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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Petitioner,

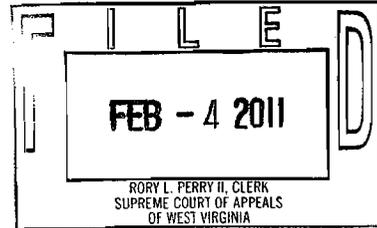
vs.

**TARA P.,
VERNER P.,
DOROTHY P.,
JOSHUA G.,
MARCUS A.,**

Respondents.

**ARGUMENT
DOCKET**

Docketing Numbers: 35743 and 35744
Juvenile Case Number: 09JN-34, 35, 36, 37



IN THE INTEREST OF THIS MINOR CHILD:

**NOAH A.
IAN A.
CARSON P.
MICAHA P.**

**DOB: 04/15/2000
DOB: 02/21/2003
DOB: 03/18/2004
DOB: 09/29/2008**

**SUMMARY RESPONSE OF GUARDIAN AD LITEM TO
PETITION FOR APPEAL**

Submitted By:

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Guardian Ad Litem for the Children

February 3, 2011

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POINTS AND AUTHORITIES

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POSITION OF THE GUARDIAN AD LITEM

Pursuant to Order of the W.Va. Supreme Court and Rev. R.A. P 11(h), The Guardian Ad Litem is filing this summary response to the Intervenor father's Petition for Appeal. The Guardian Ad Litem agrees with the decision of the Circuit Court to keep this sibling group together. That decision was made in the best interest of the children. However, the Guardian Ad Litem believes that it is not in the best interests of the children to remain in the care of the Respondent grandparents. That placement causes the Guardian Ad Litem grave concern for the safety and welfare of the children. The position of the Guardian Ad Litem is set forth more completely in the responses to the Intervenor father's arguments.

**RESPONSES OF THE GUARDIAN AD LITEM
TO THE ARGUMENTS OF THE INTERVENOR FATHER**

**I. GUARDIAN AD LITEM'S RESPONSE TO INTERVENOR FATHER'S 1ST
ARGUMENT:**

NON-ABUSING PARENT'S RIGHT TO CUSTODY OF HIS INFANT CHILD

**II. GUARDIAN AD LITEM'S RESPONSE TO INTERVENOR FATHER'S 2ND
ARGUMENT:**

PLACEMENT WITH THE MATERNAL GRANDPARENTS

**I. GUARDIAN AD LITEM'S RESPONSE TO INTERVENOR FATHER'S
1ST ARGUMENT:**

NON-ABUSING PARENT'S RIGHT TO CUSTODY OF HIS INFANT CHILD

First, the Intervenor father argues that the Court erred in failing to give him custody of his infant child because every parent has a natural right to custody of his child, absent a showing that said person is unfit. While the argument put forth by the Intervenor father is legally sound on its face, the Guardian Ad Litem believes that the Courts decision to place the children together considering the circumstances existing in this case was appropriate. The Intervenor father cites Syllabus, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d [798] (1969). Syllabus pt. 2, *Hammack v. Wise*, 158 W.Va. 343, 211 S.E.2d 118 (1975), which states, "A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." In the instant case, Jimmy G. appeared to be a fit parent at the time of the dispositional hearing. The Court made no finding that he was unfit. However, the Court failed to place his child in his custody.

The Court reasoned that the decision to place the child, Micah, with someone other than a natural parent who is fit, was made in order to protect the sibling bond. The Guardian Ad Litem is in complete agreement with this decision, and, in fact made a recommendation following the dispositional hearing that the siblings be placed together. In her post-dispositional argument and

recommendation to the Court, the Guardian Ad Litem only provided for placement with the Intervenor father and visitation with the siblings, if the Court failed to follow her previous recommendation to place the siblings together. The Court and the Guardian Ad Litem agreed that it was of utmost importance that these sibling remain together due to their strong bond and emotional attachment with each other. The only disagreement was as to where the children should be placed together. It is in the best interest of the children to maintain their close sibling bond and that it would be traumatic for all of the children in this case, not just for Micah, to be separated from each other particularly considering the instant circumstances: they have had their mother's parental rights terminated and the older siblings have lost a brother to death.

Although Jimmy G. does have a natural right to parent his child, that right should not come at the expense of the emotional well being of his child or his child's siblings. In fact, our law does not allow for that occurrence. In that regard, our Court has historically stated that, "(s)uperior to any rights of parents to the custody of their own children . . . is the overriding consideration of the child's best interest. Thus, the natural rights of parents to custody of their own is always tempered with the overriding concern for the well-being of the children involved." *Kessel v. Leavitt*, 204 W.Va. 95 175 S.E.2d 720, 799 (1998). The Circuit Court in this matter appropriately considered the best interests of all of the children involved when deciding not to separate the siblings.

II. GUARDIAN AD LITEM'S RESPONSE TO INTERVENOR FATHER'S 2ND ARGUMENT:

PLACEMENT WITH THE MATERNAL GRANDPARENTS

The Guardian Ad Litem is in complete agreement with the second argument set forth by the Intervenor father and hereby incorporates that argument in her response, thereto. Further, the Guardian Ad Litem states that she disagrees with Circuit Court's decision to place the children in the custody of the Respondent grandparents and that she has serious concerns that the children could suffer physical and/or emotional abuse while in that home. Many of the services ordered for the Respondent mother, Tara P., were also ordered for the Respondent grandparents. Because the Respondent mother failed to participate in many of the court-ordered services, the Court found that she was non-compliant with her improvement period and terminated her parental rights. The Respondent grandparents failed to comply with many of the services the Court ordered for them or failed to comply in a timely manner, however the Court awarded them a post-dispositional improvement period and placement of the children.

