

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

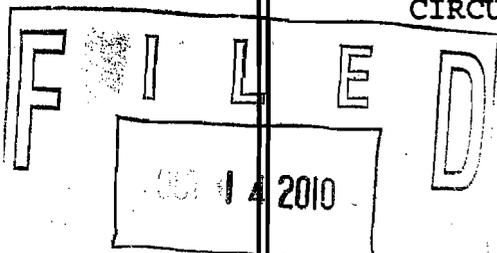
KRISTOPHER O and CHRISTINA O
vs.

THE HONORABLE JAMES P. MAZZONE

and

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

CIRCUIT COURT OF OHIO COUNTY PETITION NO. 08-CJA-31



RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RESPONSE OF THE GUARDIAN AD LITEM TO THE
VERIFIED PETITION FOR WRIT OF PROHIBITION OF PETITIONERS

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304-233-2010
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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 L. 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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TABLE OF AUTHORITIES

W. Va. Code Section 49-6-5a(c)4

PROCEEDINGS AND RULING

STATEMENT OF FACTS

This GAL has no argument with the Petitioners recollection or presentment of those facts as stated in their FACTUAL AND PROCEDURAL BACKGROUND except for the following additions and/or clarifications.

Visitations between Kathy M., paternal aunt, and child began in April, 2009. The parental rights of the biological father were terminated from the bench after a Dispositional Hearing on December 28, 2009. Visitations continued between the aunt and the child and as of March 23, 2010, Y.S.S. had been supervising the visits for over a year (Exhibit #1, attached). Since the date of the Dispositional Hearing when the parental rights of the father were terminated, there was the issue of permanent placement of the child and all parties were aware that the aunt was interested in placement and a home study was requested from the State of Ohio, where the aunt and her family resided. Subsequently, the home study was conducted, reduced to writing and sent to the DHHR with an approval of the aunt's home.

Upon receipt of the home study, the DHHR set up an MDT/ARC meeting for discussion of permanent placement issues. When advised that the home study was approved, the Petitioners

expressed their intent to retain counsel and did so some time before this meeting. The DHHR made it known to the Petitioners early on, after the termination of the father's parental rights, that their opinion and recommendation was relative placement upon receipt of an approved home study. It is unclear why Petitioners waited so long to obtain counsel.

An MDT/ARC meeting was held on March 23, 2010. Present were several representatives from the DHHR: Beth Anderson, Adoption Worker; Joe King, Homefinder; Sarah Bleigh, Regional Supervisor and Anna Grafton, CPSW. Also present were the Petitioners, paternal aunt and her husband, the GAL and Crystal Corkran, Y.S.S. Visitation Specialist.

All parties expressed their respective opinions as to permanent placement of the child. The Petitioners were told that the recommendation was placement with the relative, the paternal aunt and her husband (Exhibit #2, attached).

On March 24, 2010, the Order from the December 28, 2009 Dispositional Hearing was entered, terminating the parental rights of the respondent father. The Judge's secretary filled in the blank for the Permanent Placement Hearing date for the next Status Hearing/Permanent Placement Hearing date which was previously set on March 29, 2010 after advising counsel of same.

According to the record, Petitioners filed a Motion to Intervene on Friday, March 26, 2010. This GAL was not aware of same until the date and time of the Court hearing. At said hearing, the Petitioners were advised that this hearing was

closed and the hearing was not set to hear the issue on the Motion to Intervene. The Court advised Petitioners' counsel to call his secretary and set the Motion to Intervene for a hearing after serving the GAL, who had not received a copy of same prior to the hearing but reviewed the motion in the Courtroom.

At the Permanent Placement Hearing, the DHHR and GAL placed upon the record their respective positions concerning the issues discussed at the MDT/ARC meeting held on March 23, 2010 and what was in the best interest of the child. This GAL did not object to the Petitioners' Motion to Intervene, however, further stated that he was in agreement with the DHHR on relative placement with the aunt. Furthermore, there was an approved home study from the State of Ohio that this GAL reviewed which showed the aunt and her family to be a fit and suitable placement. This GAL had no contrary information nor any other information to show otherwise and as such expressed his opinion that this relative placement was in the best interest of the child.

Because visitations had gone well with the aunt, the decision of the MDT/ARC was made known to the Court and the Court ordered the child to be moved to the home of the aunt and physical custody be transferred to her with legal custody remaining with the DHHR. There were no issues with the physical transfer of the child to the home of the aunt from the foster home.

On April 27, 2010, after notice to all parties, a hearing was held on Petitioners' Motion to Intervene and all parties

placed upon the record, his/her respective position.

ASSIGNMENTS OF ERROR/DISCUSSION OF LAW

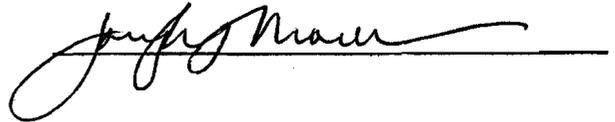
This GAL has no argument with the Petitioners' position that W.Va. Code 49-6-5a(c) requires that the foster parent be given notice of and the opportunity to be heard at a permanent placement hearing. On the date of that hearing the foster parents still had physical custody of the child and were present in the Courtroom. The issue of notice is moot. However, they were advised the hearing was closed because they filed a Motion to Intervene and they expected to be heard on that Motion. The Court was correct in asking them to leave because that Motion was not before the Court at that time. Why they left the Courtroom and did not remain as foster parents for the permanent placement hearing is unclear. Perhaps because the recommendation of the DHHR and GAL was made clear to them at the MDT/ARC meeting held on March 23, 2010. Even if the Petitioners were "heard", no other party was prepared to argue that Motion fully because of the late filing of same. Nothing would have changed. The Court advised them to set it for a hearing. Regardless, the case proceeded as it would have and the child was placed in the physical custody of the aunt. The purpose was to avoid delay in permanent placement of the child. The Petitioners had their hearing on their Motion to Intervene on April 27, 2010. Same was denied. The Court did not abuse its power or discretion nor exceed its legitimate powers. There is no clear error as a

matter of law in denying said Motion and the Order so entered should be upheld.

PRAYER FOR RELIEF

WHEREFORE, for the reasons in the aforesaid Response, the Writ of Prohibition should be denied.

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



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WV ID #2661

CERTIFICATE 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.



Joseph J. Moses, Esq.

CERTIFICATE OF SERVICE

Service of the foregoing Response of Guardian ad Litem
was had by mailing or hand delivering a true copy thereof to the
below listed on 11 OCT 10.

Honorable James P. Mazzone
Circuit Court Judge
1500 Chapline Street
Wheeling, WV 26003

Teresa C. Toriseva, Esq.
1446 National Road
Wheeling, WV 26003

Elisabeth Slater, Esq.
Prosecuting Attorney Office
1500 Chapline Street
Wheeling, WV 26003



Of Counsel for Child

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE