

IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA

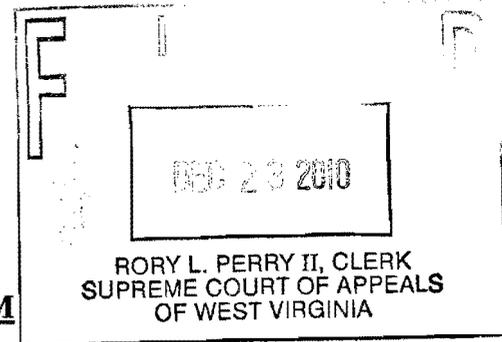
DOCKET NOS. 35750
35751

IN THE MATTER OF HUNTER H.

CIRCUIT COURT OF OHIO COUNTY PETITION NO. 07-CJA-50

Honorable James P. Mazzone

BRIEF OF THE GUARDIAN AD LITEM



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TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA:

HON. ROBIN J. DAVIS, CHIEF JUSTICE
HON. MARGARET WORKMAN, JUSTICE
HON. MENIS E. KETCHUM, II, JUSTICE
HON. THOMAS E. MCHUGH, JUSTICE
HON. BRENT D. BENJAMIN, JUSTICE

HON. RORY L. PERRY, II, CLERK

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POSITION OF GAL TO JOIN PETITION FOR APPEAL OF FOSTER PARENTS

The GAL respectfully requested to join the Petition For Appeal of the Foster Parents. Having received and reviewed same, the GAL agrees with counsel’s Statement of Facts, Assignments of Error and Discussion of Law as therein presented. The GAL supplements same as so indicated in this Brief for Appeal with attached exhibits.

TABLE OF AUTHORITIES

In Re: Katelyn T. and Joel T., 225 W.Va. 264, 692 S.E. 2d, 307 (2010)9
West Virginia Rules of Procedure for Child Abuse and Neglect, Rule 1913

PROCEEDING AND RULING

The GAL agrees with the recitation of facts as presented by counsel for the foster parents.

STATEMENT OF FACTS

The GAL agrees with the recitation of facts as presented by counsel for the foster parents. The GAL takes issue with certain facts or the interpretation of the same as presented by counsel for the West Virginia Department of Health and Human Resources (WVDHHR).

The WVDHHR contends that Donna H. (hereinafter referred to as Grandmother) was named in the Petition for Relief from Abuse and Neglect only because she was a custodian of the child. A reading of the entire Petition does not support that contention.

The Grandmother signed a Safety Plan on August 16, 2007 with the WVDHHR. Another referral was received and after same was investigated by the WVDHHR investigator, Carol Christian. Ms. Christian put her findings in the pre-petition letter to the Prosecuting Attorney’s

Office and a Petition was filed and the child was removed from the care of the Grandmother on August 24, 2007.

Paragraph 5 of the Petition states that the Grandmother signed a protection plan agreeing to keep the child safe until a safety plan could be put into place. Paragraph 7 does state specific allegations against her husband, the grandfather, who was residing in the home with the Grandmother and the child. Grandmother admitted to her husband's marijuana use and alcohol abuse in the home. She said she was unable to control his behavior when her husband drank. Her solution to remedy the marijuana use in the home was to have him smoke marijuana outside with his friends. The child was in the home.

It doesn't take much to reach the conclusion that there was marijuana and alcohol use in the home while the child was in the home. The child was eighteen (18) months old at the time of his removal. The Grandmother said nothing about her husband's drug and alcohol use and uncontrollable behavior to Carol Christian when the child was placed there.

Paragraph 8 states that based upon these facts and allegations, the child was at risk if he remained with any of the Respondents (emphasis added).

Paragraph 16 states that the WVDHHR believed the child was in imminent danger and that the "Respondents" (emphasis added) have abused and neglected the child. His physical and mental health was harmed or threatened by this drug and alcohol use in the home and the uncontrollable behavior of the husband, all of which went unreported to the WVDHHR.

Paragraph 17 states there was no appropriate alternative to giving custody of the child to the WVDHHR. It is the interpretation of all these facts and allegations which would lead one to conclude that the environment in which the child was kept was alleged to abusive and neglectful. If the Grandmother was not a named Respondent for this purpose, the "appropriate alternative" would be to keep placement with the Grandmother and have the grandfather leave the home.

