No. 23065: In the Matter of Lindsey C.

Workman, Justice, dissenting:

HOW MANY ANGELS CAN DANCE ON THE HEAD OF A PIN?

The majority has embarked on an extended and meandering expedition through the law of abuse and neglect. Prior to the enrollment of this opinion in the annals of the law, we had endeavored to develop some semblance of order and ease of application in the requirements of this area of the law. Experience has shown that neglect and abuse law should be kept as simple and humane as possible. The last thing we need in this area is a "how

many angels can dance on the head of a pin" approach with lots of meaningless procedural hoops to jump through. It must be remembered: "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." Hormel v. Helvering, 312 U. S. 552, 557 (1941). With the majority's presentation of this obscure and easily misconstrued opinion, I have several significant areas of concern.

I.

NOTICE

First, the majority is troubled by the notice of termination proceedings received by the Appellant in this case. The petition requesting termination of parental rights was apparently filed on April 29, 1994. On May 9, 1994, a copy of the petition was sent by certified mail to the Appellant at her mother's home address. That attempt at service was returned to sender. By August 19, 1994, the court and DHHR were apparently aware of the Appellant's involuntary hospitalization and the address of the mental institution. On August 22, 1994, the petition was received on behalf of the Appellant at the mental institution by a person whose signature is not legible. The Appellant now claims that she did not receive such mailing. By January 1995, a West Virginia protective services worker had contacted the Appellant's caseworker regarding the

termination proceedings, and in the March 1, 1995, order, the lower court found that the Appellant did receive actual notice of these proceedings.

In dealing with this notice issue, the majority quotes West Virginia Code § 49-6-1(b) regarding service of process and acknowledges that if neither personal service nor service by mail can be obtained, notice by publication is required. Noting that notice by publication was not attempted in this case, the majority states that notice by publication "may" have cured the deficiencies of notice in this case. The majority then references the Appellees' argument that since the lower court found that the Appellant did indeed receive actual notice of the termination proceedings, any defect in service of

process is cured. Apparently not wishing to confront that assertion, the majority somewhat abruptly concludes that it will "not reach the question of whether such a defect would be cured" by the fact that the Appellant received actual notice. The majority then launches into an examination of the necessity of a guardian ad litem, returns to the notice issue several pages later, requotes section 49-6-1(b), and concludes that notice served upon a guardian ad litem rather than the involuntarily hospitalized parent is insufficient.

Where in that discussion is a precise, unequivocal statement of the law of notice to parents in termination proceedings? Where is a concrete message regarding resolution of the issue of a missing parent

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In many of these cases, there is a missing or abandoned parent and

and the inability to serve notice? According to the majority, strict adherence to the provisions of section 49-6-1(b) allowing service by publication "may" have cured the problem in this case. That further fouls the waters by suggesting that even faithfulness to the statutory scheme may not have been enough. This opinion leaves us in great confusion.

My predominant concern is that we do not allow the mechanics of the notice issue to overshadow the obligation to expeditiously resolve the underlying issue of the rights, safety, and custody of the children. In child abuse and neglect cases, the best interests of the

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not a clue as to their whereabouts. The majority now muddies up the waters as to what constitutes proper notice in the event it is ascertained much later that they were institutionalized.

child are the paramount concern. Although the majority apparently has difficulty perceiving specificity within section 49-6-1(b), it appears clear to me that those rules unambiguously define the requirements of notice. Equally evident is the intent that individuals

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The only Rules of Civil Procedure regarding the notice requirement and applicable to child abuse and neglect cases are Rules 5(b) and 5(e), as follows:

> (b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney of record the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last-known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the person to be served; or leaving it at his office with his clerk or other

for whom a guardian ad litem is appointed under West Virginia Code § 56-4-10 are not entitled to personal service of process. That

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> person in charge thereof; or, if the office is closed or the person to be served has no office, leaving it at his usual place of abode with some member of his family above the age of 16 years. Service by mail is complete upon mailing.
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> (e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, who shall note thereon the filing date, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk; the notation by the clerk or the judge of the filing date on any such paper constitutes the filing of such paper, and such paper then becomes a part of the record in the action without any order of the court.

