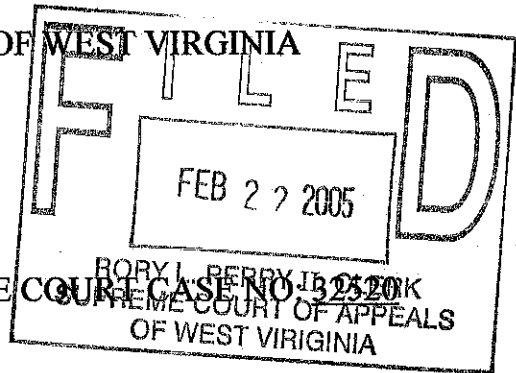


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
at Charleston



IN RE:

ALYSSA W. and
SIERRA H.

SUPREME COURT CASE NO. 2520K
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BRIEF ON BEHALF OF MILDRED H , APPELLANT

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
at Charleston

IN RE:

ALYSSA W. and
SIERRA H.

SUPREME COURT CASE NO:32520

BRIEF ON BEHALF OF MILDRED H. [REDACTED], APPELLANT

I

INTRODUCTION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA:

The instant case presents a unique issue in the arena of abuse and neglect proceedings in the State of West Virginia. Specifically, the instant proceeding relates to an appeal by Mildred H. [REDACTED], regarding the final order of the Circuit Court of Mineral County, West Virginia entered on September 1, 2004 regarding the interests of her two natural children A. W. and S. H. Said order granted a resumption of visitation between Robert H. [REDACTED], the Appellee, with S. H., his natural daughter and protected child under the instant proceedings. S. H. is the natural half-sister of A. W., a victim of sexual abuse perpetrated by the Appellee.

The instant brief is filed in accordance with an Order of this Honorable Court of Appeals entered on September 9, 2004 granting a stay of the aforesated visitation between the Appellee and S. H. and also pursuant to the Order of this Court entered January 20, 2005 granting the Appellant's petition for appeal.

For the reasons hereinafter setforth, the Appellant respectfully maintains that the Circuit Court of Mineral County, West Virginia abused its discretion by reinstating visitation privileges of Robert H and that any further contact or visitations between the Appellee and S. H. is not in the best interests of and is detrimental to, the emotional well being of both of the protected children herein.

II

KIND OF PROCEEDING AND NATURE OF THE RULING OF THE LOWER

TRIBUNAL

The instant case relates to an abuse and neglect proceeding which commenced on the 15th day of December 2000 at which time the Honorable David C. Harman, Mineral County magistrate, issued an Order of Ratification of Emergency Custody pursuant to a request for emergency medical examination and evidentiary discovery by the West Virginia Department of Health and Human Resources (hereinafter Department). The December 15, 2000 Order of Ratification of Emergency Custody issued by magistrate Harman was also ratified by telephone by the Honorable Phil Jordan, Judge of the Circuit Court of Mineral County. Thereafter on December 18, 2000 a petition was filed before the circuit court by the Department and subject thereto the court entered an order continuing custody of the minor children with the Department.

On December 28, 2000 a preliminary hearing was held before the circuit court at which

time probable cause was found to exist for continuation of the minor children in the custody of the Department.

On the 5th day of July, 2001 the Appellant entered a stipulation before the lower court to the issue of neglect and was granted a post adjudicatory period of improvement.

On August 31, 2001 the Department filed an Amended Petition before the Circuit Court alleging that A. W. had also been sexually abused by her natural father, Roy W. , several years earlier in the State of Missouri.

On September 6, 2001 an order was entered by the circuit court returning physical custody of the minor children unto the Appellant based upon her cooperation and successful fulfillment of all services required by the Department. Legal custody was ordered to remain with the Department of Health and Human Resources for an additional 90 day period.

Respectively on May 23, July 5 and September 6, 2001 evidentiary hearings were held before the circuit court for purposes of adjudication.

By order entered February 8, 2002 the circuit court affirmed the return of full legal and physical custody of the minor children unto the Appellant effective December 21, 2001.

On March 15, 2002 an order was entered by the circuit court directing the continued visitation of the Appellee with S. H. after the return of physical and legal custody unto the Appellant.

In accordance with the hearings held on May 23, July 5 and September 6, 2001, the circuit court entered its Adjudicatory Order on April 11, 2002 holding by clear and convincing evidence that the Appellee had engaged in certain sexual acts with A. W. and as a result thereof concluded that she was an abused child as defined by West Virginia Code Section 49-6-2(c).

Office.

On September 2, 2004 the Appellant petitioned this Honorable Court for a stay of execution of the order of the circuit court regarding the proceedings of August 17, 2004.

On September 9, 2004 this Honorable Court granted a stay of any further visitation between the Appellee and S. H. and further Ordered that separate guardian ad litem be appointed to represent each of the minor children's interests herein.

By subsequent order of the circuit court entered September 10, 2004 Amanda See was continued in her appointment as guardian ad litem on behalf of S. H. and Jeff Roth of Petersburg, West Virginia was appointed as guardian ad litem for A. W. It is from the August 17, 2004 order of the Circuit Court of Mineral County as entered on September 1, 2004 which the Appellant, Mildred H , respectfully seeks relief.

III

STATEMENT OF FACTS

The interests of two children are the subject of the instant case. A. W. (dob:) is the natural daughter of the Appellant and Roy W of ; S. H. (dob:) is the natural daughter of the Appellant and the Appellee. At the time of the commencement of the instant proceedings A.W. was years of age and S. H. was months old.

On December 15, 2000, the Mineral County Department of Health and Human Resources received a referral regarding sexual allegations made by A.W. Ruth Kiser, a child protective services worker with the Department, was referred to Burlington Primary School on the afternoon of December 15, 2000 to interview A.W. regarding allegations of the referral. Upon meeting with the minor child, A.W. advised Mrs. Kiser of the details regarding the sexual abuse. At the preliminary hearing held on December 28, 2000 Mrs. Kiser testified:

She told me that her stepfather, Bob, had pulled his pants down, laid on the couch and told her to sit on his legs. While she was sitting on his legs, he told her to put her hands on his penis, then told her to put her mouth on his penis. She stated that he also put his hands on his penis. She stated that his penis had hair around it. She described in detail what she had seen. She stated that something white had squirted out of his penis into her mouth and also got onto her hands. She stated that, I asked her what happened next and she said I went into the kitchen, and I asked her why she went to the kitchen, and she, she got tears in her eyes, tears welled up in her eyes, and she said to wash that stuff off of my hands. And, she said that it happened on Saturdays while her mother was working.¹

