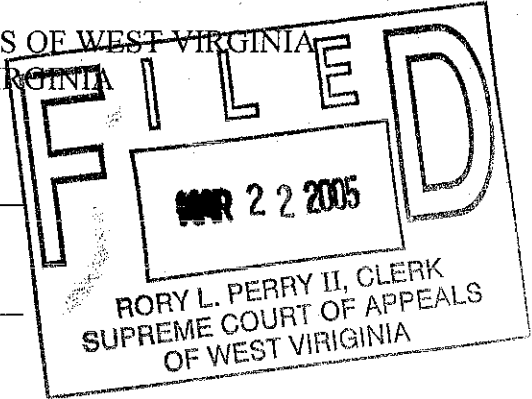


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA



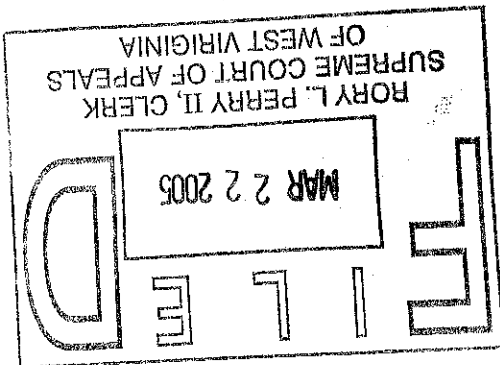
Docket No. 32520

IN RE:

**ALYSSA W. and
SIERRA H.**

CIRCUIT COURT OF MINERAL COUNTY
HONORABLE PHILIP JORDAN
CASE NOS. 00-JA-37, 00-JA-38

BRIEF ON BEHALF OF SIERRA H., APPELLEE



Respectfully Submitted By:

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

Now comes your Guardian ad litem, Amanda H. See, on behalf of the minor child, Sierra H., and would respectfully request that this Honorable Court uphold the rulings by the lower court. In support thereof, your Guardian ad litem would respectfully represent to the Court as follows:

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

This matter is an abuse and neglect proceeding instituted in Mineral County, West Virginia. Your Guardian ad litem has no additions, deletions or modifications to Appellant's representation of the kind of proceeding and nature of rulings below.

STATEMENT OF FACTS

At issue in this case are the interests of Alyssa W., age 13, and Sierra H., age 5. Alyssa W. is the daughter of Appellant, Mildred H. and Roy W. Sierra H. is the natural daughter of Mildred H. and Appellee, Robert H., making Alyssa W. and Sierra H. half sisters. The children currently reside together with their mother.

Your Guardian ad litem does not dispute the facts as represented in the briefs submitted on behalf of Mildred H. and Robert H., but would emphasize the following facts:

The lower court conducted an off-the-record conference with counsel of record and the parties regarding visitation between Robert H. and Sierra H on February 25, 2002. It is reflected in the Order from that conference that said issue was not addressed in the lower court's previous order, which returned legal and physical custody of the

children to Mildred H. The Order further reflects that it was not the intent of the lower court to terminate visitation between Robert H. and Sierra H., and the weekly visits were resumed. Absent from the order are objections, if any, by Mildred H. in regard to visitation.¹

On May 1, 2002, the parental rights of Robert H. were terminated as to Sierra H. On May 29, 2002, the issue of post-termination visitation between Robert H. and Sierra H. came before the lower court. Mildred H. agreed to limited visitation knowing that Robert H. had not received services or therapy of any kind during the pendency of this action. The Court set the visitation schedule at three Saturdays per month for three hours. The matter was scheduled for November 14, 2002 at 1:00 p.m. to review the status of the visitation between Robert H. and Sierra H. and the status of the criminal case pending against Robert H. regarding sexual abuse of Alyssa W.

Prior to the matter being reviewed by the lower court on November 14, 2002, Robert H. filed an appeal, which was refused by this Honorable Court on November 27, 2002. (Presumably, the hearing on November 14, 2002 never took place, inasmuch as the matter was stayed at that time pending a ruling by this Honorable Court.)

On March 26, 2003, Robert H. entered an Alford plea and was convicted of six counts of Third Degree Sexual Abuse before the Circuit Court of Mineral County. At no time after the refusal of Robert H's petition for appeal of termination of parental rights by this Honorable Court did Mildred H. request that the status hearing be rescheduled. At no time after the conviction of Robert H. in March 2003 until his sentencing in July 2003 did Mildred H. request that the issue of visitation between Sierra H. and Robert H. be reviewed and terminated by the lower court as a result of the criminal conviction.

