

2017 Update on the Law

Case Law

Statutory Changes

Title IV-E: Fostering Connections

In re: S.W., 236 W.Va. 309 (November 2015)

- Mother's parental rights were previously terminated.
- Grandparents granted legal guardianship.
- Mother completed Drug Court.
- Mother filed Petition to Overturn Legal Guardianship.
- Circuit Court granted petition.
- Grandparents and GAL appealed.

In re: S.W., 236 W.Va. 309 (November 2015)

- The Supreme Court reversed the lower court because there was not any evidence that the change in custody was in the best interest of the child.
- First, there must be a showing of material change in circumstances, and second, the alteration must serve the best interests of the child

In re: S.H., 237 W.Va. 626 (2016)

- Parental right terminated.
- Maternal grandmother granted legal guardianship
- DHHR filed petition against grandmother on allegation of possessing marijuana and allowing mother to live in the home.
- After receiving an IP, Circuit Court terminated legal guardianship after grandmother plead guilty to marijuana charge.

In re: S.H., 237 W.Va. 626 (2016)

- The Supreme Court found the lower court's ruling not supported by the record and clearly erroneous.
- The Supreme Court agreed that Grandmother was in complete compliance of her improvement period, and therefore, she could correct the circumstances of neglect.
- Remanded for an order continuing the improvement period and implementing DHHR's and GAL's proposal to transition the child to the home of her grandmother

In re: D.M., 237 W.Va. 713 (2016)

- First allegations: Mother allowed boyfriend to “help” the child (age 4) shoot a .22 caliber firearm. Father abused alcohol.
- Psychological evaluations revealed low IQs.
- DHHR argued that no services can be provided to a parent who possesses an IQ of less than 70, other than visitation, since parent cannot understand or retain the parenting curriculum.
- Circuit Court terminated parental rights of both parents.

In re: D.M., 237 W.Va. 713 (2016)

- The Supreme Court upheld the lower court's ruling by distinguishing this case from *In re: Billy Joe M.*, 206 W.Va. 1 (1999), but did not agree with DHHR's argument.
- The parents of *Billy Joe* did not appeal the termination of their parental rights, but challenged the denial of post-termination visitation.
- The *Billy Joe* Court noted, "The social services and legal system have left these children with their parents for eleven and twelve years, with resultant strong emotion bonds."

In re: A.L.C.M., -- W.Va. --
2017 WL 2537029; Case No. 16-0786

- Circuit Court's Question: Is a Petition for Relief from Parental Abuse and Neglect alleging abuse and/or neglect of an unborn child who is subsequently born alive, actionable under West Virginia law?
- Child's umbilical cord tested positive for cocaine, opiates, codeine, hydrocodone and oxycodone.
- Respondent Father filed a motion to dismiss the petition based upon *State v. Louk*, 237 W.Va. 200 (2016), arguing a parent could not be charged with injuries sustained *in utero*.

In re: A.L.C.M., -- W.Va. --
2017 WL 2537029; Case No. 16-0786

Certified Question:

When a child is born alive, is the presence of illegal drugs in the child's system at birth sufficient evidence that the child is an abused and/or neglected child to support the filing of an abuse and neglect petition?

Answer: Yes

“[W]hen a child is born alive, the presence of illegal drugs in the child's system at birth constitutes sufficient evidence that the child is an abused and/or neglected child.”

Memorandum Decision

In re: H.W., Case No. 16-0317 (Sept 2016)

- Circuit Court adjudicated Father based upon Father admitting to smoking marijuana, but not when the child was in his care.
- The Supreme Court reversed lower court's ruling. The Court stated, "While illegal, the Court does not find that [R.W.'s] occasional marijuana use, in and of itself, constitutes a harm or threat of harm to the child. . ."

Memorandum Decision

In re: L.J. and C.L., Case No. 16-0646

(Dec 2016)

- Circuit Court limited evidence the respondent mother was able to present at the disposition hearing.
- The Supreme Court recognized that a parent has the right to due process and a meaningful opportunity to be heard.
- Under the limited circumstances of this case, the respondent mother's rights were not violated.

