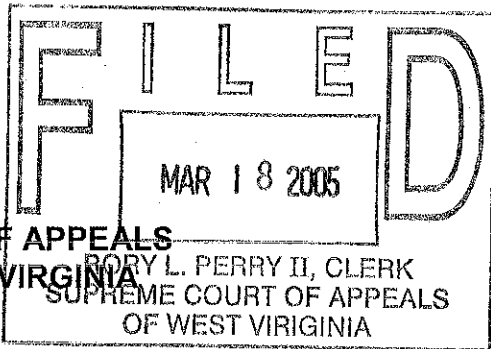


32520



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

IN THE MATTER OF

**A.W.
S.H.**

SUPREME COURT CASE NO: 32520

JUVENILES

BRIEF OF ROBERT H , APPELLEE

David H. Webb
88 South Street
Keyser, WV 26726
(304) 788-4500
WVSB #3960
Counsel for Appellee
Robert Hayes

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In re: Katie S., 198 W.Va. 79, 91 (1996).

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

In re: Christina L. 194 W.Va. 446, 453 (1995).

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

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INTRODUCTION

Comes now Appellee Robert H. [REDACTED] to present his Appellate Brief in response to the brief of the Appellant. The Appellant has appealed a Circuit Court order granting parent/child visitation after termination of the parental rights of Appellee Robert H. [REDACTED]. For the reasons that the parent/child visit is (a) in the best interest of child S.H. and (b) not harmful to child A.W., and as the trial court did not abuse its discretion or make errors of law in its rulings, the relief requested by the Appellant should be denied. In her previously-filed "Petition for Stay," the Appellant acknowledged three significant points: that the original parent/child visits "appeared to have occurred without any problems," that the Appellant had "initially agreed" to parent/child visits, and that Guardian *ad litem* William R. Kuykendall "joined in the recommendation for a reinstatement of visitation." The lower court conducted full evidentiary hearings and found the Appellant's evidence that the visitation was harmful to either S.H. or A. W. was "weak at best," and the trial

court entered an order that the best interest of the child S.H., who had an established bond and relationship with her father, the Appellee, is to visit with that parent.

The issues presented by the Appellant are responded to hereinafter.

THE LOWER COURT

The underlying case began in December 2000, and thereafter numerous evidentiary hearings were conducted by the trial judge. The record is voluminous. During the pendency of the case and even after the lower court entered a dispositional order that terminated the Appellee's parental rights to his natural child (who was not abused), the lower court awarded some parent/child contact within the discretionary power of the trial court.

The trial court specifically retained "jurisdiction for all matters related to this case," rather than referring the case to Family Court, probably due to the circuit court's breadth and depth of knowledge of the factual situations, as well as the trial judge's familiarity with the parties and children. The subject of parent/child contacts/visitation was not new to the trial court in July and August 2004, which ruling brought about this appeal. The trial court had considered the issue on other occasions, but particularly and at some length on May 29, 2002, when the visitation privilege was extended to the Appellee by the court. As indicated hereinafter, no further objections were ever raised about the legal posture of the court's May 2002 discretionary act, nor any harm to S.H. or any harm to A.W. Then, after a lengthy hearing in August 2004 regarding resumption of visitation after the Appellee's incarceration, the trial judge remarked on the record

that the Appellant's evidence that A.W. had been and/or would be harmed by the visits was "weak at best." And, upon the full record, the trial court's studied assessment is substantiated.

At the August 2004 hearing, the trial court found the Appellant's principal witness, a psychologist, had not spoken to A.W. in some time (Transcript 8/17/04, p. 54) and that the witness could only speculate that resumption of the visits "could have" some effect on A.W. With evidence that was only "weak at best," and considering that the trial court should be overturned only upon a showing of clear abuse of discretion, the lower court order granting visitation should not be overruled or modified. No evidence exists that the trial court's findings are "clearly erroneous." *In re: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E. 2d 177 (1996).

STANDARD OF REVIEW

As stated by this Appellate Court in *In re: Billy Joe M.*, 206 W.Va., 1, 521 S.E. 2d 173 (1999), the standard of review in abuse and neglect cases is well recognized:

"Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm

conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." 521 S.E. 2d at 177.

The lower court made no mistake in granting visitation.

ISSUE NUMBER ONE: BURDEN OF PROOF

The Circuit Court did not err in directing the Appellant to establish that visitation should not be resumed for the simple reason that the trial judge, after conducting lengthy hearings, had made previous determinations that visitation was appropriate, and, for the lower court to now order otherwise, the Appellant should show that circumstances had changed such that visitation should not be permitted. Once the Appellee had the court-ordered right to visit, then the court-ordered visitation should continue unless such changed circumstances presented by the Appellant would compel otherwise.

The situation that was presented to the trial court on the visitation issue is actually quite similar to deliberations made by Family Court judges in considering a reallocation of custodial responsibility of children after the original allocation at a final divorce hearing. In reassessing the allocation of custodial responsibility after the initial ruling and the passage of time with parent/child contacts, Family Court judges do not modify the allocation of custodial care unless such change was supported by a new factual situation **and** the change would materially benefit the welfare of the children.

The party seeking to change the *status quo* must bear the burden of presenting evidence that convinced the judge that a previous unappealed order should be changed.

No finding of fact by the trial court in August 2004 revealed that modifying the previous visitation order would do any harm to A.W., while at the same time the trial court found that S.H. was the beneficiary of the father/child contacts.

When the lower court continued the father/child visits even after termination of parental rights, the circuit judge remarked on the record: "And, I'm finding that it's, at this point, that [the Appellee and S.H.] do have a close relationship; that the visitation has gone well; and that the child seems to look forward to seeing [the Appellee] and at this point it is in her best interest to have visitation." (Tr. 5/29/02, p. 18). The Court had heard the Guardian ad Litem recommendation of visitation at the hearing: "I think the fact that [the Appellee] has maintained contact and has maintained very consistent visitation with [S.H.], and according to all reports, those have gone very well, is another point in favor of him having contact with the child in the future." (*Id.* at p. 8).

Interestingly, even though the Appellee appealed the lower court order terminating his parental rights and the Appellant responded, no counterappeal was made by the Appellant regarding parent/child visitation. Such failure to act was based on the fact that no circumstances supported a petition for appeal then, nor do such circumstances exist now. In point of fact, even if the burden of proof had been on the Appellee, then the testimony presented to the trial court in August 2004 would have led to the same result. In addition, S.H.'s Guardian ad litem expressed this position when

she wrote to this Appellate Court in January 2005: "In terms of whether the burden correctly lies with the [Appellee] or [Appellant] let's [*sic*] assume *arguendo*, that the burden of proof lies with the [Appellee]. He presented evidence, which established that the visitation would not be detrimental to the child and was in the child's best interest. (Letter, dated 1/3/05 to West Virginia Supreme Court).

The Court is referred elsewhere in this Appellee Brief to "Visitation Supervisor Vanessa Brooks Testimony" (p. 17) and to Kim Huff's testimony (p. 16), both of which support a finding that the Appellee did, in fact, provide compelling evidence that the parent/child visitation should resume.

VISIT REINSTATEMENT

The Mineral County Circuit Court did not err in "granting reinstatement" as no court order was ever entered that halted or terminated the visitation. The visitations were merely "suspended" due to the incarceration of the Appellee. On the face of it, the Appellee should have been able to immediately resume his visitation after his release from incarceration as no court order had been entered to the contrary.