Further, the Guardian Ad Litem continues to find it troubling that a child died while in the care of Tara P. and Verner P. (the maternal grandfather and a Respondent, herein). That child's death, as well as his injuries received just prior to death were never appropriately explained by Tara P. or Verner P.

Dr. Hitel, First Chief Deputy Medical Examiner of the West Virginia Medical Examiner's Office testified at an evidentiary hearing in this matter that the deceased child had injuries to its anus which consisted of splitting and bleeding of the anus with blood seepage under the skin, as well as stretch related fissuring of the anus. *Transcript*, page 149. She further testified that

explanations of this child's injuries as provided [by Tara P. and Verner P.] were not consistent with the injuries . . . "and just because of the picture not being that clear cut we opted not to definitively consider the cause of death asphyxia from an accidental type scenario where Preston was wedged and his breathing compromised, particularly in the presence of the additional injury in the anal region." *Transcript*, page 152. Verner P. and Tara P. were the only adults in the home the night of that child's death. The fact that the child died with such injuries unexplained is only complicated by the fact that at least two of the children who are the subject of this matter have issues such as encopresis which the Respondent grandmother testified has been known about for years, but left untreated. *Transcript*, page 274.

This fact, along with the fact that the Respondent grandparents failed to fully participate in services in this case and continually supported the Respondent mother's position cause the Guardian Ad Litem grave concern for the children. The psychological evaluations performed on the Respondent grandparents prior to disposition, but received after disposition are unfavorable to the grandparents and do not recommend placement. For all of these reasons, the Guardian Ad Litem does agree with the Intervenor father, Jimmy G., placement of these children with the Respondent grandparents is not appropriate.

CONCLUSION REGARDING ARGUMENT

For all of the reasons previously stated, herein, the Guardian Ad Litem concludes that the decision of the Circuit Court to keep this sibling group together was the correct decision and was made in the best interest of the children. However, the Guardian Ad Litem believes that it is not in the best interests of the children to remain in the care of the Respondent grandparents. That placement causes the Guardian Ad Litem grave concern for the safety and welfare of the children.

STATUS OF CHILDREN'S PLACEMENT

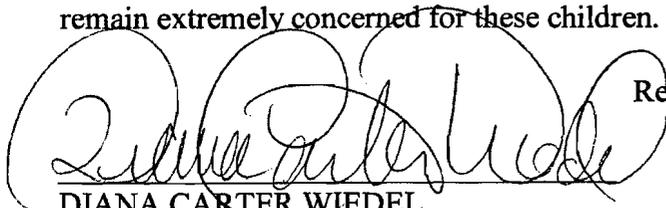
The children in this matter remain placed with the Respondent grandparents. Judicial review hearings have been held at least every ninety (90) days since in the dispositional hearing and hearings on certain motions and other matters have been held as well. The Circuit Court has refused to terminate the improvement period of the Respondent grandparents although there have been reports that the children have seen their mother on occasion. Some reports were made to the treating psychologists, then the children missed an appointment or two with said psychologist. A hearing was held on that matter and excuses were made. The Circuit Court admonished the grandparents, but found that it would be inappropriate to terminate the improvement period. Following the dispositional hearing, the psychological evaluations of the Respondent grandparents were submitted to the Circuit Court by motion with a request for termination of the Respondent grandparents' improvement period; but the Court refused, stating that the evaluations were considered within the dispositional order.

An evidentiary hearing was held following the dispositional hearing. The grandfather testified at that hearing that he did permit the children to spend time with their former foster family. He testified that the children, with the exception of Carson, spend at least a couple of nights every week or two with the former foster family. However, he also testified that the Intervenor father, Jimmy G., has failed to exercise most of his visitation since the dispositional hearing. The former foster father testified also. He confirmed the grandfather's testimony with regard to visitation with the children, including Micah's visitation with Jimmy G.

I do not believe the children are having any major problems other than those already mentioned. Noah has always had some behavioral issues and he and I know he suffers from encopresis. I believe Ian and Carson also suffer from encopresis. I have concerns that the former foster father admitted during his testimony at the last evidentiary hearing in this matter that he extensively questioned the older children about sexual abuse while in the process of cleaning them following bouts of encopresis. Carson no longer wants to visit with him and I am concerned that his feelings are due to this questioning. Although the Court has ordered psychological counseling for these children, the Respondent grandparents have not followed through with counseling, even after the evidentiary hearing regarding their failure to comply with counseling. The last counseling session any of the boys have had was on June 18, 2010.

The time the boys spend with the former foster father seems to be beneficial because it is the only time, other than school, that they interact with people outside the home. The former foster father takes them to sporting events, activities, etc. I also believe this time give the grandparents some relief which they may welcome since they are both elderly and in very poor health. Therefore, I believe the visitation is beneficial to the children even if it is unusual. I remain extremely concerned for these children.

Respectfully Submitted,



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GUARDIAN AD LITEM

CERTIFICATE OF SERVICE

I, Diana Carter Wiedel, do hereby certify that I have served a true and accurate copy of the foregoing Guardian Ad Litem's Summary Response to the following:

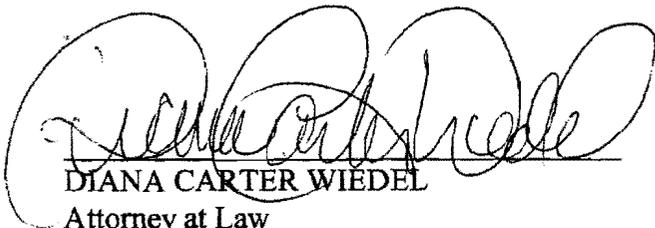
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by U.S. Mail, postage prepaid, on this the 3RD day of February, 2011.



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