On May 28, 2008 both Respondents, Grandmother and Grandfather, were dismissed without objection because neither were considered for placement. That is the only reason. For the WVDHHR to contend that neither were adjudicated as abusive and/or neglectful toward the child ignores the fact that the Grandfather smoked marijuana and drank in the home with the child present. The Grandmother knew this and did not tell Carol Christian. In this GAL's experience, this most definitely would have resulted in an adjudication of abuse and/or neglect. The child was removed and placed in the home of the foster parents, strangers to the child. The child remained there numerous years. The Respondent grandparents were dismissed from the Petition because neither was considered for placement.

The GAL objected to the intent of the WVDHHR to permanently move the child from the home of the foster parents to the home of the Grandmother as discussed at MDT meetings held in August and September, 2009, before the parental rights of the biological father were terminated. The GAL filed the GAL Objection to WVDHHR Intent to Move Infant, which was incorporated by reference during the evidentiary hearing regarding permanent placement. At the evidentiary hearing held on April 23, 2010, the WVDHHR Child Protective Service Worker testified that she never saw this filing and therefore never read it before she testified. Therefore, it is the GAL opinion that none of the concerns therein were addressed by this Child Protective Service Worker.

Furthermore, the WVDHHR made the unilateral decision to permanently move the infant without the benefit of discussing the same at an Adoption Review Committee (ARC) meeting since that decision was made by the WVDHHR before the parental rights of the father were terminated and the case was in the permanent placement stage. There was no discussion regarding the best interest of the child. This GAL reminded the MDT that there was also the paternal Grandmother to consider. This paternal Grandmother had been considered for

placement in the past. That was not done because she moved to Tennessee. There was no request by the WVDHHR to permanently place the child with the Grandmother. The MDT was told that would be done. The purpose of ARC was ignored. It took Court action to stop this placement.

ASSIGNMENTS OF ERROR / DISCUSSION OF LAW

A. THE CIRCUIT COURT FAILED TO APPLY A BEST INTEREST ANALYSIS AND INSTEAD GAVE OVERRIDING WEIGHT TO THE GRANDPARENT PREFERNCE.

The GAL agrees with this Assignment of Error and related discussion of law. In this GAL's opinion, a review of the entire record establishes that placement with the Grandmother is not in the child's best interest.

The WVDHHR contends that the concerns of the GAL are based primarily on the belief that the situation that led to the child's removal from the Grandmother has not been removed. The GAL was more specific than that during his testimony on the matter. The GAL already opined as to his position on the "environment" that existed in the home of the Grandmother that caused the removal of the child during that testimony and in this Brief in the Statement of Facts.

The Grandmother admitted in her parental evaluation that she had been the caretaker of the child from birth. There was an issue with her daughter, the mother of Hunter, concerning her addiction to drugs growing up in the home of the Grandmother. Other issues which contributed to the home "environment" were domestic violence, drug abuse, alcohol abuse, uncontrollable behavior when drinking and the tug of war, or back and forth, placement of this child before the Petition was filed. Once the WVDHHR discovered this "environment", the child was removed from the home of the Grandmother. Then, without addressing these issues, the Respondent

grandparents were dismissed from the case. If the Grandmother was not dismissed from the case, and if placement was considered with her, she would have had to be placed on an improvement period and successfully completed the terms thereof. All of these issues would have had to be considered with the Grandmother participating in parenting classes, domestic violence awareness, drug and alcohol awareness, drug screens (which the WVDHHR insisted upon but did none), and any other terms decided by the MDT team. That was not done. Instead, the Respondent Grandmother was dismissed from the case. Again, because she was not considered for placement. The child should not be and would not have been returned to the home of the Grandmother without these issues being dealt with by an "improvement period". Issues just don't disappear. The WVDHHR itself believed the Grandmother had some kind of drug issue because it insisted upon random drug screens. Again, the pre-petition letter is relevant. The purpose of an improvement period is to learn and be aware of concerns that effect the raising of a child. To learn to remedy these issues in the present to prevent re-occurrence in the future. The Grandmother did leave her husband, however, the WVDHHR itself still had issues with "her choice of men" as stated in the case plan. That was never addressed, let alone resolved.

One must understand the dynamics of the situation before any problem can be resolved. If not, the "cycle" continues. There is no assurance here that the cycle will not continue. The Grandmother states that she will not allow the terminated mother around the child unless "she is absolutely sure she is not a danger" to the child. That's ironic inasmuch as she allowed her husband around the child and exposed the child to her home environment which caused the child to be removed because of imminent danger, "putting the child at high risk of harm" as the WVDHHR states in its September 22, 2009 Child Case Plan.