West Virginia Code § 56-4-10 provides as follows, emphasis provided:

The proceedings in a suit wherein an infant or insane person is a party shall not be stayed because of such infancy or insanity, but the court in which the suit is pending, or the judge thereof in vacation, or the clerk thereof at rules, shall appoint some discreet and competent attorney at law as guardian ad litem to such infant or insane defendant, whether such defendant shall have been served with process or not, **and after such appointment no process need be served on such infant or insane person.** If no such attorney be found willing to act, the court, or the judge thereof in vacation, may compel him to act, or appoint some other discreet and proper person in his stead; but the attorney or other person so appointed shall not be liable for costs. Every guardian ad litem shall faithfully represent the interest or estate of the infant or insane person for whom he is appointed, and it shall be the duty of the court to see that the estate of such defendant is so represented and protected. And the court, or the judge thereof in vacation, whenever of opinion that the interest of an infant or insane

section, relied upon by the majority as justification for requiring a guardian ad litem for the Appellant, specifically provides that "after such appointment no process need be served on such infant or insane person . . . ." The majority feels perfectly comfortable stretching the "infant or insane" language to include persons involuntarily hospitalized by reason of mental illness in the context of justifying the requirement of a guardian ad litem. Yet the majority draws the line on literal compliance with the same statute when it arrives at the

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> person requires it, shall remove any guardian ad litem and appoint another in his stead. When, in any case, the court or judge is satisfied that the guardian ad litem has rendered substantial service to the estate of an infant or insane defendant, it may allow him reasonable compensation therefor, and his actual expenses, if any, to be paid out of the estate of such defendant.

issue of notice, apparently reasoning that such persons have not been formally deprived of their civil rights to service in the absence of a declaration of incompetency.

Why not adhere to the statutes as written? If section 56-4-10 justifies the appointment of a guardian ad litem, why not simply follow the mandate of that section and allow the guardian to accept service of process? Prior to the appointment of the guardian ad litem, section 49-6-1(b) should govern, permitting notice by publication to suffice if personal service or service by mail is not possible. If a parent is absent, our prior statement in syllabus point six of In re Christina, 194 W. Va. 446, 460 S.E.2d 692 (1995),

should still govern: "When the West Virginia Department of Health and Human Resources seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W.Va.Code, 49-6-1 (1992)." Once a guardian ad litem is appointed, the guardian, cloaked with authority to act on behalf of the individual by the very nature of his/her appointment, should be permitted to accept service of process on behalf of the parent, as is the intent of section 56-4-10.

We recognized in In re Christina that abandonment of a child by a parent "constitutes grounds for termination of parental rights." Id. at __, 460 S.E.2d at 702.

II.

JUMPING THROUGH HOOPS

The majority also fails to identify the time at which a court must appoint a guardian ad litem. Syllabus point three of the majority opinion states the rule that a guardian is required where the person is involuntarily hospitalized, and yet syllabus point four states that it is error to terminate parental rights without a guardian ad litem where there has been a "suggestion" of involuntary hospitalization for mental illness. That leaves the door cracked open on the issue of exactly when this duty to appoint a guardian ad litem is triggered. I disagree with the majority's apparent conclusion that the "suggestion" of the Appellant's mental condition was an adequate

basis for the appointment of a guardian ad litem. Unless and until a court is informed of legal incapacity or involuntary commitment, that court should be under no duty to appoint a guardian ad litem. A "suggestion" of a mental condition is much too amorphous and indeterminate to be utilized as a standard for the appointment of a guardian ad litem.