A. W. also informed Mrs. Kiser that the Appellee had threatened to kill her if she told anyone and that S. H. was present in the room at the time these incidents occurred. A. W. indicated that this had occurred on at least two occasions.²

Upon interviewing A.W., Mrs. Kiser made arrangements to inform the Appellant and within approximately 15 minutes she arrived at Burlington Primary School and met with Mrs. Kiser. Mrs. Kiser further testified at the preliminary hearing that the Appellant did not believe the allegations voiced by A. W. against the Appellee.³

As a result of concerns regarding failure to protect the infant children by the Appellant, a decision was made by the Department to take both of the minor children into custody that evening which placement of the children with the Department was affirmed pursuant to an Order of Ratification of Emergency Custody issued by David C. Harman, Mineral County magistrate on

¹ December 28, 2000 Preliminary hearing transcript pages 5-6

²December 28, 2000 Preliminary hearing transcript pages 6 and 41

³A.W. was previously sexually abused by her natural father, Roy W. [redacted], in the State of Missouri and the Appellant, at the time of meeting with Mrs. Kiser on December 15, 2000, believed that A.W. may have been confusing the respective incidents with her natural father. Preliminary transcript hearing page 7

the evening of December 15th. On December 18, 2000, a formal petition was filed before the circuit court and the same was likewise affirmed by an order entered on the same date thereby appointing counsel for all of the respective parties.

On December 16, 2000 the Appellant left the home of the Appellee and went to the Family Crisis Center in Keyser, West Virginia. On that same day, the Appellant obtained the necessary documents from the magistrate court of Mineral County and filed for a protective order against the Appellee. A protective order was issued by the magistrate court on December 22, 2000. The Appellant has remained separate and apart from the Appellee ever since December 16, 2000. On March 23, 2001, the Appellant was granted a divorce from the Appellee before the family court of Mineral County.

Pursuant to the preliminary hearing on December 28, 2000 the circuit court directed that separate visitations commence for the Appellant and Mr. H. Furthermore, A. W. and S. H. were ordered to remain in the physical and legal custody of the Department of Health and Human Resources.

On February 6, 2001 A. W. was scheduled for a psychological evaluation which was performed by Sheri Coleman, a licensed psychologist with Eastern Psychological Services of West Virginia located in Romney. Pursuant to the evaluation Mrs. Coleman recommended that A. W. undergo a sexual abuse evaluation in Morgantown and that she likewise be involved in counseling for support therapy and sexual abuse therapy. On May 24, 2001 A. W. commenced in regular counseling sessions with Mrs. Coleman which continued thereafter on a regular basis.

In accordance with Mrs. Coleman's recommendations A. W. was referred to Fremouw Psychological Associates in Morgantown for further investigation of the sexual abuse allegations. Chanin Kennedy of Fremouw Associates independently interviewed A. W. on five separate

occasions between January 30, 2001 and May 8, 2001. On May 8, 2001 Mrs. Kennedy issued a 32 page psychological evaluation report regarding her interviews with A.W. The report was very detailed setting forth an extensive history provided by A.W. of both physical and sexual abuse perpetrated upon her by her biological father, Roy Wi and the Appellee. Importantly, Mrs. Kennedy routinely presented false statements to A.W. in an attempt to confuse her but such were always clarified by the child. Furthermore, A.W. consistently reported that the Appellee never touched her in her private areas but that her biological father did. The nature of the sexual offenses committed upon A.W. by the Appellee were always consistently clarified by A.W. that she was made to touch the Appellee's private areas with both her hands and her mouth. Mrs. Kennedy further indicated that A.W. possessed sexual knowledge beyond her current developmental level and ultimately Mrs. Kennedy concluded that based upon the information provided in her evaluation "it was found that Alyssa's accusations of abuse are plausible and credible." (Page 29 psychological evaluation.) Numerous recommendations were set forth by Mrs. Kennedy in which it was opined that "it is likely that Alyssa would experience significant psychological anxiety and apprehension in having to give specific details of sexual abuse in front of multiple persons such as a judge, attorneys, etc. She would likely experience fear should Mr. H be present. Overall, the psychological harm would be extreme." (Page 32 psychological evaluation.)

On February 2, 2001 the Appellee underwent a psychological evaluation with William Snoberger of Mt. State Psychological Services of Keyser. According to the evaluation report the Appellee denied any wrongdoing with respect to the instant case and the allegations raised by A.W. On January 8, 2001 the Appellant underwent a psychological evaluation with William Snoberger of Mt. State Psychological Services. The Appellant was cooperative in the evaluation

and admitted she believed the allegations voiced by her daughter against the Appellee.

On May 23, 2001 a hearing was held before the circuit court at which time Mrs. Kennedy was qualified as an expert before the court and testified as to the manner in which her investigation and interviews with A. W. were conducted and how the same were considered with respect to the preparation of her report. Mrs. Kennedy testified that A.W. indicated that the Appellee made her touch him where he uses the bathroom and that A.W. had drawn a picture indicating where "white stuff had come out while she was rubbing him." The child also consistently reported to Mrs. Kennedy that she was "made to put her mouth on his penis as well."⁴ Through her testimony, Mrs. Kennedy then went on to discuss the sexual abuse in the State of Missouri experienced by A.W. and further to clarify that based upon the child's history of reporting during her sessions that the child was able to distinguish between events in Missouri and the events which transpired in West Virginia by the Appellee.⁵ Mrs. Kennedy also testified that A.W. told her that the Appellee threatened to kill her if she told anyone.⁶ Mrs. Kennedy further testified that A.W. also reported incidents of physical abuse by the Appellee.⁷ Pursuant to the respective interviews of A.W., the court ordered that audio tapes of Mrs. Kennedy's interviews with A.W. be released for transcription. Transcriptional copies of the respective interviews are included in the record of this case.

On July 5, 2001 an adjudicatory hearing commenced at which time the Appellant entered a stipulation as to her neglect in failing to initially protect her children and likewise agreed to the

⁴May 23, 2001 hearing transcript page 20- 22.

⁵May 23, 2001 hearing pages 26-28

⁶May 23, 2001 hearing page 31

⁷May 23, 2001 hearing page 128

problems and deficiencies which she had to address during her post-adjudicatory period of improvement.⁸ With respect to the Appellee, the adjudicatory hearing proceeded and numerous witnesses were called to present testimony. The testimony presented by Chanin Kennedy on May 23, 2001 was incorporated into the adjudicatory hearing.

On September 6, 2001 the adjudicatory hearing resumed with additional testimony presented by Chanin Kennedy among others. At said hearing, physical custody of A.W. and S.H. were returned to the Appellant based upon information provided to the court that she had successfully completed parenting classes and participated and cooperated in all services and programs required by the Department.