ISSUE NUMBER TWO: DISCRETION OF THE LOWER COURT

The lower court listened patiently to all the witnesses and to counsel during a lengthy hearing on the visitation subject on August 17, 2004. The trial court found "that it is very much in [S.H.'s] best interest to not be made a, as [visit supervisor] Ms. Huff said, a one parent child; that the visits went well and **overwhelming testimony** of that;

that [the Appellee] was very appropriate during, during the visits and that it's to benefit [S.H.] to have these visits; to know her father and to have a relationship with him; and that she looked forward to them. And, it's very much in [S.H.'s] interest to continue the visitation." (Tr. 8/17/04, pp. 161-162, emphasis supplied).

The trial court also took into account the effect of visits between the Appellee and his daughter S.H. on A.W., saying: "[T]he testimony as to the adverse effects on [A.W.] was, I would say, weak at best. I was surprised that [psychologist] Ms. Coleman had not talked to [A.W.] talked to her in quite some time, certainly since [the Appellee's] been out of jail, about this. The fact that she said that they could be, could have these effects, the depression and anxiety could increase, that she hadn't discussed those with [A.W.], and certainly there's a lot of other factors going on in [A.W.'s] life that could also cause anxiety besides these." (Tr. 8/17/04, p. 162). The judge went on to say that the court also had "the testimony of Vanessa Brooks and Kim Huff; that they had a relationship with [A.W.] and she expressed no real anxiety to them about these visits. So, I'm finding that any effect, there's just not any convincing evidence that this would have any major adverse effect on [A.W.]." (Tr. 8/17/04, pp. 162-163).

At the August 2004 hearing, the Appellee's counsel concluded: "From the time of this court hearing that we conducted here on May 29, 2002, no one, or any agency, filed any objection to the visitation schedule that was done. No one came in here with a report that there was some bad effect on either of these two girls, either [A.W.] or [S.H.]. No one came in here and said that there was an objection to Kim Huff during the nine visits or so that she conducted, all the way up until August 4 when [the Appellee] . . .

went to jail. . . . There was no motion made in here during these 50 or so visits that there was any bad effect on [A.W.]. We only hear it now. And, it's weak." (Tr. 8/17/04, pp. 165-166).

ISSUE NUMBER TWO: NO ABUSE OF DISCRETION

The "final order" and "ultimate disposition" in this termination of parental rights/visitation case clearly was within the sole province of the trial judge: the judge who presided over the case for four years; the judge who had read a large number of reports; the judge who had listened to and watched all of the witnesses; the judge who heard the recommendations of the appointed Guardian *ad litem*; and, just as importantly, the judge who presided over the criminal charges against the Appellee.

One wonders: would not this trial judge have more information – even conflicting information - about this Appellee and the best interests of the two children than anyone else imaginable.

Numerous hearings were conducted by the trial court in the abuse/neglect case and in the criminal case, and the Appellee took the witness stand in the civil case. If the trial judge had any thought that the Appellee's contact with his daughter S.H. was harmful to the child or not in her best interest, he did not express them. Why? Obviously, because the contacts were never deemed to be harmful to the child, and the contacts were deemed to be in her best interest. For another thing, no person nor any agency presented any pleading or other communication to the trial judge after the visitations began that either A.W. or S.H. were harmed – even in the least – by the

visits. No adverse psychological reports were filed, no adverse letters were written, no adverse motions for reconsideration were filed, no adverse Guardian *ad litem* concern was voiced, no appeal was filed – nothing! Nothing!

Trial judges are frequently second-guessed, which is the nature of the job. But, when they have done their job as thoroughly as this judge did on this issue, then his deliberate and thoughtful decision should stand.

