

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

RESPONSE OF SYLVIA TO APRIL 16, 2010 PETITION FOR
APPEAL FILED BY DONNA AND JOHN

Now comes Respondent Sylvia _____, by and through her attorney, Rhonda L. Harsh, and in response to the petition previously filed on April 16, 2010, states as follows:

1. Respondent Sylvia _____ (hereinafter referred to as "Respondent") is the daughter of Donna _____ and step-daughter of John _____ (hereinafter collectively referred to as "Petitioners").
2. Respondent is the mother of Emily _____ (hereinafter referred to as "Emily") who was born on _____ . Emily's father is Carl _____.
3. Respondent is the mother of Kaleb _____ (hereinafter referred to as "Kaleb") who was born on _____ . Kaleb's father is unknown at this time.
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. An Adjudication Order dated February 23, 2010 placed Kaleb in Petitioner's custody.
7. In the Adjudication Order dated February 23, 2010, the Court found that Emily and Kaleb were not abused and neglected children.
8. 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.
9. It is from this Petition that 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." See also In re Brandon Lee B., 21,1 W.Va. 587, 567 S.E.2d 597 (2001), cert. denied, 536 U.S. 942, 122 S.Ct. 2627, 153 L.Ed.2d 808 (2002); In re Beth Ann B., 20,4 W.Va. 424, 513 S.E.2d 472 (1998); State v. Michael M., 202 W.Va. 350, 504 S.E.2d 177 (1998).

The following guidance is also provided in syllabus point one of In re Tiffany Marie S., 19,6 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.”

The Circuit Court did not error in finding that the children are not abused or neglected as defined in West Virginia Code § 49-6-2(c)

On February 23, 2010, the Circuit Court issued an Adjudication Order finding 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 in a familial setting is a threshold issue in terms of upholding or terminating parental rights. The Court has repeatedly recognized this threshold requirement in abuse and neglect cases. In syllabus points one and two of State v. T.C., 172 W.Va. 47, 303 S.E.2d 685 (1983), 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-

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.

Petitioners admit that no case is precisely on point with issues of domestic violence and a finding of abuse and neglect, citing In re Francse 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 bears on 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 children¹ and moreover, the dispositional phase of the case was settled *after* a finding of abuse and neglect. In Re Brandon Lee B., is procedural in nature with the sole reference to domestic violence occurring prior to the birth of the child. The remainder of Petitioner's arguments point to cases that support the "best interest of the child" standard; however, until the threshold issue of a finding of abuse and neglect is statutorily determined, the dispositional phase regarding the best interests of the child is not ripe for review.

Domestic violence that occurs between parents or other care givers while the children are not present was discerned 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

¹" The petition was premised upon several instances of alleged domestic violence and child neglect Police helicopters searched the wooded area, *and the children fled the house by climbing out a window (emphasis added).*"

considered when determining parental fitness.² 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). Accordingly, 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.

Petitioner Sylvia constitutional rights will be violated if a dispositive determination of the best interests of the children is adjudicated prior to a finding of abuse and neglect

"The primary purpose of making an initial finding of abuse or neglect is to protect the interest of all parties and to justify the continued jurisdiction under W.Va. Code, 49-6-1, et seq." State v. T.C 172 W.Va. 47, 303 S.E.2d 685 (1983).

In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child and that right is paramount to that of any other person. State ex re. Action v. Flowers, comm'r, 154 W.Va. 209, 174 S.E.2d 742 (1970); State ex rel, Kiger v. Hancock, 153 W.Va. 404, 168 S.E. 2d 798 (1969). The Supreme Court of the United States has recognized the right to raise one's children is a fundamental personal liberty guaranteed by the Due Process clause of the *Fourteenth Amendment*. Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 11208, 31 L.Ed. 2d 551 (1972).

² By 1992, thirty-three states and the District of Columbia required Courts to consider domestic violence in determining custody and visitation. Developments in the law: Legal Responses to Domestic Violence, 06 HARV.L.REV. 1597, 1603 (1993) (citing Barbara J. Hart, State Codes on Domestic Violence: Analysis, Commentary and Recommendations, 43 JUV. & FAM.CT.J., No. 4, 1992, at 1, 29.).

Under the constitutional standard, parental rights are paramount to that of any other person. Petitioners are attempting to force a review of the best interests of the children as the paramount issue for adjudication and ignore the threshold requirement of a finding of abuse and neglect. The Circuit Court has rejected Petitioners 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 with 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." In theory, it may be in the best interests of the children to be placed in the custody of Petitioners; however, that fact in and of itself does not justify a finding of abuse and neglect. To find so, would be like putting the cart before the horse.

To reiterate her position, Respondent Sylvia _____ points to the Courts holding in In Re Beth Ann B. and Courtney Danielle B., 204 W.Va. 424, 513 S.E.2d 472 (1998), "The 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)." It would be unconstitutional and statutorily incorrect to ignore the finding of abuse and neglect before moving to the dispositional phase of this case, as Petitioner's are seeking to do.

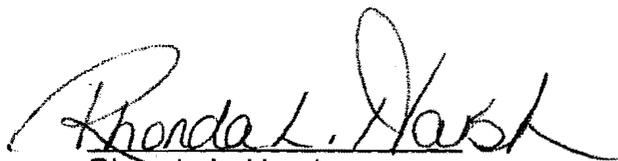
Conclusion and Relief Sought

WHEREFORE, for the reasons set forth above, Respondent Sylvia
respectfully prays for this Court to uphold and affirm the decision of the Circuit
Court in finding that the threshold requirement of abuse and neglect has not been
properly established. Respondent further prays for such relief as is just and proper.

Respectfully Submitted,

Sylvia

By Counsel,



Rhonda L. Harsh
WV State Bar No. 5782
Harsh Law, L.C.
4420 Rosemar Road Ste. 201A
Parkersburg, WV 26104
Telephone: (304) 865-2000

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 35660

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

In the Interest of:

Emily
Kaleb

08-JA-64
10-JA-02

CERTIFICATE OF SERVICE

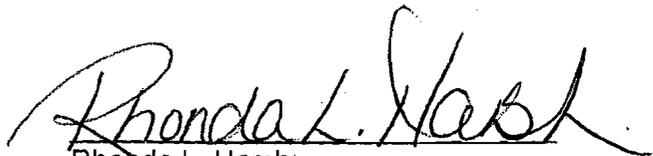
This 3rd day of September, 2010, the undersigned certifies that the enclosed "**Response of Sylvia** **to April 16, 2010, Petition for Appeal filed by Donna and John** " was served upon the following persons, by mailing a true and accurate copy thereof, first class postage prepaid, to:

Michele Rusen, Esquire
1208 Market St.
Parkersburg, WV 26101

Ashlee Mullenix, Esquire
Office of the Prosecuting Attorney
317 Market St.
Parkersburg, WV 26101

Michael Farnsworth, Esquire
1327 Market St.
Parkersburg, WV 26101

Reggie Bailey, Esquire
PO Box 1083
Parkersburg, WV 26012



Rhonda L. Harsh
WV State Bar No. 5782
Harsh Law, L.C.
4420 Rosemar Road Suite 201A
Parkersburg, WV 26104
Telephone: (304) 865-2000