By order entered on the 8th day of February, 2002 full legal and physical custody of the minor children was returned to the Appellant, effective December 21, 2001. Following return of legal and physical custody to the Appellant, visitations between S.H. and the Appellee ceased. On February 25, 2002 an off the record conference with counsel, the parties and the Department and Guardian Ad Litem was held regarding a request for visitation between the Appellee and S.H. At that time an Order was entered by the Court on March 15, 2002 ordering a reinstatement of visitation between Mr. H and S.H. until a dispositional hearing could be held.

On April 11, 2002 the Adjudicatory Order in the instant case was entered by the circuit court regarding the hearings of May 23, July 5 and September 6, 2001. The court found by clear and convincing evidence that the allegations set forth in the petition alleging that the Appellee engaged in certain sexual acts with A.W. were proven and the court further concluded that as a matter of law that A.W. was an abused child as defined by West Virginia Code Section 49-6-2(c). Particularly, the circuit court's opinion was based upon the statements which A.W. initially

⁸ The Appellant likewise stipulated to an additional allegation which arose in accordance with the Amended Petition filed in the instant case on August 31, 2001.

provided to Ruth Kiser at the commencement of the investigation as well as other consistent statements made by the child to other witnesses. The Adjudicatory Order further referenced testimony by Teresa Rodeheaver who had testified that A.W. had not wanted to go home when the Appellee was there without the Appellant present and on one occasion A.W. had shut herself in the bathroom rather than go home with the Appellee.

Particularly, with respect to the testimony presented by Chanin Kennedy, the Adjudicatory Order stated "the Court finds the methodology, the thoroughness, and the objectivity and the patience by Chanin Kennedy to be the most impressive I have ever seen." In paragraph 10 of the Adjudicatory Order the circuit court set forth the following conclusions as included in Mrs. Kennedy's report:

- A. A.W. has consistently and reliably reported core and peripheral details that have occurred in her life. She immediately corrected any false information and did not take the opportunity to expand on the abuse allegations. She has continued to provide consistent details over time and to different persons.
- B. The timing and circumstances of A.W. disclosures are consistent with sexual abuse.
- C. The child used age-appropriate language such as "white stuff" and having to wash her hands after the abuse. The child has been exposed to sexual activity that she relates in a way that had to be experienced, not "made-up".
- D. Her statements are plausible. She has given a congruent description of being sexually abused and does not appear to give rehearsed or coached statements. She can be interrupted at any point during her statements and can rely upon a rational visual image to described details.
- E. The child's behavioral changes and emotional reactions to discussing the allegations are consistent with those of a victim of child sexual abuse.

Surprisingly, the circuit court made an interesting statement in the Adjudicatory Order indicating that "this Court's first reaction on hearing the allegations was 'I can't believe Bob would do that.'" The circuit court then stated that it had attributed to the Appellee a character trait of not generally having exhibited a propensity to being sexually attracted to children. The court then continued the case for a dispositional hearing on May 1, 2002.

At the May 1, 2002 dispositional hearing the Department recommended that the parental rights of the Appellee as to S.H. be terminated. The Guardian Ad Litem likewise recommended a termination of parental rights but did not object to continued supervised visits. On behalf of the Appellant, argument was presented that the parental rights of the Appellee as to S. H. be terminated and that no visitation be granted. In response, the circuit court again cited within its dispositional order that the Appellee had sexually assaulted A.W. Furthermore, the circuit court held that the Appellee had never admitted to sexually abusing A.W. and as a result of A.W. and S.H. being half-siblings in the same household, pursuant to West Virginia Code Section 49-6-5 , Robert H ' parental rights be terminated. The court then continued the issue of visitation pending the presentment of a proposed schedule of visitation by the Appellee.

On May 29, 2002 the issue of visitation came before the circuit court for hearing. At said time the Appellee proposed that he be permitted visitation with S.H. every Friday from 1:00 to 2:00 and every Saturday from 4:00 to 6:00. On behalf of the Appellant it was argued that this was not a domestic relations case and as a result of the adjudication and termination, visitation would not be warranted. The Appellant reminded the lower court that criminal proceedings against the Appellee were still pending and that all of these factors needed to be taken into consideration. The Appellant did inform the court however that she would reluctantly agree to a visitation between S.H. and the Appellee one time per month on Friday afternoon for approximately two hours.⁹ More importantly, the circuit court was informed of the Appellant's concerns about the relationship between S.H. and A.W. as the children grew older, issues arising in the household regarding the Appellee and the impact which the same would have upon each of the children. Emphasis was also placed upon the concern that the more contact the Appellee had

⁹May 29, 2002 hearing transcript pages 5-6

with S.H. the more of an adverse influence such would have upon A.W.¹⁰

The guardian ad litem concurred in part with the Appellee and in part with the Appellant but did note concerns about too much visitation.¹¹ In conclusion the Appellant advised the court that the Appellant reluctantly would agree to visits on Friday afternoon for approximately two hours but by no means was that to be considered by the court or any of the parties as a permanent agreement. Such was based at that time upon the circumstances as they existed but clarified that what transpired at the Appellee's criminal trial would have a major influence on future visitation.¹² Additional issues arose before the court regarding the dynamics of transportation and supervision for the visits.

The circuit court concluded that visitations would be held on three Saturdays per month from 3:00 to 6:00 p.m., supervised, and that the same be set for a period of 6 months at which time the parties would come back for review. The court indicated that the Appellee and S.H. had a close relationship, that the visitations had gone well and that the child seems to look forward to seeing the Appellee.¹³ Objections were noted to the court's ruling regarding the structuring of the

¹⁰May 29, 2002 hearing transcript pages 7-8

¹¹May 29, 2002 hearing transcript page 9-10 The Guardian Ad Litem also indicated "I think that essentially what the Court is considering is a request for visitation here, for permissive visitation, not as a right of visitation. And, because of that, I don't want to see any schedule that we may come up with at this time become a millstone around Mildred H. neck in the future. So, I think as well, that the supervision, not the physical supervision of the visitation, but the supervision and the final say on the schedule as to when its going to be in the future, is going to have to be with Mildred H. This is not going to be a case that is going to go back before the Family Law Master, the Family Law Judge in the future. Another thing that concerns me about being too specific about the visitation at this time, is the fact that the criminal case has not been disposed of to my knowledge."

¹²May 29, 2002 transcript hearing pages 13-14

¹³May 29, 2002 transcript hearing page 18

visitations by both counsel for the Appellant and the guardian ad litem.¹⁴

On September 11, 2002, the instant case resumed for a hearing before the circuit court at which time the Appellee moved for extended visitation for the entire weekend of September 27, 2002. Said request was denied by the circuit court and visitation was changed from Saturdays to Sundays.