Memorandum Decision
State of WV ex rel. J.E.H.G. v. Hon. Tod Kaufman
Case No. 16-0931

- The abuse and neglect case was initiated at the birth of J.E.H.G. based upon the Mother's termination of her parental rights to 10 other children.
- Mother stipulated to the allegations contained in the petition.
- The lower court granted a post-adjudicatory improvement period. At the time of the hearing, DHHR did not oppose the improvement period.
- GAL objected and filed a writ of prohibition.
- Supreme Court granted writ and remanded with instructions to schedule a disposition hearing.

Memorandum Decision
State of WV ex rel. R.H. v. Hon. Louis H. Bloom
Case No. 17-0002

- Maternal Grandfather filed a “Petition for Adjudication as Psychological Parent of the Infant Children and Motion to Intervene for Purposes of Establishing Psychological Parent.”
- Lower Court denied petition/motion, but allowed Petitioner’s attorney to monitor the case.
- Petitioner argued that he and his attorney were not allowed to participate fully in the proceedings though they were permitted some participation.
- The Supreme Court ruled custodians enjoy the “right to be heard” pursuant to WV Code § 49-4-601(h), but not full rights of a party to the case.

Memorandum Decision
In re: D.W., G.D., and D.D.
Case No. 16-0895

- For D.W., Petitioner signed guardianship over to “the guardians” and did not see the child for 9 years.
- D.W. was removed from the guardians’ home after a domestic violence incident.
- DHHR filed an amended petition to include the Petitioner and her other children, who lived with their father.
- The Supreme Court ruled that venue was improper for G.D. and D.D. because neither they nor their parents had any connection to Webster County.
- The Supreme Court suggested using Rule 4 of RPCAN.

Memorandum Decision
In re: I.J.-1, I.J.-2, and T.J.
Case No. 16-1005

- Father voluntarily relinquished his parental rights to his children.
- Circuit Court accepted relinquishment, but denied the DHHR's motion for child support without explanation.
- The Supreme Court reversed and remanded the case with directions to address the issue of child support citing that only absent the "rare instance" that such payment is not in the child's best interest, the parent should be required to pay child support.

Disciplinary Actions

- Lawyer Disciplinary Board v. Cooke, 799 S.E.2d 117
 - Two-year suspension
- Lawyer Disciplinary Board v. Thompson, 238 W.Va. 745
 - Three-month suspension

House Bill 2318

Relating Generally to Human Trafficking

Child Abuse and Neglect Provisions:

- Added human trafficking within the definition of an abused child
- Added under the definition of sexual exploitation an act where a parent, guardian, or custodian knowingly maintains or makes available a child for the purpose of engaging the child in commercial sexual activities

Juvenile Provisions:

- Provided for immunity for offense of prostitution for minors
- Defined a minor victim of sex trafficking as an abused child and established a child's eligibility for services

Senate Bill 445

Abused Child Definition

Pursuant to West Virginia Code § 49-1-201, the definition of “abused child” now includes:

A child conceived as a result of sexual assault, as that term is defined in this section, or as a result of the violation of a criminal law of another jurisdiction which has the same essential elements: *Provided*, that no victim of sexual assault may be determined to be an abusive parent, as that term is defined in this section, based upon being a victim of sexual assault.

House Bill 2702

School Absences

West Virginia Code § 18-8-4

Highlights of the bill:

- Limited excused absences for personal illness or injury in the family to those of student's parents, guardian, custodian or family member and requiring a reasonable explanation for why the student's absence was necessary and caused by illness or injury
- Requiring documentation relating to absences to be provided to the school no later than three instructional days after the child returns to school

Title IV-E

Fostering Connections

- Title IV-E is a federal program which reimburses DHHR for children in foster care, if the child meets certain criteria.
- On October 1, 2017, payments on behalf of young adults may be reimbursable under certain circumstances. DHHR will be tracking these youth to make sure the Court continues to have review hearings after the youth turns 18. During the review hearings, the Court must determine:
 - Within 180 days of signing the FC-18, the Court determines that it is in the best interest of the young adult to enter into the FC-18
 - Annually, the Court finds that DHHR is making reasonable efforts to achieve the goals of the permanency plan and specifically addresses DHHR's efforts to prepare the young adult for independence.
- Court sanctioned Legal Guardianships may also be reimbursable.