

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 35659

Case No. 09-JA-21

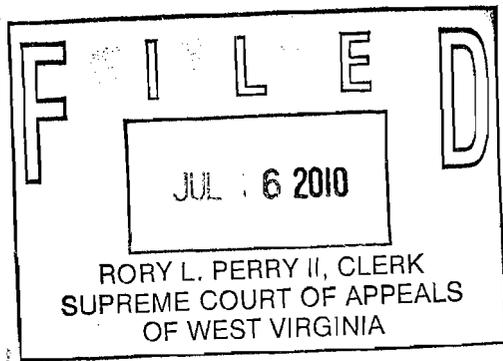
(Circuit Court of Logan County)

IN RE: CECIL, T. Infant,

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BRIEF ON BEHALF OF CECIL, T. Infant.

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Submitted by:

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Guardian ad Litem for Cecil, T, II.

## **TABLE OF AUTHORITIES**

### **CASES**

In re: Brian, James D. 209 WV 537

In Re: Emily. 208 W.Va. 325, S.E. 2d 542 (2000)

In the Interest of Carlita B. 185 W.Va. 613, 408 S.E.2d 365 (1991)

In re: Tiffany Marie S. 196 W.Va. 223, 470 S.E. 2d 177 (1996)

In re: Jonathan Michael D. 194 W.Va. 20, 459 S.E.2d 131 (1995).

In re: George Glen, B. 205 W.Va. 435, 518 S.E. 2d 863 (1999).

In re: R.J.M. 164 W.Va. 496, 266 S.E.2d 114 (1980),

In re: Jonathan P. 182 W.Va. 302, 387 S.E.2d 537 (1989)

In re Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162 (1993).

In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973)

In Re: Samantha S. and Hope S. W.Va. Docket No. 33713 (2008)

### **STATUTES/FEDERAL CODE**

WV Code 49-6-2

WV Code 49-6-5

Adoption and Safe Families Act

### **RULES:**

Rule 2 of the West Virginia Rules of Procedure for Child Abuse and Neglect proceedings

**I.**

**PROCEEDINGS AND RULINGS BELOW**

This action arises from a Petition filed by the West Virginia Department of Health and Human Resources (hereinafter WVDHHR/Petitioner below) in the Logan County Circuit Court on March 9, 2009. In this petition the WVDHHR sought custody of the infant respondent and alleged the circumstances of the Respondent's care and custody posed an imminent danger to the child's physical well being based upon the previous placement of the child in the custody of the state under abuse and neglect action 08-JA-55-O; the return of the child to the respondent's care February 9, 2009 and subsequent arrest of the Respondent March 6, 2009 on Federal ATF charges and current incarceration and lack of appropriate caretaker for the child. The Court entered an Order January 29, 2009 denying the WVDHHR's Motion to terminate the Respondent's parental rights and ordering the child to remain in the physical custody of the Intervenor's and legal custody of the infant to remain with the WVDHHR

**II.**

**FACTS**

The infant respondent was born on September 6, 2008 and pursuant to Petition for Immediate Custody of Minor Children in Imminent Danger, Civil Action 08-JA-55-O, filed by the WVDHHR on September 9, 2008, the infant respondent was placed in the legal and physical custody of the WVDHHR. The previous petition was filed due to statutory requirements of WV Code 49-6-1 to 49-6-12 due to past involuntary termination of parental rights and relinquishment of parental rights with regard to the infant's mother April T ; the child being born

presumptive positive for benzodiazepines, methadone and barbiturates and suffering minimal withdrawal symptoms; illegal substance use by April T ; respondent Cecil T reports of taking unprescribed Vicoden and reporting pending criminal charges for possession with intent to deliver and the parties reports they are residing together as a couple.