ISSUE NUMBER TWO: PARENTAL VISITATION: DISCRETION OF THE CIRCUIT COURT

Facts found by the Circuit Court should not be disturbed unless they are found to be “clearly erroneous.” Based upon the evidence, the Circuit Court made a finding that:

Visits between S.H. and the Appellee are in the best interest of S.H. This was shown from evidence that S.H. had always been excited about seeing her father for past visitation, so much so that S.H. would sometimes cry when she had to leave him or when she thought visitation was going to be cancelled or postponed. Evidence was also presented that during those visits S.H. and the Appellee played and interacted appropriately, got along well, and seemed to enjoy themselves. S.H. never showed any signs of being afraid of Robert H

On several occasions this Appellate Court has considered visitation between children whose parents have had their parental rights terminated. For one thing, this Court has determined that the right to “post-termination visitation is the right of the child, not the parent.” (*In re Christina L.*, 194 W.Va. 446, 453 (1995); cited in *In re Billy Joe*

M., 206 W.Va. 1, fn10). This Court has consistently ruled that the “best interest of the child” is the guiding light for circuit judges who consider that issue (*In re Billy Joe M.*, 206 W.Va. 1, 177 (1999)) and the “close emotional bond that has been established between parent and child” is an important consideration. (*Id.* at 178.) The close emotional bond between the Appellee and his daughter was apparent from the testimony heard by the trial court and as cited in this brief.

This Court has considered the parent visitation issue on other occasions, stressing the “emotional bond” criterion and the trial court’s discretion, saying in *In Christina L.*

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.

(Syl. pt. 5.)

In re Christina L. was cited by this Court in *In re Katie S.*, 198 W.Va. 79, 91 (1996), when the Court remanded *In re Katie S.* to the circuit court “to determine if continued visitation or other contact between the respondent and Katie S. would be detrimental to Katie S.’s well being and if the visitation would be in Katie S.’s best interest.” The trial judge in the case at bar took such evidence and heard argument

from all sides, before he exercised his discretion in granting the visits. All issues were thoroughly examined, and no discretion was abused.

THE GUARDIANS

Throughout the court proceedings that began in December 2000 and which continued to September 2004, A.W. and S.H. had the same Guardian *ad litem*. No one objected to the role of one Guardian *ad litem* for both children, and it should be presumed that the Guardian was conscience of the mutual interest of both of his wards as well as the separate interest of both of his wards. Considerable weight is accorded by a circuit court judge to the recommendations of the court's Guardian *ad litem*, and throughout these lower court proceedings, the Guardian *ad litem* was present; he interviewed the children; and, he made his recommendations with some thoughtfulness. Throughout the proceedings, the Appellant did not object to the Appellee's physical contact with S.H., nor did the Guardian *ad litem*. As the Appellant has said in her petition that was presented to the Appellate Court: "The Guardian Ad Litem concurred in part with [the Appellee] and in part with the Appellant but did note concerns about too much visitation." (Petition, p. 13). At the hearing in which visitation was discussed more than any other subject, (May 29, 2002), the Appellant agreed to visitation between the Appellee and S.H. As the Appellant's counsel stated at the May 29, 2002, hearing: "I've discussed this with [the Appellant]. She has advised me that, basically what she would be willing to concede and agree to to [sic] the Court, would be a visitation one time per month on a Friday afternoon, for approximately two hours." (Tr. 5/29/02, p. 6).

Undoubtedly, if the Appellant had had some concern about A.W., then she would have voiced her concern. Not one time after the circuit court's order allowing visitation did the Appellant express any concern through any petition to the court or through any correspondence or at a multidisciplinary meeting. During the entire time, neither did the Department nor any psychologist or social worker involved in this case express any concern about the visitation between the Appellee and his daughter S.H. or any adverse effect on A.W.

This court is aware of the importance of the role the Guardian *ad litem*, particularly as defined in *In re: Jeffrey R.L.*, 190 W.Va. 24, 435 S.E. 2d 162 (1993) (Appendix A). In May 2002, when visitation was first considered by the lower court, the Guardian *ad litem* agreed that visitation would be appropriate and "that Appellee Robert had a 'good track record' in his visitation." (Court Order, 7/19/02). At the May 2002 hearing the Guardian *ad litem* made various comments about the visitation proposal being considered by the Court:

- "I think the positive here in what we are discussing at the last hearing is that [the Appellee] has a history of maintaining as much contact and visitation as he possibly can." (Tr. 5/29/02, p. 8).
- "I think the fact that he has maintained contact and has maintained very consistent visitation with [S.H.], and according to all reports, those have gone very well, is another point in favor of him having contact with that child in the future." (Tr. 5/29/02, p. 8).

