on Behalf of Donna and John M. be dismissed.
2. Your Guardian further prays that nothing be done to prejudice the interests of Emily and Kaleb and that the Court consider any and all other forms of relief necessary to protect and promote the best interests of said children.

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Respectfully submitted,  
Emily G. and Kaleb D.,

By their Counsel



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**CERTIFICATE OF SERVICE**

I, Michael D. Farnsworth, Jr., do hereby certify that, on the 6<sup>th</sup> day of February 2011, I have caused to have served a true and accurate copy of the attached **BRIEF OF GUARDIAN AD LITEM** to the parties herein by facsimile transmission or either hand delivery or depositing the same with the United States Postal Service on the 7<sup>th</sup> day of February 2011, First-Class Postage Prepaid, and addressed to the last known address of counsel for parties as follows:

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