At no time during any of the proceedings before the circuit court did the Appellee participate in any services, counseling, sexual offender therapy, parenting classes or otherwise. On March 26, 2003, the Appellee entered a plea of guilty to six counts of third degree sexual abuse in violation of West Virginia Code Section 61-8B-9.¹⁵ On July 23, 2003 the Appellee was sentenced to 90 days incarceration on each of the six counts to be served consecutively. The Appellee's period of incarceration commenced August 4, 2003 and extended through June 15, 2004. The Appellee's last visitation with S.H. was just prior to his date of incarceration.

Following the Appellee's release from incarceration a motion was filed before the circuit court on June 22, 2004 requesting that visitation be reinstated. Such was not consented to by the Appellant and an initial hearing on the motion was scheduled for July 20, 2004.

At said hearing the Appellee called as a witness, Harriett H. _____, the Appellee's ex-wife who is his current live-in girlfriend, to testify regarding her credentials for purposes of supervising visitation. Following cross examination the circuit court determined that Mrs. E. _____ would not be an appropriate candidate to supervise visitation. The circuit court did however determine that Kimberly Huff an employee of the Department of Health and Human

¹⁴May 29, 2002 hearing transcript page 25

¹⁵ On January 9, 2001 the Appellee had been Indicted by the Mineral County Grand Jury on one count of first degree sexual assault in violation of West Virginia Code Section 61-8B-3; one count of first degree sexual abuse in violation of West Virginia Code Section 61-8B-7 and two counts of sexual abuse by a custodian in violation of West Virginia Code Section 61-8D-5.

Resources, and prior girlfriend of Mr. H would be an appropriate individual to supervise visitation. At that time, the matter was continued until August 17, 2004 for purposes of additional consideration by the court of various reports and additional testimony.

Commencing with the hearing on August 17, 2004, the circuit court noted for the record that the previous day a conference had been held between the court and all counsel at which time the court determined the following issues to be resolved:

1. The Respondent Mildred H has the burden of proof to show why visits between the minor child S.H. and the Respondent Robert F should not resume as previously ordered.

2. The effect of these visits on A.W. is a factor to be considered but is not the central issue; the central issue before this court is the best interest of S.H. and continuing visitation with her father Robert H.

3. The Court will decide who will supervise visits between S.H. and Robert H if any such visits are ordered by the court.

As a preliminary matter counsel for the Appellant advised the circuit court that A.W. was available in his office to be interviewed by both the court and the guardian ad litem if either felt it was of interest or necessary to speak with the child.¹⁶ Neither the court or the guardian ad litem elected to talk to A.W. Witnesses were then called by the Appellant to present testimony before the court regarding the respective issues which had been identified. Lara Courier, a counselor with Mt. State Psychological Services presented testimony regarding her counseling sessions with S.H. Although Mrs. Courier indicated that S.H. had only been in counseling sessions for a short period of time, she could not comment as to whether the minor child S.H. had developed a strong emotional bond with her father but did indicate that at no time during sessions had the

¹⁶August 17,2004 hearing transcript page 7

minor child asked any questions or mentioned her father.¹⁷

Sherri Coleman, a licensed psychologist with Eastern Psychological Services who served as the primary therapist for A.W. was then called to present testimony. Mrs. Coleman provided details regarding her counseling of A.W. and the child's concerns about Mr. H , how she was traumatized by the sexual abuse and that she has experienced depressive symptoms and anxiety symptoms.¹⁸ Significantly, Mrs. Coleman also described her experience with A.W. in the early morning hours of September 8, 2002 when she received a phone call from the Appellant reporting that A.W. was crying hysterically and believed that the Appellee had been in her bedroom. It was determined that Mr. H had not been in the child's bedroom but that A.W. truly believed that he was and very fearful that he would hurt her. Mrs. Coleman stated that she believed A.W.'s fears were genuine.¹⁹ Mrs. Coleman further testified that in approximately May of 2002, A. W. became very concerned about S. H.'s safety during the visitations. A. W.'s concerns regarding the safety of her sister remained a topic during the counseling sessions up until the visitations stopped in July of 2003. Following the Appellee's incarceration A. W.'s behavior and stress greatly improved, her behaviors and stress appeared to have stopped by July 28th and thereafter she was weaned completely off of her medication.²⁰ In conclusion Mrs. Coleman testified as to a reasonable degree of psychological certainty that A.W.'s symptoms and manifestations would worsen if visitations were to resume with an increase in depression and

¹⁷August 17, 2004 hearing transcript pages 58-61

¹⁸ August 17, 2004 hearing transcript pages 23-26

¹⁹ August 17, 2004 hearing transcript pages 26-28

²⁰ August 17, 2004 hearing transcript pages 32-34

anxiety attacks.²¹ Mrs. Coleman's testimony was supported by her counseling reports which were submitted into evidence and are part of the record in the instant case. The September 9, 2002 report references the September 8, 2002 incident to which Mrs. Coleman testified and likewise references A. W.'s fears that the Appellee would hurt S. H. during her visits which had been discussed in a counseling session with Mrs. Coleman on September 3rd. The child also continued to be traumatized by the potential of having to testify in front of the Appellee which continued to cause her stress at both home and in school.²² Mrs. Coleman's report dated July 15, 2004 which was prepared as an update subsequent to the Appellee's incarceration further described the improvements made by the child after the incarceration period began. In February 2004 counseling sessions were ended. The report further indicates that beginning in April of 2004 A.W. resumed in therapy with Mrs. Coleman because of an increase in behaviors which unfortunately resulted in her placement at the Elkins Children's Home. Mrs. Coleman did testify in her cross examination by the guardian ad litem that A.W.'s behaviors could be considered to be consistent with a child who has been sexually abused.²³ Although Mrs. Coleman last saw A.W. on June 11, 2004 she never specifically spoke with A.W. regarding the child's thoughts concerning the resumption of visitation between the Appellee and S.H. However, in a response to a question from the court Mrs. Coleman did indicate that the child could be adversely affected emotionally by the visitation based on her past reactions to the visits.²⁴

²¹August 17, 2004 hearing transcript pages 35-36

²²November 13, 2002 report of Sherri Coleman likewise addresses the concern and difficulties which A. W. was experiencing as a result of the continued visitations between Mr. H. and S.H. Although counseling sessions continued no additional reports were generated by Mrs. Coleman after November 12, 2002 until July 15, 2004.