- "As Guardian Ad Litem, I would like to see [the Appellee] have contact with [S.H.]" (Tr. 5/29/02, p. 11).
- The Guardian considered A.W. as well as S.H.: "As much as I think it's in [S.H.'s] best interest to continue to have some contact with her father, I think it's also in [A.W.'s] best interest to know that there's not going to be possibility of any contact with [the Appellee]." (Tr. 5/29/02, p. 17-18).

As the court order of September 1, 2004, stated, the Guardian *ad litem* did not oppose the resumption of visitation. And, upon A.W.'s meeting/interview with her separate Guardian *ad litem*, Atty. Jeffrey R. Roth wrote to this Appellate Court that his "position with regard to what harm [visitation by the Appellee with S.H.] would cause [A.W.] would only be speculative at best." (Letter dated 1/4/05, to West Virginia Supreme Court of Appeals). Clearly, the letter falls short of a suggestion that Appellee/child contacts should not be resumed.

The Guardian *ad litem* for S.H. was clear in her observation and recommendation, all as set forth in her letter to the Appellate Court. (Letter dated 1/3/05 to West Virginia Supreme Court). She said, among other things:

- "I have had an opportunity to review the record and meet with Sierra H. I have also had an opportunity to observe the other minor, Alyssa W."
- "I was able to talk with Sierra H. about her wishes in regard to visitation with her father, to which she responded in the affirmative."
- "[I]t appears from the record that [S.H.] has an established bond with her father and enjoyed previous visits."

- "It is evident from the testimony of the visitation supervisors that Sierra H. would benefit from visitation and such visitation is not detrimental to her."
- "The [Appellant] did not put forth much evidence at previous hearings in regard to the alleged trauma to Alyssa W. caused by her half-sister's supervised visits with [the Appellee]."
- "[Sierra H.] has been exposed to her father since her birth to three years nine months of age. Any psychologist, or any parent for that matter, would tell you that a strong bond can be established between birth and three years of age."
- "[Sierra H.] is now five years of age and is requesting visitation."
- "[I]f the child seeks visits now, and is refused, time may cause Sierra H. to grow resentful that her mother and sister have kept her from knowing her father and making her own decision about the relationship she wishes to have with him in light of the events which have transpired."

S.H.'s Guardian *ad litem* had reviewed the record below, and she had seen **both** children.

S.H.'s Guardian made a clear recommendation to the Appellate Court: **"I feel that the lower Court has carefully and correctly balanced the interests of both children by allowing the supervised visits with Sierra H. while continuing therapy with Alyssa W. to help her deal with her anxiety regarding the visitation."**

LARA COURRIER TESTIMONY

The Appellant refers to the testimony of psychologist Lara Courier, to whom S.H. was referred for services. This psychologist testified that S.H.'s concern was that S.H. missed her sister A.W. when A.W. was sent to the Elkins Children's Home in juvenile delinquency proceedings. (Tr. 8/17/04, pp. 60-61). In cross-examination, the witness testified that if the child had a problem with her father, the Appellee (fear or concern about him), then such problem, fear, or concern would likely have been expressed by the child. (Tr. 8/17/04, p. 65-66).

Under questioning from the Guardian *ad litem*, the witness testified that she was not in a position to comment on the father/child visitation issue, but the witness would continue to see S.H. after visits resumed and address "issues," if any, that arose therefrom. (Tr. 8/17/04, p. 69).