During the initial case, both adult Respondents were initially afforded the opportunity to visit with the child, and the parties were ordered to submit to negative drug screens. Subsequently, respondent Cecil T reported the parties were no longer a couple and Respondent Cecil T was granted a Preadjudicatory Improvement period at hearing held November 5, 2008, pursuant to order entered November 24, 2008. Respondent April T failed to further appear and participate in the case and based upon evidence presented to the court April T parental rights were terminated pursuant to order entered December 9, 2008. At hearing held December 16, 2008 Respondent Cecil T acknowledged Respondent April T was found at his home and had been allowed to stay a few days in his home. Final hearing was held February 9, 2009, at which the WVDHHR and Guardian Ad Litem noted concern with Respondent Cecil T facing recent Indictment for drug related charges and how that would affect caretaking for the child, his submission to drug screens positive for alcohol usage on dates the respondent was caring for the child or evidencing abnormal results, continued reports the Respondent remained in a relationship with April T and Respondent's lack of alternative caretaker's for the child should he be incarcerated. The court noted the WVDHHR and Guardian Ad Litem's concerns for the safety and welfare of the child, however found the Respondent had substantially complied with the terms of his improvement period and the allegations that led to the filing of the petition have been abated and ordered legal and physical

custody of the child placed with Respondent Cecil T . The court ordered in home services to continue in the home for a period of 90 days.

Subsequently, Respondent Cecil T was arrested March 6, 2009 for selling firearms to ATF agents from his residence. The infant child was present at the Respondent's residence when law enforcement entered the residence and arrested the Respondent and the child was initially allowed to be taken to the paternal grandmother's residence. The WVDHHR filed the petition subject of the current appeal, Civil Action. 09-JA-21-O and found the paternal grandmother in respiratory distress and not an appropriate caretaker for the child.

During the initial abuse and neglect case the child was placed into the foster home of Brett and Susan E on or about September 9, 2008. The child was transitioned back into the home of Respondent Cecil T full time when the previous legal matter ended February 9, 2009. On March 6, 2009 the child was placed back into the home of Susan and Brett E . Respondent Cecil T has remained incarcerated since that date and has had no visitation with the child.

Initial hearing in Civil Action 09-JA-21 was scheduled March 17, 2009, continued to March 31, 2009 and continued to April 3, 2009. At hearing April 3, 2009, counsel reported Respondent waived Preliminary hearing and waived timeframe to hold adjudicatory hearing and an MDT was to be held to discuss possible relatives as placement options for the child. Further hearing was held May 18, 2009 at which continued issues with receiving information about relatives from the respondent were reported and the matter was scheduled for adjudicatory hearing June 25, 2009. The Respondent signed a Stipulation of Facts, Plea Agreement Exhibit A on May 9, 2009 and a written Plea of Guilty on June 1, 2009 in Federal Criminal Action 2:09-cr-00085.

Hearing scheduled June 25, 2009 was continued to allow coordination of Respondent Cecil T to appear via video. Further hearing was scheduled July 1, 2009 at which the State requested leave to amend the Petition. Amended Petition was filed by the WVDHHR on July 10, 2009 in which the WVDHHR asserted new allegations of abuse and neglect stem from Indictment of Respondent by Federal Court, being incarcerated since March 6, 2009, knowingly participating in illegal activities that led to his being prohibited from caring for the child and participating in such behaviors as the primary caretaker with the child present during an illegal sale of guns. Hearing was continued to July 27, 2009, at which hearing Respondent Cecil T through counsel stipulated to certain allegations in the Petition and Amended Petition, however maintained such did not rise to the level of abuse and neglect. The court found the child a neglected child pursuant to WV Code chapter 49 and found the WVDHHR has been unable to use reasonable efforts to reunify the infant due to the Respondent's incarceration. The WVDHHR filed a Motion to Terminate Parental Rights of Adult Respondent Cecil T on or about August 26, 2009. Further hearing was scheduled for September 2, 2009. Hearing was continued to October 5, 2009 due to the Guardian Ad Litem being unavailable and further continued to October 27, 2009 due to the Guardian Ad Litem being ill. Brett and Susan B filed a Motion to Intervene as caretakers for the infant respondent and the Motion was granted at hearing October 27, 2009. At this hearing the WVDHHR and Guardian Ad Litem moved to terminate the parental rights of the Respondent based on the grounds there was no reasonable likelihood the circumstances that led to removal could be corrected in the near future, that the allegations did not just rely upon the incarceration of the Respondent, but the risk of harm to the infant by the respondent's actions, the actions of the respondent placing the child without a caretaker other than state placement, in consideration of the history of these parties and