²³August 17, 2004 hearing transcript pages 51-52

²⁴August 17, 2004 hearing transcript pages 48 and 55

Cathy Vibostok, who is currently the supervisor of Child Protective Services at the Keyser office of the Department of Health and Human Resources and who previously served as the investigative worker in this case was called to present testimony. Mrs. Vibostok generally testified as to the services provided to the Appellant and the children. Mrs. Vibostok also testified that the Appellee did not participate in any services with respect to the case. Mrs. Vibostok clarified that after termination it was the position of the Department that the Appellee should have no further visitation or contact with S.H.²⁵

Kimberly Huff and Vanessa Brooks presented testimony on behalf of the Appellee regarding past visitations. Both witnesses testified that visitations had gone well in the past and on cross-examination it was disclosed that Kimberly Huff had previously been involved in an intimate relationship with the Appellee. The Appellant, as in hearings past, objected to any continued approval by Kimberly Huff to supervise visitations.

The guardian ad litem did not call any witnesses but with respect to the issue of resuming visitation did advise the court that he objected to an expansion of visitation more than three times a month as requested by the Appellee. The guardian ad litem noted that no one had spoke with A.W. prior to the hearing regarding her opinions on the matter of resuming visitation and neither the court nor guardian ad litem elected to speak with A.W. who remained at the office of counsel for the Appellant. The guardian ad litem did not oppose the motion to resume visitation but did recommend that all visits be supervised. The Appellant opposed the motion to resume visitation in its entirety and the Appellee moved for resumption of visitation as well as an expansion of visitation.

In consideration, the circuit court determined that visits between S.H. and the Appellee

²⁵ August 17, 2004 hearing transcript pages 84,85,89-92

would be in the best interest of the minor child and granted a reinstatement of visitation. The circuit court further indicated that only a weak showing had been demonstrated that visits between S.H. and the Appellee would be harmful to A.W. "considering that no one had spoken to A.W. in the last year about her feelings concerning S.H. visiting with Robert H ." The circuit court further ordered visitation to recommence three times per month on Sundays commencing September 12, 2004 and that the same could be supervised by Vanessa Brooks or Kim Huff. The Appellee's request for expanded visitation was denied. On September 9, 2004 this honorable Court entered an Order staying visitation pending a resolution of this case.

IV.

STANDARD OF REVIEW

A review of the findings and conclusions of a circuit court are subject to a two -prong deferential standard of review. The final order and ultimate disposition of the circuit court are reviewable under an abuse of discretion standard and the circuit court's underlying factual findings are reviewable under a clearly erroneous standard. In Re: Tesla N. M. and Sarah S. B., 211 W. Va. 334, 566 S. E. 2d 221 (2002).

V.

ISSUE NUMBER ONE

The Circuit Court of Mineral County abused its discretion by shifting the burden upon the Appellant to establish that a reinstatement of visitation between the Appellee and S.H. should not be resumed.

VI.

DISCUSSION ISSUE NUMBER ONE

The instant case appears to present an issue of first impression before this Honorable

Court regarding whether a shifting of the burden of proof in an abuse and neglect proceeding is permissible. It is without argument that the parental rights of the Appellee have been permanently terminated and any grounds which he had for relief with respect thereto have been conclusively resolved as a result of this Court's previous refusal of his petition for appeal. What makes matters more confusing in the instant case is the fact that the Department is not currently a party to the instant proceedings as from its standpoint the case has been closed as a result of the minor children having previously been returned to the permanent custody of the Appellant.

On June 23, 2004 the Appellee filed his motion for reinstatement of visitation and noticed the same for hearing. It would therefore naturally appear that the burden of proof would rest upon the Appellee to establish by clear and convincing evidence that a resumption of visitation with S. H. would not be detrimental to the child's well being and would be in the child's best interest. It would likewise appear that it would be incumbent upon the Appellee to also establish by clear and convincing evidence that a resumption of visitation with S. H. Would not be detrimental to A. W. 's well being and in her best interests as well. However, the transcript and order of the August 17, 2004 hearing reflect the circuit court's shifting of the burden of proof upon the Appellant.

The closest guiding law which the Appellant can find relevant to this issue is In the Interest of S.C., 168 W.Va. 366, 284 S.E. 2d 867 (1981) in which this Court held that the burden of proof in a child neglect or abuse case does not shift from the State Department of Welfare to the parent, guardian or custodian of the child. Rather the burden remains upon the Department throughout the proceedings. Obviously from a review of the foregoing case, it is evident that the burden of proof should not have been placed upon the Appellant to establish that a resumption of visitation between the Appellee and S. H. should not be resumed. The Appellant's

objections were clearly noted to the ruling of the lower court regarding the shifting of the burden upon the Appellant.²⁶

Because of the cessation of visitation between the Appellee and the minor child, the Appellant respectfully maintains that the burden of proof should remain upon the Appellee to establish that a resumption of visitation would not be detrimental to the child's well being and would be in the child's best interest in order for visitation to resume. This is especially the case in light of the fact that there has been a long period of time without any contact between the minor child and the Appellee as a result of his incarceration. Other factors to be considered are S.H.'s tender age and the emotional impact which this entire case has had upon A. W.

The "Polar Star" in abuse and neglect cases has always been what is in the best interest of the minor child. Any change in the shifting of this standard to placing the burden upon a child or, as in this case a party who is advancing the best interests of a child, would set an unprecedented and erroneous standard which would have a detrimental impact upon not only S.H. and A.W. but on all future abuse and neglect proceedings in this State.

The burden of proof should have remained upon the Appellee to establish that continued visitations would have in fact been in the minor child's best interest. The Appellee is the individual who has been convicted and whose parental rights were terminated as a result of the heinous sexual offenses perpetrated upon A.W. For the circuit court to shift the burden of proof upon the Appellant and adopt the presumption that a reinstatement of visitation was automatically in the best interest of S.H. unless proven otherwise was an abuse of discretion.

The Appellee introduced no probative evidence that continued visits would be in the best interest of S.H. Simply the lower court made a determination that past visits had gone well and

²⁶ August 17, 2004 transcript pages 145-148 and August 17, 2004 Order

because the child had enjoyed seeing her father, one year previously when she was only three years and nine months of age, the visits should resume. No consideration was made by the circuit court as to truly how such visitations would be in S.H.'s best interest particularly on a long term basis when S.H.'s perception and understanding of the instant case has developed or the emotional impact that such would have upon her sibling relationship with A.W.

The holding in In the Interest of S.C. is particularly interesting as a result of the Department having been dismissed as a party to the instant case. The Department has not been involved as a party since approximately September 2002. Furthermore, at the July 20, 2004 hearing a brief discussion took place before the court regarding the Department's prior dismissal in the instant proceedings. The Appellant would assert that the instant case commenced pursuant to the Department invoking its jurisdictional power and should have remained herein until all issues were completely resolved. Although the Department is not currently a party, the burden of proof should remain upon the Appellee to prove by clear and convincing evidence that visitation would not be detrimental to and in the best interests of both S. H. and A.W.