The one saving grace the majority includes in its guardian ad litem requirement is that the trial court may, in its order appointing counsel, provide that the appointment imposes the additional status of guardian ad litem. Now that the majority has cast so much doubt as to exactly what (even a suggestion or suspicion of mental illness?) may create the obligation to appoint a guardian ad litem and so

much confusion as to how a parent with some "suggestion" of mental illness may be notified, I recommend that the circuit courts routinely couch the orders appointing counsel in those terms. In fact, I will propose that the new Rules of Procedure for Child Abuse and Neglect Proceedings now out for public comment until August 15, 1996, include that requirement. Judicial training will have to be held at the next conference, and we'll get this esoteric hoop jumped. Whew!

What a lot of trouble -- for what real gain?

III.

CHILDREN ARE PEOPLE, TOO

The majority, in the midst of its discussion of the potential conflict in the roles of a guardian ad litem and an attorney for the parent, states that "[i]t is entirely appropriate in the case of a child to treat the two functions of counsel and guardian ad litem as being completely identical." The majority imparts the impression, to which I object most strenuously, that the adult litigant should have rights which exceed those of the child, suggesting to me that the child is considered a person with a lesser entitlement to rights than the adult.

The majority hypothesizes that conflicts could emerge between the roles of guardian ad litem and counsel for the adult, yet deftly dismisses even the possibility that such conflicts could also occur in the roles of guardian ad litem and counsel for the child. If the majority believes an adult may be entitled to both appointed counsel and a

guardian ad litem, how can they blithely presume that an individual can always operate in both capacities simultaneously for a child?

We commented upon the general expectations of a guardian ad litem for a child in abuse and neglect proceedings in syllabus point five of In re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993):

> Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W.Va.Code, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the West Virginia Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the West Virginia Rules of

> Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client.

We also summarized the guardian ad litem's role in syllabus point three of In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991), as follows:

> In a proceeding to terminate parental rights pursuant to W.Va.Code, 49-6-1 to 49-6-10, as amended, a guardian ad litem, appointed pursuant to W.Va.Code, 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian ad litem, an appeal is necessary.

We further elaborated in syllabus point five of James M. v.

Maynard, 185 W.Va. 648, 408 S.E.2d 400 (1991), that "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." In syllabus point five of In re Christina, 194 W. Va. 446, 460 S.E.2d 692 (1995), we acknowledged that the wishes of the child regarding continued visitation or other contact with the parent should be considered, as follows:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental

> to the child's well being and would be in the child's best interest.

Just as some circumstances may present conflict between the role of guardian ad litem and counsel for the parent, those roles may also conflict in the case of the child. Part I B-2 of the Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, adopted by the American Bar Association in February 1996, provides guidance on this issue and provides as follows:

> Conflict Situations.
> (1) If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles of guardian ad litem and child's attorney, the lawyer should continue to perform as child's attorney and withdraw as guardian ad litem. The lawyer should request appointment of a guardian ad litem without revealing the basis for the request.

(2) If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

Comment-

The primary conflict that arises between the two roles is when the child's expressed preferences differ from what the lawyer deems to be in the child's best interests. As a practical matter, when the lawyer has established a trusting relationship with the child, most conflicts can be avoided. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change an imprudent position or to identify alternative choices if the child's first choice is denied by the court.

The lawyer-client role involves a confidential relationship with privileged communications, while a guardian ad litem-client role may not be confidential. Compare Alaska Bar Assoc. Ethics Op. #854 (1985) (lawyer-client privilege does not apply

> when the lawyer is appointed to be child's guardian ad litem) with Bentley v. Bentley, 448 N.Y.S.2d 559 (App. Div. 1982) (communication between minor children and guardian ad litem in divorce custody case is entitled to lawyer-client privilege). Because the child has a right to confidentiality and advocacy of his or her position, the child's attorney can never abandon this role. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as guardian ad litem. When the roles cannot be reconciled, another person must assume the guardian ad litem role. See Arizona State Bar Committee on Rules of Professional Conduct, Opinion No. 86-13 (1986).