¹ Order entered March 15, 2002.

Mildred H. never requested that the issue of visitation be reviewed and terminated by the lower court during the time that Robert H. was incarcerated, between August 4, 2003 and June 15, 2004. Mildred H. never requested that the issue of visitation be reviewed and terminated by the lower court after Robert H's release from jail on June 15, 2004. It wasn't until the filing of the motion to reinstate the visitation by Robert H. on June 22, 2004 that Mildred H. objected to the continuation of visitation.

Alyssa W.'s psychologist, Sheri Coleman, testified at the hearing regarding reinstatement of visitation between Robert H. and Sierra H. held on August 17, 2004. Through her testimony, it was determined that the visitation between Robert H. and Sierra H. did not stop until July 2003, around the time that Robert H. was incarcerated.² Mrs. Coleman still continued to see Alyssa, except for two months from February 2004 to April 2004, but there were no reports generated between September 9, 2002 and July 15, 2004.³

Mrs. Coleman stated that Alyssa became concerned about visits between Robert H. and Sierra in May 2002, but those concerns and fears dissipated in June 2003.⁴ Mrs. Coleman opined that "... based upon her past history and her responses to the visitations between [Robert H.] and Sierra, I see that Alyssa could be affected emotionally by the visitation...specifically again adding to depression and anxiety."⁵ In her letter dated July 15, 2004, Mrs. Coleman stated that she hadn't spoken with Alyssa recently regarding

² August 17, 2004 hearing transcript, pages 31, lines 5-7.

³ *Id* pages 26, lines 24-25; page 32, line 25 through page 33, lines 1-2.

⁴ *Id* page 30, lines 19-21; page 33, lines 21-22.

⁵ *Id* page 35, lines 15-19 and 21-22.

visitation between Robert H. and Sierra H.⁶ In fact, she had not spoken with Alyssa about the visitations since he was incarcerated in July 2003.⁷

In regard to therapy for Sierra H., Lara Courier counseled Sierra for a period of time, but never addressed the issue of visitation with her father.⁸

The DHHR's position in regard to visitation between Robert H. and Sierra H. was that there should not be any visitation.⁹ However, there was no petition for appeal of the order granting post-termination visitation filed by the DHHR or counter-assignment of error filed by any party in response to Robert H.'s petition for appeal regarding the existence and/or frequency of visitation with Sierra.

There was an objection at the August 17, 2004 hearing by Mildred H. in regard to the qualifications and potential conflict of the visitation supervisor obtained by Robert H., namely Kimberly Huff. Ms. Huff took over supervision of visitation between Robert H. and Sierra H. in late May 2003, and she continued to supervise the visitations August 2003.¹⁰

⁶ *Id* page 47, lines 8-17.

⁷ *Id* page 55, line 3.

⁸ *Id* page 62, lines 21-23.

⁹ *Id* page 89, lines 4-5.

¹⁰ *Id* page 129, lines 3-10.

TABLE OF AUTHORITIES

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ARGUMENT AND DISCUSSION OF LAW

Standard of Review

“ ‘When this Court reviews challenges to the findings and conclusions of the circuit court, a review a two-prong deferential standard of review is applied. We review the final order and ultimate disposition of the circuit court under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard.’ *Syl. Pt. 1, McCormick v. Allstate insurance Company*, 197 W. Va. 415, 475 S.E. 2d 507 (1996).” *Syl. Pt. 1, State v. Michael M.*, 202 W. Va. 350, 504 S.E. 2d 177 (1998).

I. The Circuit Court of Mineral County did not abuse its discretion by shifting the burden upon the Appellant to establish that a reinstatement of visitation between the Appellee and Sierra H. should not occur.

The Appellant assigns error to the lower court for shifting the burden of proof to the Appellant to establish that reinstatement of visitation between the Appellee and Sierra H. should not occur. In fact, the appellant suggests that the DHHR should not have been dismissed from the case as the burden of proof always lies with the DHHR. The Appellant cites *In the Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981) to support her assertion. It is clear from the evolution of the case law in regard to abuse and neglect that, depending upon the issue, the burden does shift to a party other than the DHHR. For example, it is the Respondent parent who must show that he or she demonstrates a willingness to fully participate in an improvement period before the Court will grant an improvement period.

