

Docket No. 35660

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: EMILY GRACE G. and KALEB ALLEN D.

Wood County Abuse and Neglect Case Nos: 08-JA-64, 10-JA-02
The Honorable Jeffrey B. Reed

RESPONSE BRIEF ON BEHALF OF THE DEPARTMENT OF HEALTH AND HUMAN
RESOURCES

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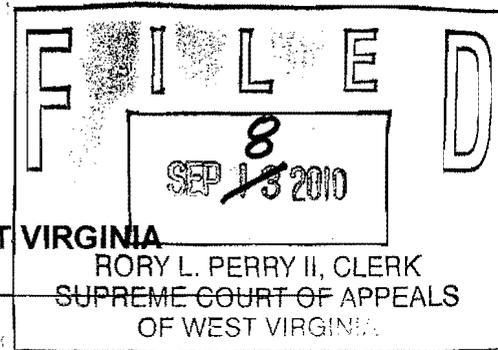


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**RESPONSE BRIEF OF THE DEPARTMENT OF HEALTH AND HUMAN
RESOURCES**

Comes now the West Virginia Department of Health and Human Resources ("the Department"), by and through its counsel, Assistant Attorney General Katherine M. Bond, and responds to the Petition for Appeal and Appeal Brief as follows.

STATEMENT OF FACTS

The facts of this case are not in dispute. The respondent mother, Sylvia G., and the respondent father, Carl B.¹, have a history of domestic violence. As the Circuit Court stated in its February 22, 2010 Adjudication Order, "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. The domestic violence between Sylvia and Carl began before Emily was born. Emily was born on August 14, 2006. At the time of her birth, both Emily and Sylvia resided with Sylvia's mother and stepfather, Donna and John M. Shortly after Emily's birth, Sylvia signed custody of Emily over to Donna and John. The Family Court recognized that custody agreement, and on July 8, 2008, the Family Court awarded custody of Emily to Donna and John until further order of the Family Court. Kaleb was born on July 3, 2009. Shortly after Kaleb's birth, Sylvia asked Donna and John to care for Kaleb.² Per order of the Circuit Court on January 20, 2010, Donna and John were officially given temporary custody of Kaleb.

¹ Carl B. is the father of the infant, Emily G. The father of the other child, Kaleb D., is unknown as both people named by Sylvia G. as possible fathers have been ruled out by DNA testing.

² It is unclear from the record exactly when Kaleb went to stay with Donna and John; however, during the adjudicatory hearing on January 14, 2010, Sylvia testified that Kaleb had been with Donna and John for "a couple months." January 14, 2010 transcript, page 8, line 2. Donna testified that Kaleb had been with her and John "mostly since his birth." January 14, 2010 transcript, page 73, line 3.

Although Sylvia and Carl have an on-again, off-again relationship replete with instances of domestic violence, Donna testified that Emily has never been exposed to the domestic violence between Sylvia and Carl and that Emily has never lived in the home of Sylvia and/or Carl. January 14, 2010 transcript, page 65, lines 12-22 and page 69, line 25 – page 70, line 5. At the continued adjudicatory hearing on February 9, 2010, Donna reiterated that Emily was never exposed to the domestic violence. February 9, 2010 transcript, page 25, lines 17-23. There was no evidence presented that Kaleb was ever exposed to any domestic violence or that he lived in the home of Sylvia when any instances of domestic violence occurred. Sylvia testified that Kaleb and Emily were never exposed to domestic violence. February 9, 2010 transcript, page 27, lines 14-19.

Based on the testimony and exhibits presented to the Court, by order dated February 22, 2010, the Circuit Court dismissed Donna and John's petition because there was no evidence that Emily or Kaleb were abused or neglected children. Specifically, the Circuit Court found that although Sylvia and Carl have a history of domestic violence, neither Emily nor Kaleb were present during the domestic violence, nor did either child reside in the home where the domestic violence occurred. Adjudication Order, p.4, February 22, 2010. Donna and John appeal the Circuit Court's ruling and ask this Court to find that Emily and Kaleb are abused and/or neglected children.

STANDARD OF REVIEW

The standard of review for abuse and neglect cases is well established. The West Virginia Supreme Court has held

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.

Syl. Pt. 1, In the Interest of: Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996).

ARGUMENT

The issue in this case is under what circumstances domestic violence rises to the level of child abuse. Donna and John contend that the extensive existence of domestic violence in the parents' relationship automatically requires a finding that the children are abused regardless of whether the children have actually been exposed to the domestic violence. The Department argues that, under the statutory definition of child abuse, domestic violence can only be characterized as child abuse if there is evidence that the domestic violence has harmed or threatened the child's health or welfare. In this case, although there is evidence of domestic violence, there is no evidence that Emily or Kaleb's health or welfare has been harmed or threatened by the domestic violence. Therefore, the Department requests that this Court affirm the Circuit Court's dismissal of the abuse and neglect petition.

Domestic violence can only be characterized as child abuse if there is evidence that the domestic violence has harmed or threatened the child's health or welfare.

West Virginia Code § 49-1-3 defines an abused child, in pertinent part, as "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.” (Emphasis added). There is no question that Carl and Sylvia have a history of domestic violence. The question is whether Carl and Sylvia’s history of domestic violence harms or threatens Emily and Kaleb’s health or welfare.

In order to adjudicate a parent as abusive or neglectful, the petitioner in an abuse and neglect case must prove the allegations of abuse by clear and convincing evidence.

The West Virginia Supreme Court has held

W.Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove ‘conditions existing at the time of the filing of the petition ... by clear and convincing proof.’ The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden. Syl. Pt. 1, *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

Syl. Pt. 5, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Although clear and convincing evidence was presented in the Circuit Court to show that Carl and Sylvia engaged in a pattern of domestic violence, absolutely no evidence was presented to show that Emily and Kaleb were in any way affected by the domestic violence. As the Circuit Court indicated, Emily, by virtue of a Family Court order, resides with Donna and John. Consequently, Emily is not in danger of being placed into a home where domestic violence is occurring. Similarly, the Circuit Court has directed the parties to obtain a Family Court order to place Kaleb with Donna and John once this abuse and neglect case is resolved. The evidence in the Circuit Court clearly indicated that neither Emily nor Kaleb have ever been present during the acts of domestic violence. Moreover, Emily and Kaleb never lived in the home when the domestic violence occurred. Therefore, there is no clear and convincing evidence to show that

Kaleb and Emily are abused children because there is no evidence that their health or welfare is harmed or threatened by the domestic violence between Carl and Sylvia.

Donna and John contend that the existence of domestic violence must be considered in determining the custody of Emily and Kaleb. The Department agrees with this argument. In 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.

Syl. Pt. 1, Id. In the case at hand, the Family Court considered Sylvia and Carl's history of domestic violence and determined that they could not care for Emily. Therefore, the Family Court awarded custody of Emily to Donna and John. However, the evidence presented to the Circuit Court clearly showed that neither Emily nor Kaleb ever witnessed the domestic violence or were ever living in the home when the domestic violence occurred. Consequently, as Emily and Kaleb were in no way exposed to the domestic violence, there is no evidence to show that Carl and Sylvia's actions have had any effect on Emily or Kaleb.

In Nancy Viola R. v. Randolph W., 177 W.Va. 710, 356 S.E.2d 464 (1987), the Supreme Court found that the father's parental rights should be terminated because of the history of domestic violence toward the child's mother that culminated in the father murdering the child's mother. Id. at 716, 470. However, the spousal abuse that occurred in Nancy Viola R., occurred in the home in which the child resided. Id. The Supreme Court also determined that the domestic abuse of the child's mother by the

father “irreparably affected [the father’s] relationship with his son.” Id. Contrarily, in regards to Emily and Kaleb, neither child has ever resided in the home while domestic violence occurred and there is no evidence to suggest that the domestic violence has had any effect on Emily or Kaleb.

Donna and John state, and the Department agrees, that there is no West Virginia case law on point that addresses whether domestic violence must occur in the presence of the children to constitute abuse and neglect. See Opening Brief on Behalf of Donna and John [M.], p. 11. Nevertheless, Donna and John set forth case law from which they extrapolate that the presence of a child is not necessary to qualify domestic violence as child abuse.