The Ohio Supreme Court, in In re Baby Girl Baxter, 17 Ohio St. 3d 229 (1985), resolved a situation of conflict in the two roles by holding:

> [W]hen an attorney is appointed to

> represent a person and is also appointed guardian ad litem for that person, his first and highest duty is to zealously represent his client within the bounds of the law and to champion his client's cause. If the attorney feels there is a conflict between his role as attorney and his role as guardian, he should petition the court for an order allowing him to withdraw as guardian. The court should not hesitate to grant such request.

Id. at 232. As part of Ohio's reformation of temporary and permanent custody actions in 1988, R. C. 2151.281(H) was added to the Ohio Code. Closely tracking the language of Baby Girl Baxter, it provides, in pertinent part, as follows:

> If a person is serving as guardian ad litem and counsel for a child and either that person or the court finds that a conflict may exist between the person's roles as guardian ad litem and as counsel, the court shall relieve the person of his duties as guardian ad litem and appoint

someone else as guardian ad litem for the child.

See also In re Shaffer, 540 N.W.2d 706 (Mich. App. 1995) (holding that while one person can simultaneously act as guardian ad litem and attorney for the children in an appropriate case, conflicts in those roles may require appointment of a guardian ad litem separate from the attorney).

In Newman v. Newman, 663 A.2d 980 (Conn. 1995), the Supreme Court of Connecticut expressed concern regarding the creation of "conflict in the attorney's role by conflating the role of counsel for a child with the role of a guardian ad litem or next friend." 663 A.2d at 987.

Typically, the child's attorney is an advocate for

> the child, while the guardian ad litem is the representative of the child's best interests. As an advocate, the attorney should honor the strongly articulated preference regarding taking an appeal of a child who is old enough to express a reasonable preference; as a guardian, the attorney might decide that, despite such a child's present wishes, the contrary course of action would be in the child's long term best interests, psychologically or financially.

Id. at 987-88. The division of roles may be "necessary to make sure that the attorney for the children will not be faced with the dilemma of reconciling such diverging interests while conforming to her role as advocate." Id. at 990.

The reality is that abused and neglected children frequently want to be returned to their parents, for that is all they know, and

despite the abuse, there usually still is an emotional bond. As we explained in Christina, as quoted above, the wishes of the child are not to be disregarded. Id. at ___, 460 S.E.2d at 694, syl. pt. 5. West Virginia Code § 49-6-5(a)(6), regarding the disposition of neglected or abused children, also requires a child's wishes to be considered in some instances. That statute, in pertinent part, emphasis added, provides as follows:

> (6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the state department or a licensed child welfare agency. If the court shall so find, then in fixing its

> dispositional order, the court shall consider the following factors: (1) The child's need for continuity of care and caretakers; (2) the amount of time required for the child to be integrated into a stable and permanent home environment; and (3) other factors as the court considers necessary and proper. Notwithstanding any other provision of this article, **the permanent parental rights shall not be terminated if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination.**

Dissimilarly, there is almost always a community of interest in the wishes of an allegedly abusive parent and the legal position adopted on his or her behalf by appointed counsel. Thus, there is far greater potential for a conflict in the representation of a child than in the representation of an adult in an abuse and neglect case.

It is not so much the result in the present case with which I so vehemently disagree; it is the potential ramification of future interpretation and attempted application of this very rambling opinion, full of confusing ideas and standards, which disturbs me profoundly. Lastly, I must observe that the entire tenor of the majority opinion sounds in the rights of the Appellant. We recently observed in syllabus point seven of In re Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995) that "[c]ases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." It is not simply the rights of the parents with which we must be concerned in an abuse and neglect setting; rather, the rights of the children must be the foremost, preeminent responsibility. The rights of the children

cannot be obfuscated under the guise of protection of the procedural rights of the parents.

For the reasons set forth above, I respectfully dissent.