To emphasize this principle further Lengyel v. Lint, 167 W.Va. 272, 280 S.E. 2d 66(1981) held that the burden on a motion for summary judgment is not upon the nonmoving party to show that he has developed facts which would allow him to prevail but rather the burden is on the moving party to show that there is no genuine issue as to any material facts in the case. Although the issue at hand is not that of summary judgment, such holding nevertheless lends precedent to the fact that the moving party before the lower court was the Appellee and upon whom the burden should rest.

The ruling of the circuit court thereby shifting the burden upon the Appellant, effectively resulted in a conclusion that the Appellee was automatically entitled to a continuation of

visitation before any evidence or testimony was presented, thus ignoring the detrimental effects upon A.W. The record of the instant case reflects the emotional trauma experienced by A. W. resulting from the acts perpetrated by the Appellee. A. W.'s emotional stability improved after the Appellee's incarceration.

Both children in the instant case are faced with delicate circumstances: S. H. based upon her age and A. W. based upon her victimization. To say that the Appellee is automatically entitled to reinstatement of visitation, as he argued in his response to the petition for appeal, and that the burden is on the Appellant, defies logic and ignores the past holdings of this Court that the "polar star" in any case is the best interests of the children.

The Appellant recognizes that this matter remained before the circuit court for consideration, rather than family court, based upon that fact that it is and should be controlled by the abuse and neglect law of this State, not for the reasons promoted by the Appellee. In Haller v. Haller, 198 W.Va. 487, 481 S. E. 2d 793 (1996) this Court stated that "where serious allegations of abuse and neglect arise, the protections afforded children under abuse and neglect law should apply." Citing Syl. Pt. 2, Boarman v. Boarman, 190 W. Va. 533, 438 S. E. 2d 876 (1993).

For the foregoing reasons the Appellant respectfully submits that the lower court abused its discretion by concluding that burden of proof be shifted upon the Appellant to establish that visits not be resumed.

VII.

ISSUE NUMBER TWO

The Circuit Court of Mineral County clearly erred by granting a reinstatement of visitations to the Appellee with S. H.

VIII.

DISCUSSION ISSUE NUMBER TWO

The issue regarding the Appellee's post termination rights to visitation first arose at the on May 29, 2002 hearing. As memorialized in the transcript of the May 29, 2002 hearings, the Appellant reluctantly agreed to visitation at that time. The Appellant also clarified that such was only temporary and not to be considered as any permanent agreement as to visitation. The decision of the Appellant was made based upon a perception of the lower court's position with respect to visitation by the Appellee and the position of the guardian ad litem. The Appellant was also of the opinion that the issue of visitation would be settled once and for all at the time the Appellee became incarcerated believing that no further visitation thereafter would be considered by the lower court.

The law regarding post termination visitation is well settled that the "evidence must show that visitation or continued contact would not be detrimental to the child's well being and would in fact be in the child's best interests." In the matter of Brian D., 194 W.Va. 623,461 S.E. 2d 129(1995); In re: Charity H., 215, W.Va. 208, 599 S.E. 2d 631(2004). Therefore, a two-prong standard must be met by an individual whose parental rights have been terminated in order to maintain post termination visitation. First, it must be determined that continued visitation would not be detrimental to the child's well being. Second, it must independently be determined to be in the child's best interests.

With the exception of the trial court's finding that the visitations between the Appellee and S. H. went well and that the child seemed to enjoy the visits, there is nothing within the record to support the court's reasoning that such is not detrimental to the child nor specifically what is in S. H.'s best interest to justify a reinstatement of visitation. The Appellant has

consistently advocated that continued contact between the Appellee and S. H. is neither in the best interests of S. H. or A. W. and such is supported by the evidence presented at the August 17, 2004 hearing.

In In re: Christina L., 194 W.Va. 446,467 S.E. 2d 692(1995) this Court held that in addition to the standard of whether continued contact would not be detrimental and in the best interests of the child, the circuit court should also 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 requests.” In the case at hand S. H. is clearly not of appropriate maturity to make a request for visitation. Furthermore, the evidence adduced at the August 17, 2004 hearing establishes that she has not made any requests to visit with her father or mentioned her father during counseling sessions.

Granted, prior visitations between the Appellee and S.H. appeared to go well, such must be placed into context. Particularly, at the commencement of the instant case S. H. was only 14 months of age and at the time of the last visitation with the Appellee was only 3 years 9 months of age. Vanessa Brooks testified at the August 17, 2004 hearing that the Appellee sometimes was excessive with gifts for S. H. which he brought to the visitations. Obviously, any minor child of such a tender age would be excited and look forward to visitations as a result of the material incentives. Testimony presented by Sheri Coleman at the August 17, 2004 hearing also establishes that A.W. has been emotionally traumatized by the events of this entire case and any reinstatement of visitation could be detrimental. Mrs. Vibostok, the D.H.H.R. case worker for this case, also recommended no additional visitations.

The August 17, 2004 Order of the court stated “the effect of these visits on A. W. is a factor to be considered, but is not the central issue; the central issue before the court is the best

interest of S. H. and continuing visitation with her father, Robert H ” In response, the Appellant maintains that the central issue is not what is in the best interest of S. H. but what is equally in the best interests of both children. This concern is demonstrated by a review of this Honorable Court’s Order of September 9, 2004 granting a stay of visitation as well as directing the appointment of a separate guardian ad litem for each child.

The interests of A.W. have been somewhat forgotten in the instant case. This point was particularly argued by the Appellant at the August 17, 2004 hearing. At said hearing, the circuit court commented that no counselor had discussed the issue of a resumption of visitation between the Appellee and S. H. with A.W. or how she felt about that particular issue. However, the lower court and guardian ad litem were both explicitly advised that A.W. was available to be interviewed but elected not to meet with her.²⁷ The guardian ad litem, who previously represented both children during the lower court proceedings, did not meet with A.W. at anytime during the period of time that the issue regarding a resumption of visitation came back before the court. Conversely, the guardian ad litem surprisingly argued that no counselor had discussed this matter with A.W. but felt precautions could be made for A.W.’s benefit while at the same time recommending a reinstatement of visitation between the Appellee and S. H. There was no evidentiary basis developed to support the guardian ad litem’s position.