the placement of the child back in the home and removal a short time later and the best interests of the infant child are upheld by achieving permanency. The Intervenor's joined in the Motion of WVDHHR. The Respondent's counsel and Guardian Ad Litem opposed the Motion to Terminate and argued the only allegation against the Respondent is his incarceration.

The court denied the Motion to terminate, citing the case to be procedurally difficult and did not fit into a normal abuse and neglect matter contemplated by the legislature, noted the child has lived most of his life in foster care with the same foster parents, found no clear and convincing evidence that there is no reasonable likelihood the neglect could not be corrected once the Respondent is released from incarceration and assigned the foster parents as guardians for the infant respondent, and at time the Respondent is released from incarceration and sees fit to exercise his parental rights, he can file an action in Family Court. Subsequent written proposed Order was submitted to the Court and objections to Order were filed by Respondent's counsel. The Intervenor's filed a Motion to Reconsider previous order of the court.

Hearing was held January 15, 2010 at which the court addressed objections to previous proposed order and the Motion to Reconsider by the Intervenor's. The court directed the WVDHHR to obtain a transcript of October 27, 2009 hearing and directed counsel for Respondent to submit proposed Order. Further, the court noted need for subsidy for the child considering the placement and reported the court's intention that order be changed to allow for subsidy and medical card to be provided to the caretakers for the infant respondent.

An Order was subsequently entered January 29, 2010 which denied the Motion to terminate; found the WVDHHR failed to establish clear and convincing evidence that there is no reasonable likelihood that the conditions that led to the finding of neglect could be corrected after the Respondent is released from prison and failed to evidence elements for termination;

ordered physical custody of the child remain with the Intervenor's and legal custody remain with the WVDHHR; ordered that at the time of the Respondent's release from prison, should he wish to make a record that he is fit to resume exercising his parental rights, the appropriate forum would be in Family Court; and in the interim, that during the Respondent's incarceration visitation with the infant is not in the best interest of the infant respondent.

Further hearing was held March 24, 2010, at which the court ordered legal and physical custody of the child placed with the foster parents and any future modifications of custody to be heard before the appropriate Family Court. The court further ordered the WVDHHR to provide in writing why the child was denied a subsidy, the WVDHHR to provide a medical card for the child for a period of at least one year and services for the child to continue until appeal in the case is resolved. The court ordered the Guardian Ad Litem to contact the foster parents at least once per week to discuss the child's welfare. The child remains in the care of the foster parents and as of the date of this filing the Respondent remains incarcerated.

A Family Case Plan, Child's Case Plan or Permanency Plan other than the Motion to Terminate were not filed by the WVDHHR in this case.

### III.

#### ASSIGNMENT OF ERRORS AND MANNER DECIDED BELOW

- 1. The Court erred in denying the WVDHHR and Guardian Ad Litem's and Intervenor's request and Motion to Terminate the parental rights of Respondent Cecil I and in failing to find the WVDHHR failed to establish by clear and convincing evidence, elements for termination.**
- 2. The Court erred in denying the WVDHHR's Motion to terminate parental rights of the Respondent on the basis that the WVDHHR had failed to prove by clear and convincing evidence there is no reasonable likelihood that the conditions that led to neglect could be corrected when the Respondent is released from prison.**
- 3. The Court erred in ordering a disposition of the infant child that does not achieve permanency and is contrary to the best interests of the infant respondent.**

### IV.

#### POINTS AND AUTHORITIES RELIED UPON DISCUSSION OF LAW AND REQUEST FOR RELIEF

The Court employs a compound Standard of Review for appeals from abuse and neglect proceedings, which entails conclusions of law are subject to a de novo review and findings of fact are weighed against a clearly erroneous standard. See In Re: Emily 208 W.Va. 325, 332-340 S.E. 2d 542, 549 (2000). Findings of the circuit court are not be set aside unless clearly erroneous and a find 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 reviewed in it's entirety." In Re: Emily 208 W.Va. 325, citing Syl. Pt. 1 In re: Tiffany Marie S. 196 W.Va. 223,

470 S.E. 2d 177 (1996), Syl. Pt. 1 In re: George Glen, B. 205 W.Va. 435, 518 S.E. 2d 863 (1999).

**1. The Circuit Court's erred in denying the WVDHHR and Guardian Ad Litem's and Intervenor's request and Motion to Terminate the parental rights of Respondent Cecil T and in failing to find the WVDHHR established by clear and convincing evidence elements for termination.**

In a parental rights termination case, the parent's incarceration may be considered along with other factors and circumstances impacting the ability of the parent to remedy the conditions of abuse and neglect. In re: Brian, James. D. 209 W.Va. 537 at 541, citing In Re: Emily 208 W.Va. 325 at 342, 540 S.E.2 at 559. While the court may consider a parent's incarceration in determining whether to terminate parental rights, the court "must also evaluate additional evidence relevant to his ability to parent his children, such as his history of substance abuse,... his regular visits with and telephone calls to his children during his imprisonment; his frequent inquiries as to the health and well being of his children during these proceedings; and any additional information which the lower court deems instructive to its decision. In Re Emily 208 W.Va. 325 at 342, 501 S.E. 2d at 559.

In the present action, the WVDHHR presented evidence, to which the Respondent stipulated, that included not only the incarceration of the Respondent and his subsequent plea to federal charges, but also included the Respondent's decision to participate in the illegal activity with the child present and at risk of immediate harm. In addition, the State and Guardian contend that the Respondent's history in only recently completing his prior improvement period must be considered, although the court found the Respondent "substantially" completed his improvement period, the safety concerns for the child were noted, including the fact that during the prior case the Respondent had multiple positive drug screens, had issues with obtaining employment and

appropriate caretakers for the child given the paternal grandmother's inability to function as a full time caretaker and remained involved with the biological mother who's rights were terminated.

Most notable, the child had only been returned to the Respondent's full time care for less than a month prior to his arrest by the ATF, during a time when in-home services were ongoing from the prior case, yet the Respondent chose to participate in dangerous, illegal activity with the child present. The Guardian contends the Respondent knew upon completion of the prior case that he was the primary caretaker for this child and his decision to continue with illegal activities jeopardized his ability to care for this child and again resulted in this child being in an out of home placement.

The Circuit Court in the lower action addressed contact between the Respondent and the child and ruled the Respondent could telephone and check on the welfare of the child. However, given the age of the child, the child and parent could not converse by telephone. Ultimately, the court found no strong emotional bond between the child and Respondent based on the age of the child and determined during the Respondent's incarceration visitation with the infant is not in the best interest of the infant respondent.

The consideration of not only the Respondent's incarceration, but also his previous involvement with the court and recent return of the child to his care; the difficulties the Respondent faced with the return of the child to his care; the Respondent's choice to participate in activities that by their very nature were dangerous and put the child in harms way, but also led to another removal of the child in less than a one month period, with no timeframe for return of the child to his care, along with the lack of bonding between parent and child, are all sufficient evidence for termination.

The Respondent's counsel in this action, relied upon In Re: Brian James D. 209 W. Va. 537, in his contention that incarceration, per se, is not sufficient to terminate the Respondent's parental rights. Your guardian would contend, and did so in the lower action, that the present case is distinguishable from In Re: Brian James D. in that the current action does not ultimately involve a parent who is not incarcerated and on home confinement, but also the fact scenario in the present case includes a much shorter time period of involvement and removal of the child—while considerable time had passed between the two abuse and neglect actions filed in In re: Brian. Your Guardian maintains In re: Brian James D., with its citation to In Re: Emily, Id. and the court's requirement to consider other factors in determining whether to terminate parental rights, supports termination of the Respondent's parental rights in the present action.

