

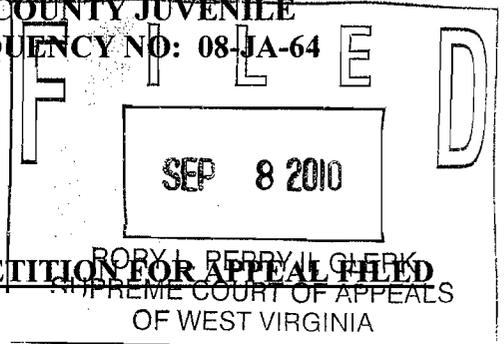
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN RE:

WV SUPREME CASE NO. 35660

EMILY  
KALEB

WOOD COUNTY JUVENILE  
DELINQUENCY NO: 08-JA-64  
10-JA-02



*Brief of Appellee*

RESPONSE OF CARL

TO APRIL 16, 2010 PETITION

FOR APPEAL FILED

BY DONNA AND JOHN

OF WEST VIRGINIA

Now comes Respondent Carl , by and through his attorney, Reggie Bailey, and in response to the petition previously filed on April 16, 2010, states as follows:

**PRECEDINGS BELOW**

1. Respondent Carl (hereinafter referred to as "Respondent") is the father of Emily (hereinafter referred to as "Emily") who was born on August 14, 2006.
2. Respondent is not the father of Kaleb . The father of Kaleb is unknown.
3. The mother of both Emily and Kaleb is Sylvia Marie
4. The lower Court found that domestic abuse had occurred, but only outside of the presence of the children.
5. On July 10, 2008, the Family Court designated Petitioners as primary residential custodians of Emily until further order of the Court.
6. In the Adjudication Order dated February 23, 2010, the Court found that Emily and Kaleb were not abused and neglected children.
7. On April 16, 2010, Petitioners filed an appeal with the West Virginia Supreme Court of

Appeals in an attempt to overrule the finding that the children are not abused and neglected.

8. It is from this Petition that the Respondent responds.

### STANDARD OF REVIEW

A Circuit Court's final order is reviewed using the two-pronged standard of review set forth in syllabus point one of McCormick v. Allstate Insurance Co., 197 W.Va. 415, 475 S.E.2d 507 (1996). That syllabus point provides as follows:

When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

The following guidance is also provided in syllabus point one of In re Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996):

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.

### ARGUMENT

**The Circuit Court did not error in finding that the children are not abused or neglected by §47-6-2(c) of the Code of West Virginia**

On February 23, 2010, the Circuit Court issued an Adjudication Order in which the court

found no abuse or neglect against the children in this matter. The Circuit Court found that the Petitioner had not proven by clear and convincing evidence that, based upon the conditions existing at the time of the filing of the petition, the children were abused or neglect as defined in West Virginia Code §47-6-2(c). The Court was correct in reaching its conclusion.

The finding of abuse and neglect is of paramount importance, and must be found prior to a dispositional finding may occur, as stated by the West Virginia Supreme Court of Appeals. In State v. T.C., 172 W.Va. 47, 303 S.E.2d 685 (1983) (*syl. pts. 1 and 2*), the Court held:

1. In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W.Va. Code, §49-6-5, it must hold a hearing under W.Va.Code, 49-6-2, and determine "whether such child is abused or neglected." Such a finding is a prerequisite to further continuation of the case and 2. W.Va.Code, 49-6-1, et seq., does not foreclose the ability of the parties, properly counseled, in a child abuse or neglect proceeding, to make some voluntary dispositional plan. However, such arrangements are not without restrictions. First, the plan is subject to the approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question which is the issue of abuse or neglect.

The two part inquiry was reiterated In Re Beth Ann B. and Courtney Danielle B., 204 W.Va. 424, 513 S.E.2d 472 (1998), when the Court held that "[T]he statutory scheme applicable in child abuse and neglect proceedings provides for an essentially two phase process. The first phase culminates in an adjudication of abuse and/or neglect. See W.Va.Code §49-6-2(c) (1996). The second phase is a dispositional one, undertaken to achieve the appropriate permanent placement of a child adjudged to be abused and/or neglected. See W.Va.Code §49-6-5 (1996)."

