

**Workman, C.J., Concurring Opinion, Case No.23928
State of West Virginia ex rel. Diva P. & the State of
West Virginia v. Hon. Tod J. Kaufman & Sherry P.**

No. 23928 - State of West Virginia Ex Rel. Diva P., and The State of West Virginia v. Honorable Tod J. Kaufman, Judge of the Circuit Court of Kanawha County, and Sherry P.

Workman, C. J., concurring:

Justice Davis has done a fine job of examining this very difficult case from both a legal and a human perspective---which is what should be done in every child abuse and neglect case. Baby Diva may definitely be in harm's way, not (it seems from the record before us) from any malevolent intent on the part of this mother, but because she appears to lack any real parenting skills and perhaps because she may have very limited intellect. Yet, there appears to be a strong emotional bond between mother and child, and the mother has attempted to sustain a relationship with this child during all of these proceedings. Thus, the lower court in his discretion decided to make one last effort at remedying the problems leading to these proceedings. During the course of this post-dispositional improvement period the department should monitor Diva very closely. At the final dispositional hearing, the court will have Diva's life---figuratively and perhaps literally---in its hands, just as we do now.

I write separately on the issue of the role of the prosecuting attorney in abuse and neglect cases. When I authored the Jonathan G. case last year, we were presented with a classic case of the Department of Health and Human Resources and the prosecuting attorney taking conflicting positions on a termination issue. See In Re Jonathan G., ___ W. Va. ___, 482 S.E.2d 893 (1996). In the instant case, it is the same. From a very pragmatic view, this issue was particularly hard for me because over the course of almost sixteen years on the bench, I have seen the department fail to protect children and fail to advocate vociferously for them on many occasions.⁽¹⁾ In addition, although guardians ad litem are appointed to represent children, most of them until relatively recently, did not do much aggressive advocacy either, frequently not even appearing on appeal on behalf of the children. In Justice McHugh's case, In Re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993), however, we clearly set forth the responsibilities of guardians ad litem in abuse and neglect cases. That opinion, together with an intensive effort to develop continuing legal education in this area, has created steady improvement in the quality of representation of children.⁽²⁾

Furthermore, I believe strongly that the community at large (all of us in the corporate sense) have an interest and a responsibility in abuse and neglect proceedings which could and probably should be represented by prosecuting attorneys. Thank goodness, we as a society have stopped looking at child abuse as a "family problem" and now recognize that it's everyone's business. But as I have said in other contexts, it is up to courts to interpret the law, not create it. As much as I would like to make the policy decision that prosecuting attorneys have the right and responsibility to represent the public interest in protecting abused and neglected children when their position conflicts with the department's, I do not believe the law as currently constituted⁽³⁾ permits them that role. Thus, it is my recommendation that the Prosecuting Attorneys Association and child advocacy organizations explore the possibility of bringing this issue to the attention of the Legislature and seeking legislative change in this area.

There cannot be too much advocacy for children. The public has a legitimate interest in protecting abused and neglected children, and the prosecutors are very logical representatives to carry out that mission if the Legislature chooses to modify the law to accord them that responsibility.

1. A September 1996 legislative audit of the Child Protective Services Division (CPS) for the 1995 fiscal year, involving a twelve-county survey, found that despite the requirement that it conduct a face-to-face interview with the child or children within 14 days of being notified of suspected abuse or neglect, CPS failed to conduct any such interview in 46% of the cases. In 29% of cases, CPS conducted the interview within 14 days, in 15% of the cases, CPS conducted the interview within 15 to 90 days, and in 10% of the cases, CPS took over 90 days to interview the alleged victims. Information from Office of Legislative Auditor, Performance Evaluation and Research Division, September 1996 Report.

2. The Jonathan G. case and the instant one, precluding prosecutors from an independent role in abuse and neglect, impel me to re-emphasize that, now more than ever, guardians ad litem more than ever must be strong advocates for the children they represent.

3. See Jonathan G. and Diva for further reasoning of this conclusion.