**2. The Court erred in denying the WVDHHRs Motion to terminate parental rights of the Respondent on the basis that the WVDHHR had failed to prove by clear and convincing evidence there is no reasonable likelihood that the conditions that led to neglect could be corrected when the Respondent is released from prison.**

The WVDHHR and Guardian contend the circumstances of the case evidenced clear and convincing proof there is no reasonable likelihood that the conditions that led to the neglect could be corrected in the near future and the Respondent's actions demonstrated an inadequate capacity to solve the problems of neglect on his own or with help. The circumstances presented in the present action evidence the Respondent was afforded an Improvement Period to regain custody of his infant child in the initial abuse and neglect action. Not only did the Respondent receive and technically complete a previous improvement period, which involved the child being out of the home for a period of five (5) months (the child's entire life at the time), the child was only returned to the Respondent's full time care for approximately one (1) month before being

removed again. Throughout the entire second abuse and neglect case, the Respondent has remained incarcerated, being another sixteen (16) months. The reality is the infant respondent is currently 22 months old, and has spent 21 months of his life in foster placement and the conditions that led to the removal of the child have not corrected at this point in time.

Although a court may find a parent performed tasks to complete an improvement period, their rights may be terminated if their attitudes and beliefs have not changed. In re: Jonathan Michael D. 194 W.Va. 20, 459 S.E.2d 131 (1995). In the previous case, the court found the Respondent had ‘substantially’ completed his prior improvement period, but the passage of less than a month, and the Respondent’s acknowledged commission of a federal criminal offense of selling guns to the ATF, while still receiving services to assist him, evidence that his attitude about proper care for his child had not changed. The Respondent presented no evidence of any changed circumstances while incarcerated throughout the present case.

In Civil Action 09-JA-21 the Respondent’s circumstances did not warrant an improvement period and he nor his counsel requested an improvement period. The Court has determined that delaying the start of improvement periods to accommodate circumstances of parents, to include present incarceration, violate statutory mandates established for abuse and neglect matters, which establish timeframes for improvement periods to begin. See, In re: Emily 108 W.Va. 325. In our present action, the Circuit Court noted that a delayed improvement period could not be granted, citing the Emily case. Therefore, the Respondent would not be eligible for an improvement period, presented no evidence of his circumstances changing in the future and he remained incarcerated and no established release date was confirmed by the court.

Pursuant to WV Code 49-6-2 and pursuant to Rule 2 of the West Virginia Rules of Procedure for Child Abuse and Neglect proceedings, a core requirement in dealing with abuse and neglect matters involves the fair, timely and efficient disposition of these cases, with the rules to be construed so as to achieve safe, stable, secure permanent homes for abused and/or neglected children. The court's ruling that the WVDHHR failed to prove by clear and convincing evidence there is no reasonable likelihood that the conditions that led to neglect could be corrected when the Respondent "is released from prison", requires the State to predict actions and behaviors for an undetermined period of time in the future. That ruling in conjunction with the court's order that the Respondent could choose to seek further legal action upon his release from incarceration both serve to delay the opportunity of the Respondent to regain custody and improve--such as with a delayed improvement period--contrary to the statutory guidelines to finalize permanency for infant children subject of abuse and neglect matters and contrary to the premise of not delaying improvement periods discussed In re: Emily, because such serves to delay permanent placement of the child that awaits the future release of the Respondent.

"Termination of parental rights,... may be employed without the use of less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code 49-6-5(b) that the conditions of neglect or abuse can be substantially corrected. "Syl. Pt. 2, In re: R.J.M. 164 W. Va. 496, 266 S.E.2d 114 (1980), Syl. Pt. 4, In re: Jonathan P. 182 W. Va. 302, 387 S.E.2d 537 (1989), Syl. Pt. 1, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993). The "courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened..." Justice Maynard dissenting, In re: Brian James D 209 W. Va. 537 at 543, 550 S.E. 2d 73 at 79; citing Syl. Pt. 7, in part, In the Interest of Carlita B. 185 W. Va. 613, 408 S.E.2d 365 (1991).