Respondent Carl maintains that the circuit court correctly found that no abuse or

neglect occurred against the children and therefore, that he did not commit abuse or neglect, defined in §49-1-3(4). While both parents testified regarding several occurrences of physical and verbal aggression towards each other, no evidence was introduced to suggest these incidents occurred in the presence of either child, or in the home of either child. Neither has this conduct been directed towards, or intended to be a threat to, the children's physical or mental welfare. The Guardian Ad Litem appears to agree that neither child has been harmed or threatened by exposure to domestic violence. (See Response of Guardian Ad Litem To April 16, 2010 Petition for Appeal Filed by Donna and John , at page 3.)

The conduct of the parental figures in this case may be unbecoming to societal norms; however, this conduct does not circumvent the necessity of adhering to statutory requirements. Accordingly, the Circuit Court properly addressed the threshold issue of a finding of abuse and neglect before proceeding to dispositional aspects of the case.

As the Petitioners admit, no case is precisely on point with issues of domestic violence and a finding of abuse and neglect, citing In re Frances J.A.S., 213 W.Va. 636, 639, 584 S.E. 2d 492 (2003) and In Re Brandon Lee B., 211 W.Va. 587, 567 S.E.2d 597(2001). Neither case upholds domestic violence outside of the presence of the children as a determining factor of abuse and neglect. In re Frances is a case involving domestic violence that occurred in the presence of the children. In Re Brandon Lee B., is procedural in nature with the sole reference to domestic violence occurring prior to the birth of the child. Other cases noted in the argument of the Petitioners refer to cases that support the "best interest of the child" standard in reaching a disposition of the case, but do not support a finding of abuse or neglect in this case.

Domestic violence that occurs between parents or other care givers while the children are not present was discussed by the Court in Henry v. Johnson, 192 W.Va. 82, 450 S.E.2d 779

(1994), “It is clear that where domestic violence is present it should be considered when determining parental fitness.” Yet, the Court further added that “In the findings underlying West Virginia’s domestic violence statute, the state legislature recognized that: “[c]hildren are often physically assaulted or *witness* (emphasis added) violence against one of the parents and may suffer deep and lasting emotional harm.” W.Va. Code, 48-2A-1(a)(2). Therefore, the Court did not establish that domestic violence occurring outside of the presence of the children is determinative for a finding of abuse and neglect.

In the instant case, Respondent believes the Petitioners are circumvent the primary issue of abuse and/or neglect required for adjudication by focusing on the issue of the best interests of the children. However, the Circuit Court has correctly rejected this argument stating that “[T]he Court does not believe, as counsel have argued, that you can make a finding of abuse and neglect based upon what is in the best interest of the children or upon what is best in terms of permanency of the children because a finding of abuse and neglect has to fit the statutory definition of abuse and neglect.”

Finally, the point appears to be moot. The family court has placed guardianship of the two children with the Petitioners, who are the maternal grandparents. This step appears to have obviated the need for an abuse or neglect petition to be filed, as they are now in charge of all decision making regarding the children.

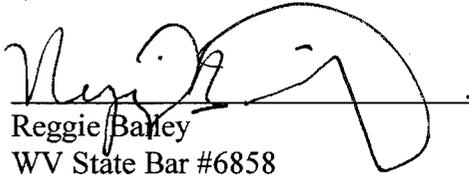
Therefore, the Respondent believes the Circuit Court was correct in finding that no abuse or neglect had occurred, despite the history of problems between the parents. The Respondent believes it cannot be found that the Circuit Court plainly erred or abuse its discretion in reaching its conclusions.

**CONCLUSION AND RELIEF SOUGHT**

WHEREFORE, the Respondent Carl respectfully prays for this Court to uphold and affirm the decision of the Circuit Court in finding that of abuse and neglect has not been properly established. The Respondent further prays such relief as is proper.

Respectfully Submitted,

Carl  
By Counsel

A handwritten signature in black ink, appearing to read "Reggie Bailey", is written over a horizontal line. The signature is stylized and cursive.

Reggie Bailey  
WV State Bar #6858  
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**CERTIFICATE OF SERVICE**

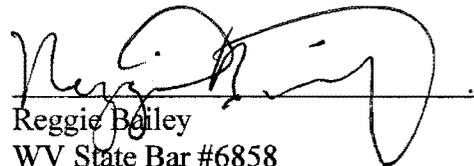
This 7<sup>th</sup> day of September, 2010, the undersigned counsel hereby certifies that he did serve the heretofore appended papers entitled, "**RESPONSE OF CARL TO APRIL 16, 2010 PETITION FOR APPEAL FILED BY DONNA AND JOHN**" upon the following persons, by depositing in the mails of the United States, a true copy thereof, to:

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