**B. THE CIRCUIT COURT ISSUED FINDINGS OF FACT THAT WERE CLEARLY
ERRONEOUS AND IMPLAUSIBLE IN LIGHT OF THE ENTIRE EVIDENCE
PRESENTED.**

The GAL agrees with this Assignment of Error. In addition, the GAL states that the lower Court significantly diminished the substance of the GAL's testimony or omitted the substance of the same as same appears in the findings of fact. There is no mention in the findings of fact of the "environment" of the grandmother's home as testified to by the GAL: domestic violence of the mother and the father; abuse of alcohol by the step-grandfather; abusive behavior of the step-grandfather while intoxicated, only to name a few of the concerns. The transcript of the GAL testimony should be reviewed in its entirety.

The GAL also agreed with the opinion of the only expert that testified in the matter, Sandra Street. The substance of her testimony was also diminished in the findings of fact. Neither the WVDHHR nor the grandmother (who had counsel and had that opportunity) sought the opinion of any expert nor did one testify on her behalf. The only expert to render an opinion, did so and testified, said testimony being diminished by the Court. The issue of permanent placement, where the child was to spend his life, was worthy of this opinion. This GAL respectfully disagrees with the Court's decision not to accept the opinion of the only expert to render one.

The GAL cites In re: Katelyn T. and Joel T., 225 W.Va. 264, 692 S.E. 2d, 307 (2010). That case concerned the mental health expert testimony of two (2) mental health experts during the adjudicatory hearing concerning clear and convincing evidence of abuse/neglect by the respondent mother. There was no contrary expert evidence presented by any other party. Both experts squarely addressed and refuted the Circuit Court's basis for disregarding their opinions. In reversing the lower Court, this Court stated that the finding of the Circuit Court was

misguided. This Court found it clear error for the Circuit Court to disregard the only expert evidence in the case.

This GAL testified that he relied upon the only expert opinion in this case. This was an expert that had previously been qualified as such numerous times in the lower Court, an expert the WVDHHR did not challenge by obtaining their own expert. Reliance upon an expert opinion is necessary when we ourselves are not experts and there is no contrary expert opinion nor any reason to discount that opinion after meaningful investigation and cross-examination.

Furthermore, much has been made of the home study of the Grandmother being approved. That may mean something, but it is not controlling and the WVDHHR knows it. There is no mention anywhere in the findings of fact about the testimony of the GAL concerning this issue. In selecting the home of the Grandmother permanently, the WVDHHR violated its own policy concerning the whole Adoptive Review Committee (ARC) process.

The Grandmother was chosen for placement and a permanent move intended because it had legal custody of the child. No other opinion of any other party was requested. This was done before the biological father's parental rights were terminated and even after this GAL informed the MDT that the decision was premature and the paternal grandmother (who had been considered for placement earlier but moved to Tennessee) may request placement of the child, which she did.

The proper and usual procedure is to collect all the home studies, convene an ARC, discuss the matter fully and make a decision. Just because a home study is approved doesn't mean placement is in the best interest of the child. This GAL has attended numerous ARC meetings with the WVDHHR representatives and considered home studies which had been approved which all attending the ARC opined that they would never place a child there

wondering how such a home was ever approved. Sometimes approved home studies mean nothing.

C. THE CIRCUIT COURT ERRED IN FAILING TO ADMIT INTO EVIDENCE THE WVDHHR CONTACT SHEETS AND A PRE-PETITION LETTER FROM A WVDHHR CASEWORKER TO THE PROSECUTING ATTORNEY'S OFFICE ON THE BASIS OF ATTORNEY CLIENT PRIVILEGE.

The Gal agrees with this Assignment of Error and related discussion of law.

The WVDHHR asserts that there is no evidence in the transcript that the GAL ever saw the pre-petition letter. The GAL has no clue why this isn't so except to opine that the discussion concerning the letter was off the record. All parties were aware that I had read the letter and I informed the Court of same and that I would use it and it should be disclosed to all counsel.

Actually, the WVDHHR is incorrect in asserting that "those letters have never been disclosed while she was has represented the Department". This GAL has received two of those letters which were disclosed with other "contact sheet" information in other cases either by accident or design.. The letter served only as informational.