It is important to note that the DHHR’s position in regard to visitation between Robert H. and Sierra H. was that there should not be any visitation. Even more notable is

the fact that there was no petition for appeal of the order granting post-termination visitation filed by the DHHR or counter-assignment of error filed by any party in response to Robert H.'s petition for appeal regarding the existence and/or frequency of visitation with Sierra. One could speculate that because Mildred H. agreed to visitation at the hearing on May 29, 2002, the DHHR did not wish to pursue their position in regard to the visitation to this Honorable Court. Why would they appeal? There certainly was not an overwhelming outcry from the DHHR or any service providers on behalf of Alyssa to terminate visitations. Even after the petition was refused and Robert H. presented an Alford plea to six counts of Sexual Abuse in the Third Degree, no one came forward on Alyssa's behalf claiming that the visitations between Robert H. and Sierra H. were so harmful to Alyssa that they should be stopped.

The reality is that no one has inquired of Alyssa about visitation between Sierra and Robert H. since before his incarceration in August 2003. The first person to recently approach Alyssa regarding this issue is her Guardian ad Litem, Jeffrey Roth, well after the instant petition was filed with this Court.

Technically, there was never a court order terminating visitation once Robert H. was convicted, sentenced or incarcerated. It would appear that neither the DHHR nor Mildred H. requested that the issue of visitation be rescheduled for review and termination at any time after the status/review hearing set for November 14, 2002, was cancelled. Theoretically, the visitation could have just resumed, and any objections would have to have been brought to the Court's attention, via motion, by the aggrieved party.

This Court asserted in *Syl. Pt. 4, Lindsie D.L. vs. Richard W.S.*, 214 W. Va. 750, 591 S.E. 2d 308 (2003), that “[t]here is a presumption that fit parents act in the best interests of their children.” Mildred H. agreed to the visitation. If the agreement should be abandoned, as the aggrieved party either she or the children’s Guardian ad Litem would then need to demonstrate a change in circumstance showing why visitation is no longer in the best interest of the child and/or that the visitation unreasonably interferes with the child’s permanent placement.

II. The Circuit Court of Mineral County did not err by granting a reinstatement of visitations to the Appellee with Sierra H.

The Appellant invites this Court to review the Court’s decision to grant a resumption in visitations by using the tests laid out in *Syl. Pt. 5, In Re: Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995), which states,

“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.”

Additionally, Appellant adds an additional consideration to the aforementioned standard by asserting that post-termination visitation should be permitted if it is in the children’s best interest and “would not unreasonably interfere with their permanent placement.” In

Re: Billy Joe M. and Jason M., 206 W. Va. 1 at 4, 521 S.E. 2d 173 (1999), *citing*, State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996).

In the previous section was a discussion of who should have had the burden at the August 17, 2004 hearing. If the burden is placed with Mildred H. to show that visitation between Robert H. and Sierra should not resume because it creates a psychological harm to Alyssa which outweighs the benefit reaped by Sierra from visitation with her natural father, then the burden certainly was not met. No one talked with Alyssa about the issue of visitation for one year prior to the hearing or even at the hearing. The most recent communication with Alyssa regarding visitation between Sierra and Robert H. was in late December, 2004 by her Guardian ad Litem, Mr. Roth.

The Appellant is asking this Court to place the burden of proof with Robert H. to show that post-termination visitation is appropriate between Robert H. and Sierra, *at the appellate level*, and apply the standards as set forth above as stated in *Christina L.* and *Billy Joe M.* to the facts presented on the record. There are two immediate problems with that request, which produce patently unfair results. First, if the Court granted Appellant's request, this Court would be ignoring the fact that Mildred H. waived the application of the aforementioned standards by the lower court at the post-termination visitation hearing on May 29, 2002 by consenting to the visitation. Moreover, neither the DHHR nor the Guardian ad Litem objected to the agreement on the basis that it was not in the best interest of Sierra.

The Appellant argues that she should not be held to her agreement to visitations made by her on May 29, 2002 because the order from the Adjudicatory hearing had not yet been entered and the outcome of the criminal proceeding was yet to be determined.

That argument is flawed for two reasons. First, the reason the children were removed from her custody was because, initially, she did not believe that Robert H. sexually abused Alyssa. Once Mildred H. completed her improvement period, the Department was satisfied that she had remedied the neglectful conduct of failing to protect her children and returned legal and physical custody of both children to her almost nine months prior to the hearing. If Mildred H. truly believed the allegations Alyssa made against Robert H., then she had a full understanding of the circumstances at the time she made the agreement for visitation without the necessity of an Adjudicatory Order and convictions in criminal court.