Donna and John indicate that in the case of In re Frances J.A.S., 213 W.Va. 636, 584 S.E.2d 492 (2003), the West Virginia Supreme Court upheld a finding of abuse based on domestic violence even though there was no indication that the domestic violence occurred in the presence of the children. However, the finding of child abuse in that case was not determined solely on the basis of domestic violence; there were also allegations of alcohol abuse that affected the mother’s parenting abilities. Moreover, while there was no indication of whether the domestic violence occurred in the children’s presence, the case indicates that the domestic violence did occur in the children’s home. Id. at 639, 495. Contrarily, in the case at hand, the only proof offered to show that Emily and Kaleb are abused children is Carl and Sylvia’s history of domestic violence outside of the children’s home.³

Donna and John also cite In re Brandon Lee B., 211 W.Va. 587, 567 S.E.2d 597

³ Although the Petition alleged that both Carl and Sylvia suffer from disabilities that may impair their parenting ability, no evidence was presented to support that Carl and Sylvia’s disabilities render them unfit to care for their children.

(2001) to support that domestic violence does not have to occur in the presence of a child to constitute abuse and neglect. However in Brandon Lee B., the case clearly showed that the finding of abuse and neglect was premised more on the mother's failure to make any effort to parent her child after its birth than on the instances of domestic violence that occurred before the child was born. Id.

The West Virginia Supreme Court has stated that “[c]hildren ... [who] witness violence against one of their parents may suffer deep and lasting emotional harm ... from [such] exposure to domestic violence.” In re Stephen Tyler D., 213 W.Va. 725, 737, 584 S.E.2d 581, 593 (2003). The Department does not disagree with that statement. However, in a case such as Emily and Kaleb's, when the child has never witnessed or been in the home in which the domestic violence occurred, domestic violence cannot constitute child abuse without some evidence that the acts harmed or threatened the child's health or welfare. Carl and Sylvia's history of domestic violence could only potentially affect Kaleb and Emily's health or welfare **if** either child returned to Carl or Sylvia's home and **if** Carl and Sylvia continued their abusive relationship. Any possible harm or threat to Kaleb and Emily's health or welfare is based on mere speculation and not supported by clear and convincing evidence.

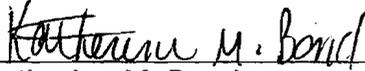
CONCLUSION

WHEREFORE, as there is no evidence that Emily or Kaleb's health or welfare has been harmed or threatened by Carl and Sylvia's history of domestic violence, the Department respectfully requests that the Supreme Court affirm the Circuit Court's dismissal of the abuse and neglect petition. The Department asks for any other relief this Court deems fit.

Respectfully Submitted,

West Virginia Department of
Health and Human Resources,
by counsel.

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The Honorable Jeffrey B. Reed

CERTIFICATE OF SERVICE

I certify that I have, on this 8th day of September 2010, served a true and accurate copy of the foregoing RESPONSE BRIEF ON BEHALF OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES on all parties of record by sending a copy, via U.S. first-class mail, to the following addresses:

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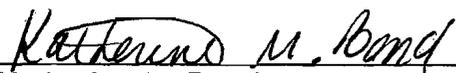
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES'S
DESIGNATION OF RECORD

Comes now the West Virginia Department of Health and Human Resources, by and through its counsel, Assistant Attorney General, Katherine M. Bond, and designates the following as part of the record to be considered on appeal:

- (1) Transcript of the January 14, 2010 Adjudicatory Hearing in the Circuit Court, filed with the Circuit Clerk on August 18, 2010;
- (2) Transcript of the February 9, 2010 Continuation of Adjudicatory Hearing in the Circuit Court, filed with the Circuit Clerk on August 18, 2010.

Respectfully Submitted,
West Virginia Department of
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by counsel.

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I certify that I have, on this 8th day of September 2010, served a true and accurate copy of the foregoing WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES'S DESIGNATION OF RECORD on all parties of record by sending a copy, via U.S. first-class mail, to the following addresses:

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