PSYCHOLOGIST SHERRI COLEMAN TESTIMONY

At the trial court hearing, the Appellant called psychologist Sherri Coleman as her principal witness with most of witness' testimony referring to events and consultations that occurred before the trial court granted visitations to the Appellee. At no time in her testimony did the witness mention that the witness was present to observe either S.H. or A.W. before or after the father/child visits to see what effect the visits might have wrought. The witness testified that whatever fears A.W. had about S.H.'s visit with the Appellee had "dissipated" by July 2003 (Tr. 8/17/04, p. 47), and that during the April through June 2004 sessions, there was no expression by A.W. of "fears regarding their

visitation between [the Appellee] and [S.H.]" (Tr. 8/17/04, p. 54). Actually, this witness merely rehashed the 2002 testimony previously heard and considered by the court.

ISSUE NUMBER FOUR: KIM HUFF AS VISITATION SUPERVISOR

Appellant claims that the lower court erred in approving Kim Huff as a person to supervise visitations, which raises the question: Where was this objection back when Kim Huff was doing the supervising? It was well known through testimony presented at the trial in this case of a previous relationship between Kim Huff and the Appellee, but the testimony of Kim Huff covered this matter thoroughly at the August 2004 hearing. Kim Huff testified that before this court case arose, she had not spoken to the Appellee in "about ten years." (Tr. 8/17/04, p. 128). Kim Huff testified that she was a Family Support Specialist with the Department of Health and Human Resources, that she had established a relationship with A.W. as well as S.H., and, actually, also with the Appellant. Kim Huff testified that she saw A.W. at every Appellee/child visit that she supervised. (Question: "Did you also see [A.W. on the visits]?" Answer: "Every time." (Tr. 8/17/04, p. 129)). Kim Huff testified that she made A.W. comfortable with visitations (Tr. 8/17/04, p. 131), and she testified, "I didn't see [A.W.] anxious." (Tr. 8/17/04, p. 131). If the Appellant had had an objection to Kim Huff as a supervisor, the lower court would have heard about this many months ago. As with her other arguments, this Appellant argument is weak.

VISITATION SUPERVISOR VANESSA BROOKS' TESTIMONY

Witness Vanessa Brooks testified that she supervised nearly forty (40) visits between the Appellee and his daughter (Tr. 8/17/04, p. 112), and that her qualifications include "eight years of working with domestic violence victims and sixteen years of working with children and youth." (Tr. 8/17/04, p. 111). She testified that no problems occurred during the entire time, and the child looked forward to the visits. Under examination from the Guardian *ad litem*, she testified:

When I got Sierra, she was excited. Whenever she saw, whenever we got to where we were going, when she saw [the Appellee], she knew immediately who it was. She was excited. Jumped up in his arms, and she was thrilled, I mean, she was happy to see him. Visits, when we concluded, there were times when she cried; she didn't want to leave. You know, she'd say I don't want to leave my Daddy, and he assured her, you know, I'll see later. Those kinds of things. (Tr. 8/17/04, p. 123).

A.W. AVAILABLE AS A WITNESS

The Appellant writes in her brief (Brief, p. 15) that the circuit court and the guardian ad litem were advised that A.W. was in counsel's office "if either felt it was of interest or necessary to speak with the child." (Appellant Brief, p. 15). The record reflects that the child was at home on a week-long pass from the Elkins Children's Home, but it is interesting – and perhaps informative – that no proffer was made of the child's testimony. Neither was a request made that either the Guardian *ad litem* or the judge or any of the psychologists speak with the child. (Tr. 8/17/04, p. 7).

The record below reflects that A.W. had issues with her mother – unrelated to this case – for which she was placed in the Children’s Home in Elkins through the Department of Health and Human Resources. In other words, she would not even have been in the home when father/child visits resumed, which would have helped with the transition.

To the Appellee the credibility of A.W. has always been an issue, but he has never had an opportunity to confront her, either in a courtroom, in judge’s chambers, or anywhere. To the knowledge of the Appellee or his counsel, the trial judge did not interview the child in any proceeding. This Appellate Court is respectfully directed to the petition for appeal previously filed by the Appellee (refused 3-2 by this Court: S. Ct. Case # 021776) wherein the credibility of the child was raised as one issue and the failure of the trial court to allow some “confrontation” was raised as another issue.