To the best of this GAL's recollection, the pre-petition letter contained allegations against both grandparents. This GAL was not the initial GAL, but it is my understanding that the WVDHHR wanted drug testing for both grandparents. None were conducted on the grandmother. Anna Grafton, the WVDHHR Child Protective Service Worker testified that "there was no need to conduct drug screenings on Ms. Dunsmore due to the fact that she was not alleged to have used drugs" (Findings of Fact, Paragraph No. 37, emphasis added by the Court). That logically does not follow in light of the WVDHHR position in this case in the beginning when both grandparents were to have drug testing. Furthermore, if the recollection of the GAL

is correct, the testimony of the Child Protective Service Worker is not only totally incorrect on this issue, but bothersome in light of the pre-petition letter. The pre-petition letter should not have been sealed by the Court. Any referral against anyone in the home contained in this letter is relevant. The grandmother stated in her home study that “she was the caretaker of Hunter from birth until his placement in foster care”. In this GAL’s opinion, any issue concerning any party seeking permanent placement of a child, which is information known to the WVDHHR, is relevant.

This GAL cannot possibly understand the statement of the WVDHHR that “the Department is unsure if the GAL intended for the sealed letter to be considered by the Supreme Court”. The Court made it a part of the record for appellate reasons. The GAL designated the entire record for appeal.

D. THE COURT ERRED WHEN IT INAPPROPRIATELY FAVORED GRANDMOTHER AS INDICATED IN A TWO PAGE SECTION ENTITLED “CONCLUSION” AT THE END OF ITS ORDER WHICH CONTAINED VARIOUS THOUGHTS AND OPINONS THAT WERE NOT BASED UPON THE EVIDENCE PRESENTED.

The GAL agrees with this Assignment of Error. In addition and with all due respect to the Court, this GAL disagrees with the Court in its opinion that “such conduct of the grandmother exceeds changes that other respondents, who have been reunified with their children, have made through improvement periods”.

This GAL has already commented upon those terms and conditions of an improvement period had the Grandmother remained in the case as a respondent. What is also concerning is, had the biological mother completed her improvement period and the child returned to her, the

home environment of the Grandmother would have remained the same for visitation purposes. This GAL would have had to object to that visitation occurring under the circumstances as alleged in the Petition., without addressing and resolving same.

This GAL disagrees with the assertion of the WVDHHR that this “Conclusion” is merely a recap of the reasons to place the child with the Grandmother.

Furthermore, the WVDHHR states that the GAL never moved to rename the Grandmother as a respondent. That simply would have delayed the matter much longer than it had already been delayed. Also, that was not possible. West Virginia Rules of Procedure for Abuse and Neglect, Rule 19, permits amendment of a petition up until such time as the adjudicatory hearing begins or after it begins. We are at the Permanent Placement stage here.

**E. THE COURT ERRED WHEN IT FAILED TO GRANT FOSTER PARENTS’
MOTION TO STAY AND FAILED TO PROVIDE FOR A TRANSITION PERIOD
FOR THE CHILD.**

The GAL agrees with this Assignment of Error. In addition this GAL filed a Motion to Stay and Notice of Intent to Appeal, same being denied by the Court.

CONCLUSION

For the reasons stated in the aforesaid Brief and in the Brief of Petitioners/Appellants, the Petitioners should be granted the relief requested.

PRAYER FOR RELIEF

WHEREFORE, because of the aforesaid errors and other plain error apparent upon the record, your GAL respectfully prays for the following relief:

1. That review of the entire transcript be made;
2. That the Order be vacated and that this matter be remanded to the Circuit Court of Ohio County for further hearing;
3. For all such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,
JOSEPH J. MOSES, ESQ., GAL

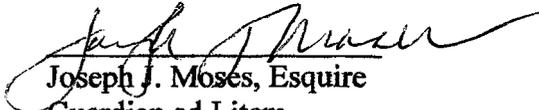
A handwritten signature in cursive script, appearing to read "Joseph J. Moses", is written over a horizontal line.

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CERTIFICATION BY ATTORNEY

I hereby certify, pursuant to Rule 4A(c) of the West Virginia Rules of Appellate Procedure, that the facts alleged are faithfully represented and that they are accurately presented to the best of my knowledge, recollection and ability.

Dated this 20 day of December, 2010.


Joseph J. Moses, Esquire
Guardian ad Litem

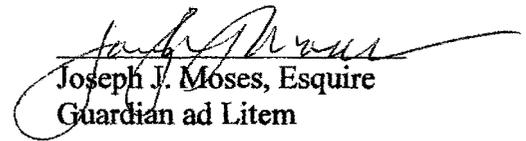
CERTIFICATE OF SERVICE

Service of the foregoing Brief for Appeal was had by mailing or hand delivering a true copy thereof to the below listed on the 22 day of December, 2010:

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