The perpetration of the sexual abuse by the Appellee against A. W. was so heinous that such obviously supports the circuit court’s termination of parental rights. Furthermore, based upon the nature of the offense, and the same having occurred in the presence of S. H., such would warrant a determination that no further contact be permitted between the Appellee and S.

²⁷ As noted earlier, A.W. who was home on break from the Elkins Children’s Home, was present in the office of counsel for the Appellant and was readily available to be interviewed in camera by the court and the Guardian Ad Litem.

H. A resumption of visitation would surely result in an increase in traumatic psychological difficulties for A.W. As revealed from the numerous interviews between Chanin Kennedy and A.W. the history of abuse which A.W. has sustained during her childhood years is of major significance. As Mrs. Kennedy noted in her psychological evaluation, any appearance by A.W. to openly testify to details of the sexual abuse would present significant psychological anxiety and the overall psychological harm would be extreme. Although such potential for A.W. to appear publically to present testimony has been resolved as a result of the plea entered by the Appellee, the long term psychological scars remain. Direct contact between the Appellee and S.H. through visitation indirectly results in emotional anxiety and fear to A.W. It cannot be ignored that S. H. and A.W. are two half sisters residing in the same home with the same mother of which relational issues and conflicts are sure to arise in the future as the children grow older, especially if visitations between the Appellee and S.H. are reinstated.

As this Court recognized in In re: Billy Joe M., 206 W.Va. 1, 521 S.E. 2d 173(1999) post termination visitation should also be considered as to whether it would “unreasonably interfere with the children’s permanent placement.” The children’s permanent placement with the Appellant has been and would continue to be unreasonably interfered with if visitation is permitted to resume. This Court in Billy Joe M. also recognized how the children’s future can be affected in these types of cases. Although the Billy Joe M. Court recognized that the children, being 11 and 12 years of age had developed a strong emotional bond with their parents and such would make separation painful as the children grew older and prejudice their chances of permanency, the Appellant maintains that the facts in the instant case warrant a protection of A. W. and S.H.’s future well being from a perspective contrary to that espoused in Billie Joe M. This is especially apparent because a strong emotional bond has not been established between S.

H. and the Appellee, based upon her age and the fact that she has not seen him for more than 1 year.

Although not directly on point, the Appellant believes that this Court's holdings in Lindsie D. L. v. Richard W. S., 214 W. Va. 750, 591 S. E. 2d 308 (2003) also lend guidance to consideration of the issue at hand. In Lindsie D. L., this Court recognized the fundamental right pursuant to the due process clauses of Article III, Section 10 of the Constitution of West Virginia and the Fourteenth Amendment of the Constitution of the United States of parents to make decisions concerning the care, custody and control of their children. A presumption exists that parents act in the best interests of their children. It was further determined by this Court that not only should the best interest of the child be considered but whether such visitation would substantially interfere with the parent child relationship. *Id.* at page 313- 314.

Considering these concepts in light of the facts of the instant case, no consideration was given by the circuit court to the position of the Appellant and her request that visitation of the Appellee and S. H. be permanently terminated. Not only would a reinstatement of visitation between the Appellee and S. H. result in an interference of the Appellant's right to parent her children, but would result in a substantial interference in the relationship of S. H. and A. W. With the exception of an open adoption, had S. H. been placed into foster care and adopted after a termination of the Appellee's parental rights, the Appellee would maintain no standing to seek visitation with S. H. Can it be said that the Appellant has less rights to object to visitation than an adoptive parent. It must also be recognized that if not for the psychological impact which testifying would have had upon A. W., the Appellee would most likely be serving an extended felony sentence. Furthermore had the circuit court suspended a portion of the Appellant's sentence for probation, he would not be permitted any visitation in accordance with West

Virginia Code Section 62-12-9a(4).

From an emotional standpoint, the current case is analogous to a malignant tumor which should be removed before it would have the opportunity to develop into a wide spread cancer. The emotional protections afforded A.W. by terminating further contact between the Appellee and S.H. far outweigh the emotional benefit that S.H. would receive through future visitation. If S.H. were older circumstances may be different and possibly visitation would be more of a reasonable consideration. However, based upon the children's ages, especially S.H., a preservation of the sibling relationship between S. H. and A. W. should be the primary objective and is best protected by a cessation of any further contact between the Appellee and S.H.

The Circuit Court of Mineral County clearly erred by granting a resumption of visitation between the Appellee and S. H. The order of the circuit court should be reversed and an order entered by this Honorable Court permanently terminating any future visitation rights of the Appellee with S.H.

IX.

ISSUE NUMBER THREE

In the event it would be determined that the Appellee should be entitled to a reinstatement of visitation, such visits should be considerably reduced.

X.

DISCUSSION ISSUE NUMBER THREE

For some strange reason the circuit court throughout this case has appeared to have given the Appellee quite liberal visitation and additional consideration which under similar circumstances for other respondents would most likely not have been granted. As noted in it's Adjudicatory Order entered on April 11, 2002 the court's first reaction on hearing of the

allegations was "I can't believe Bob would do that." The Appellant would therefore respectfully question as to whether there may have an inclination on behalf of the circuit court to grant visitation, and for that matter excessive visitation, to the Appellee given the court's past impressions of him even though the court determined by clear and convincing evidence that the Appellee had perpetrated the sexual abuse upon A. W.

Although such matters appear to be discretionary with the lower court, and notwithstanding the fact that the Appellant maintains that no further visitation should be permitted, if this Honorable Court were to determine that visitations should be resumed, visitations established three times per month are unquestionably excessive. Generally, in proceedings before a lower court in which a termination of parental rights have resulted, visitations if granted at all, would be approximately two times per year, three at the most, and in cases that do not even meet the degree of the offense perpetrated herein.

Unfortunately, prior holdings of this Court do not lend guidance as to timeframes in which an individual, whose parental rights have been terminated, may be granted visitation. As the Appellant noted in the lower court proceedings on May 29, 2002, the instant case is not a domestic relations case in which reasonable and seasonable visitation would be permitted but rather an abuse and neglect case in which visitation determinations should be accordingly based upon the merits of the case.

As the Appellee noted in his responsive petition and will surely argue before this Court in an attempt to advance his position, the Appellant did agree at the May 29, 2002 hearing for some limited contact between the Appellee and S.H. However such must be placed into context by recognizing that this was prior to the entry of the Adjudicatory Order by the circuit court and more importantly prior to the resolution of the Appellee's criminal case. Although the Appellant

may have mistakenly believed the circuit court would have permitted no further visitation after the Appellee commenced upon his period of incarceration, it was never imagined that such frequent contact would have been ordered by the lower court at the May 29, 2002 hearing and likewise after the Appellee's release from incarceration.