The Appellant’s main witness at the August 17, 2004, (Psychologist Sherri Coleman) proceeding testified that A.W. was lying to her foster mother about having a friend over and that A.W. also lied to the Appellant about other matters. The trial judge cut off cross-examination of the psychologist regarding A.W.’s honesty by saying to the Appellee’s counsel: “I think you’ve gotten enough instances of dishonesty.” (Tr. 8/17/04, p. 43).

THE CRIMINAL CHARGES

It is not difficult to understand the Appellant's reasoning in emphasizing the criminal charges against the Appellee. The Appellee was charged with crimes that could have sentenced him to life in prison when one considers his age. But, he was not convicted of even **one** felony when he made his Alford plea. His risk was terrific, and even the worst penalty for misdemeanor convictions paled in comparison. Nearly any reasonable person would have accepted such a plea agreement, and few defense attorneys would recommend the risk of a jury trial when such plea bargain is available.

Importantly, and as pointed out herein, the trial judge in both this abuse/neglect case and the criminal case was the same judge. One can reason that the trial judge's acceptance of the misdemeanor plea and the trial court granting supervised visitation between the Appellee and his child have some common connecting thread.

APPELLEE EVALUATIONS

Although the Appellant claims that the Appellee did not participate in services, the Appellee did participate in parenting class in his divorce case from the Appellant, and he was subjected to a battery of evaluations considered by the trial court: Dr. David Estep, Dr. Morris, Mt. State Psychological Services, and all of which records were provided to the trial judge for his consideration.

BEST INTEREST OF THE CHILD

If the "polar star" of domestic relations and abuse/neglect cases is the "best interest of the child," then the relationships that the child has formed must be a foremost consideration. This point was recently recognized by this appellate court in *In re: Charity H.*, 215 W.Va. 208 (2004).

The question is: Is it in the best interest of S.H. to visit with her father, the Appellee? The trial court answered "yes."

As was found in *Charity H.*, "The record clearly reveals that an emotional bond exists between the [mother] and her children. Throughout the proceedings, the visitations have progressed well" (215 W.Va. at 218). And, that is the situation found in the case at bar, based upon the credible evidence of those persons who are and were closest to the parties and these children. This appellate court directed the *Charity H.* lower court to take evidence and hear argument from all parties on the post-termination visitation issue, which the lower court did at some length and on multiple occasions in the case at bar, in clear recognition that: "A child has a right to continued association with individuals with whom he has formed a close emotional bond . . . provided that a determination is made that such continued contact is in the best interest of the child." *In re: Jonathan G.*, 198 W.Va. 716, 482 S.E. 2d 893 (1996).

In May 2002, the trial judge listened to the pros and cons of father/child visitation; and at the conclusion of the hearing he expressed his opinion: "I'm finding that it's, at this point that [S.H. and the Appellee] do have a close relationship; that this visitation

has gone well; and that the child seems to look forward to seeing the [Appellee] and at this point it is in her best interest to have visitation." (Tr. 5/29/02, p. 18).

In August 2004, Kim Huff, who had supervised Appellee/child visits, was asked whether S.H. looked forward to seeing the Appellee. Her response was compelling:

I think she did, yeah. Yeah. She was always excited as soon as we'd get in the car. That's what I'd hear. We're going to see my Daddy. We're going to see my Daddy. In fact, one time, we always go to a place and meet [the Appellee]. So, that you know, I'd pick her up from the home and take her away from the home so that he wouldn't be anywhere near [A.W.] or [the Appellant] and so that he wouldn't know where they lived. And, one time, we got there before [the Appellee] did, and she was very upset. She was very upset. My Daddy's not coming. My Daddy's not coming. She was almost in tears. And, I kept saying, hang on, honey, he's coming. And, when he came down the road, she spotted him and she was excited. She was coming out of her car seat. (Tr. 8/17/04, p. 132).