While the court may have previously found that the Respondent had “substantially” completed his prior improvement period, the respondent’s attitudes and beliefs obviously had not changed during the five (5) months of the child’s previous removal, given the Respondent continued involved in illegal activities and was arrested within a month of receiving full time care and custody of his child. The conditions that led to the neglect of this child did not correct in the first abuse and neglect case, did not correct in the one month the child was in the full time care of the Respondent and will not be corrected when the Respondent is released from prison. The Respondent’s circumstances will obviously not have changed upon his release from incarceration, not only have no relatives been located to provide care for this child, but the Respondent will again face the same circumstances from the original abuse action—no resources, no employment and issues with providing for the child and appropriate caretakers should the Respondent be able to gain employment, not to mention issues with the Respondent’s personal decision to maintain legal behaviors.

**3. The Court erred in ordering a disposition of the infant child that does not achieve permanency and is contrary to the best interests of the infant respondent.**

In matters involving children determined abused and neglected the welfare of the child is the polar star by which the discretion of the court is guided. Syl. Pt. 8 in part In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973). See also, In Re: Samantha S. and Hope S. W.Va. Docket No. 33713 (2008); In Re: Carlita B. 185 W.Va. 613, 408 S.E. 2d 365 (1999); In Re: Jeffrey R.L. 190 W.Va. 24, 435 S.E. 2d 162 (1993). The Order of the court entered January 29, 2010 initially ordered legal custody of the child remain with the WVDHHR and physical custody

remain with the foster parents, with the provision that when Respondent is released from prison, should he wish to make a record that he is fit to resume exercising his parental rights, the appropriate forum would be Family Court. This disposition is not permanent for the infant child and does not uphold the best interests of the child.

The court's subsequent Order provided legal and physical custody of the child be placed with the Intervenor, as it would not be expected these individuals would not continue to be willing to provide care to this child. However, the disposition as ordered allows the Respondent a delayed opportunity to appear at some unknown time in the future, when he is released from incarceration, if he decides to pursue the matter in Family Court, and seek to again be a parent. Such is just not in the best interest of a child who has not lived with this person for 21 of the 22 months of his life at the present time—which stands to be even more time in the future. The court can simply not ignore the time that has passed and in doing so ignores the best interests of the child.

As Guardian for the child, counsel notes the lower court's indications that this case did not "fit" in parameters established by the legislature. The court seemed to weigh more on the case law that precludes termination based on incarceration per se and the fact an improvement period could not be granted to the Respondent and delayed due to his incarceration. Nevertheless the court's ruling served to delay the chance for the parent anyway—by allowing the Respondent the opportunity to pursue his parental rights at some unknown time in the future, without sufficient weight given to the child's need to be in a safe, secure permanent placement. The Court's failure to afford more weight to the prior legal action, the timing of the illegal activity of the Respondent and the direct impact his decision making had on the child, the lack of bonding between the parent and child, and the ultimate open ended passage of time that the

disposition allows with no permanency for the child, are all contrary to the best interests of the child and do not evidence the ultimate guiding factor in the disposition was what was best for the child.

### CONCLUSION

In Summary, the Circuit Court erred in denying the WVDHHR and Guardian Ad Litem's Motion to Terminate and disposition ordered by the court failed to uphold the best interests of the infant child and fails to afford permanency for the child. Accordingly, the Guardian Ad Litem prays the court reverse the lower court and grant the Motion to Terminate the parental rights of Respondent Cecil T to the infant respondent.



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Cecil T , II  
By Guardian Ad Litem

CERTIFICATE OF SERVICE

The undersigned does hereby certify that she has served the foregoing Brief on Behalf of Cecil, T. Infant by mailing via first class, postage paid, US mail a true copy on the 15<sup>th</sup> day of July, 2010 to the following:

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