The Appellee did nothing in the lower court proceedings other than protect his best interests from a criminal standpoint, albeit a decision he had to make in accordance with the holdings of In Re: Daniel D. and Samantha D., 211 W. Va. 79, 562 S. E. 2d 147(2002) and took no steps whatsoever to address the problems and deficiencies which led to the perpetration of the sexual offense.²⁸ This Court recognized in Daniel D. that the interpretations adopted therein not only serve a purpose to provide significant protection of Fifth Amendment rights of the accused but secondly, "they advance the significant goal of ascertaining truth and appropriate protection on children's rights in abuse and neglect proceedings by removing a potential stumbling block to full and complete disclosure, investigation and treatment of perpetrators." *Id.* at page 159. As in the foregoing case, the Appellee has always denied the sexual abuse charges even though the facts in the instant case like those of In Re: Daniel D. establish a "clear cut case of sexual abuse." The Appellee has taken no steps to engage in counseling, or pursue any type of sexual offender treatment and even if sporadic visitation were reinstated, the Appellee reaps the benefit of visitation without any responsibility of sharing financial support for S.H.

Concerns raised by the Appellant and the guardian ad litem at the May 29, 2002 hearing now appear to have come to fruition. As noted by the guardian ad litem, the court was simply

²⁸ In In Re: Daniel D. and Samantha D. this Court addressed the decision which must be made by Respondents in abuse and neglect cases regarding the invocation of their Fifth Amendment right to remain silent, in light of pending criminal charges, versus an open acknowledgment of the incidents of abuse and/or neglect which gave rise to the abuse and neglect proceedings.

considering a request for permissive visitation, not a right of visitation and the guardian advised that any scheduled visitation should not become a "millstone" around the Appellant's neck in the future. Furthermore, the guardian ad litem commented that the final say on the schedule of future visitation "is going to have to be with Mildred H . This is not going to be a case that's going to go back before the Family Law Master, the Family Law Judge in the future." (Page 10 May 29, 2002 hearing transcript.)

The underlying ruling of the circuit court has now effectively resulted in more visitations on a monthly basis between the Appellee and S.H. than would ordinarily be afforded to a non custodial father in a divorce proceeding before a family court of competent jurisdiction. The significant issues as they relate to the children are at the forefront for consideration by this Honorable Court. However, this does not take into consideration the numerous logistical problems which will also arise with resumed visitation, even if on a very limited basis.

Notwithstanding the Appellant's arguments previously set forth herein, should visitations be reinstated by Order of this Honorable Court, such should be significantly reduced from that ordered by the lower court.

XI.

ISSUE NUMBER FOUR

The Circuit Court of Mineral County erred by approving Kimberly Huff as a proper individual to supervise visitations.

XII.

DISCUSSION ISSUE NUMBER FOUR

Not only have the visitations which previously occurred in the past created difficulties in arranging schedules, transportation etc., but major disagreements have likewise arisen regarding the individuals which the Appellee has presented before the court as being appropriate to

supervise visitation.

At the July 20, 2004 hearing the Appellee proposed that Harriett H _____, the Appellee's ex-wife and who is now his current live in girlfriend, was an acceptable candidate to supervise visitations. Following a thorough cross examination the circuit court determined that Ms. H _____ was not acceptable and denied the Appellee's recommendation. The Appellee has also consistently promoted Kimberly Huff as an individual to supervise visitations which in response the Appellant has adamantly objected to being a qualified or appropriate supervisor for visitations. In fact, Ms. Huff is a current employee of the West Virginia Department of Health and Human Resources and a former girlfriend of the Appellee. The Appellant believes this to be a blatant conflict of interest especially in light of the past positions and involvement of the Department.

The lower court in its order of July 20, 2004, which was entered August 12, 2004, determined Kimberly Huff to be an appropriate individual to supervise visitation. The circuit court has virtually stripped the Appellant of any ability to have a say in the input of who supervises her daughter's visitation and seriously questions the reliability of Ms. Huff based upon her past involvement with the Appellee and her employment with the Department. Furthermore, the proceedings before the court revealed that Ms. Huff is a family support specialist with the Department which provides monetary benefits to participants through the West Virginia Works Program. Ms. Huff was never assigned to the child protective services division of the Department has no experiences or training in the area of parental visitation and had never supervised visitation until having previously supervised some of the visits between the Appellee and S.H.²⁹

²⁹ Note pages 134-138 August 17, 2004 hearing transcripts.

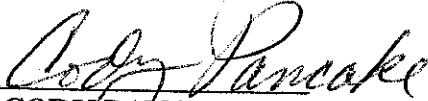
Ms. Huff is not qualified to supervise visitation in any abuse and neglect case, even though she is an employee of the Department, and should not be permitted to supervise visitations independently on a private pay for services basis. In the event visitation would be reinstated the Appellant requests a determination by this Honorable Court that Kimberly Huff is an inappropriate and unqualified individual to supervise visitation.

XIII.

CONCLUSION

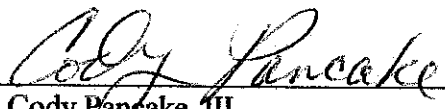
For the grounds setforth herein, the Appellant, Mildred H , respectfully moves this Court to enter a decision holding that the Circuit Court of Mineral County abused its discretion by placing the burden of proof upon the Appellant to establish that a reinstatement of visitation between the Appellee and S.H. should not be resumed. In addition, the Appellant would move that this Honorable Court reach a finding and thereby enter an Order that no further visitation be permitted between the Appellee and S.H. In the event, visitation would be determined to be reinstated, it is respectfully requested that this Honorable Court determine the appropriate frequency of such visitations and set forth guidelines as to appropriate qualifications of personnel for supervision.

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Certificate of Service

I, F. Cody Pancake, III, do hereby certify that I served a copy of the foregoing Brief on behalf of the Appellant, Mildred H. [redacted] by hand delivery upon Lynn A. Nelson, Prosecuting Attorney for Mineral County, counsel for the Department; a copy by hand delivery upon David H. Webb, counsel for the Appellee Robert Hayes; a copy upon Amanda See, Guardian ad Litem for S. H. by first class mail postage prepaid at her address of P.O. Box 700 Moorefield, WV 26836; Jeffrey Roth, Guardian ad Litem for A. W. by first class mail postage prepaid at his address of 107 Highland Ave., Petersburg, WV 26847 and the original and nine copies upon the Honorable Rory Perry, Clerk of the Supreme Court of Appeals of West Virginia at his address of State Capitol, Room E-317, 1900 Kanawha Blvd, East, Charleston, WV 25305 by first class mail, postage prepaid on this 18th day of February 2005.



F. Cody Pancake, III