...

[S.H.] looked forward to [visits]. [The Appellee] always did things like, geared toward her, just like [the other supervisor] Vanessa said. We'd go to the park; they'd go to the pool. They went fishing. You know, she'd like that. She looked forward to it then. I don't see why she wouldn't [look forward to visits] now. (Tr. 8/17/04, p. 134).

Under cross-examination, witness Kim Huff testified that it would benefit [S.H.] to have both of her parents. When asked "Why," she responded: "Because as a single parent with two children whose father has never laid eyes on them since they [were] two

and four, and they are now eighteen and sixteen, I see the issues that my children have had with not having a father figure in the house, and I think that every child should have a father and a mother." (Tr. 8/17/04, p. 142). As for continuation of visitation, she testified: "[S.H.] looked forward to [the visits]; she loved her father; he was very good with her. I think it would be a good thing for her." (Tr. 8/17/04, p. 142).

ISSUE NUMBER THREE: REDUCED VISITATION

Based upon the testimony of all the witnesses heard by the trial judge and argument of counsel, the parameters of the visits and the frequency of visits were fixed and determined by the Court. The witnesses who actually had "hands on" with the visits and with the reaction of both S.H. and A.W. would not have been clearer about the positive benefits for S.H. In consideration of the entire record, the visits should be resumed at the same frequency as when they were suspended and under the same parameters.

CHILD SUPPORT

The Appellee has offered to pay child support (Tr. 8/17/04, p. 174) as part of his effort to parent S.H. to the maximum extent practicable.


CONCLUSION

First, the findings of the lower court should not be set aside unless clearly erroneous. ("A finding is clearly erroneous when, although there is evidence to support

the finding, the reviewing court on the entire evidence is left with definite and firm conviction that a mistake has been committed. *In re: Billy Joe M.*, 206 W.Va. 1, (1999)). Secondly, this court is aware of the importance of the role of the Guardian *ad litem*, and the Guardian *ad litem* has always agreed that visitation would be appropriate between the Appellee and S.H., all as set forth in the record. Thirdly, evidence supports all the findings of the lower court, including the finding that there is no detrimental harm to A.W. by the Appellee visiting with his daughter S.H. Fourthly, the lower court's finding that the visits would be in the best interest of S.H. are supported by clear and convincing evidence, the lower court even concluding that the Appellant's evidence was "weak." Lastly, the correspondence by the two present Guardians *ad litem* to this Appellate Court support the reinstatement of Appellee/child visitation.

Upon the facts developed by lengthy testimony below and the law applicable to the lower court's findings, it is clear that S.H. will continue to benefit from the parent/child visits; and, it is equally clear that half-sibling A.W. has not been harmed by the visits to date and would not be harmed by future visits. The Appeal should be dismissed.

ROBERT H.
APPELLEE
By Counsel



David H. Webb
88 South Street
Keyser, WV 26726
(304) 788-4500
Fax (304) 788-4525
WVSB #3960

CERTIFICATE OF SERVICE

I, David H. Webb, a practicing attorney do hereby certify that I mailed by first class mail the original and nine copies of the foregoing Brief of Robert H. [redacted], Appellee to the Supreme Court of Appeals of West Virginia, State Capitol, Charleston, WV 25305 and upon the following, by mailing a true copy thereof, on this the 16th day of March 2005, to:

Lynn A. Nelson, Esq.
Prosecuting Attorney
P. O. Drawer 459
Keyser, WV 26726

F. Cody Pancake, III, Esq.
Counsel for Appellant
P. O. Box 726
Keyser, WV 26726

Amanda See, Esq.
Guardian ad Litem
P. O. Box 700
Moorefield, WV 26836

Jeffrey Roth, Esq.
Guardian ad Litem
107 Highland Avenue
Petersburg, WV 26847



David H. Webb