This Court asserted in *Syl. Pt. 4, Lindsie D.L. vs. Richard W.S.*, 214 W. Va. 750, 591 S.E. 2d 308 (2003), that “[t]here is a presumption that fit parents act in the best interests of their children.” Mildred H. had been involved in an improvement period, wherein she received services, participated in multi-disciplinary team meetings and was privy to the positions of all parties in the case. Knowing all of the circumstances, she still consented to visitation between Robert H. and Sierra H.

Additionally, even after the entry of the Adjudicatory Order and the convictions in criminal court, Mildred H. never requested that the Court review the visitation issues. The matter was scheduled for November 14, 2002 at 1:00 p.m. to review the status of the visitation between Robert H. and Sierra H. and the status of the criminal case pending against Robert H. regarding sexual abuse of Alyssa W. Prior to the matter being reviewed by the lower court on November 14, 2002, Robert H. filed an appeal, which was refused by this Honorable Court on November 27, 2002. (Presumably, the hearing on

November 14, 2002 never took place, inasmuch as the matter was stayed at that time pending a ruling by this Honorable Court.)

On March 26, 2003, Robert H. entered an Alford plea and was convicted of six counts of Third Degree Sexual Abuse before the Circuit Court of Mineral County. At no time after the refusal of Robert H's petition for appeal of termination of parental rights by this Honorable Court did Mildred H. request that the status hearing be rescheduled. At no time after the conviction of Robert H. in March 2003 until his sentencing in July 2003 did Mildred H. request that the issue of visitation between Sierra H. and Robert H. be reviewed and terminated by the lower court as a result of the criminal conviction. Mildred H. never requested that the issue of visitation be reviewed and terminated by the lower court during the time that Robert H. was incarcerated, between August 4, 2003 and June 15, 2004. Mildred H. never requested that the issue of visitation be reviewed and terminated by the lower court after Robert H's release from jail on June 15, 2004. It wasn't until the filing of the motion to reinstate the visitation by Robert H. on June 22, 2004 that Mildred H. objected to the continuation of visitation.

The other problem with placing the burden with Robert H. at the appellate stage and applying the established standards of determining the appropriateness of post-termination visitation to the facts presented in the record is that since Robert H. was told prior to that date that he did not have the burden, the record was not sufficiently developed in terms of the detrimental effect that termination of visitation would have on Sierra H. Lara Courier, Sierra's therapist, did not talk about visitations with her father during their sessions.

The record was, however, replete with testimony regarding the appropriateness of visitation, how Sierra enjoyed visitation with her father, and how the visits were not harmful to Sierra. After visits three times per month from May 31, 2002 until August 4, 2003, certainly one can surmise that a bond had already formed by the time Robert H. was incarcerated, if it hadn't already, keeping in mind that Robert H. lived with Sierra H. from her birth until she was removed from the home at fourteen months of age. Although there is no evidence submitted by the service providers, common sense would tell you that children form bonds with their parents from birth. Robert H. had consistent contact with Sierra from birth until he was incarcerated. Prohibiting visits at this point based upon the argument that no bond has been formed or that visits with her natural father are not in her best interests would be absurd. There was no evidence presented at any time to the lower Court to support a termination of visits based upon those two factors, and the Guardian ad Litem below never objected to the visits.

III. Frequency of visitation should be reduced.

Your undersigned did not address this issue in the letter dated January 3, 2005 to this Honorable Court, but would like to do so at this time.

For several reasons, your Guardian ad Litem would agree with Appellant that the visitations should be reduced if this Honorable Court determines that the visitation should resume. First, the Mildred H. agreed at the May 29, 2002 hearing to permit visitation between Robert H. and Sierra H. one time per month for two hours "given the circumstances". Despite this agreement, the Court awarded visitations three times per month, which far exceeds standard visitation in divorce cases. Although Mildred H.

never appealed the issue of frequency from the May 29, 2002 order, it would appear that the visitation is excessive when compared to similar cases in the same jurisdiction. The Appellant is correct in asserting that when post-termination visitation is awarded to a respondent, routinely the frequency is not more than two or three times per year.

While the gravity of the abuse is certainly notable, the abuse was not specific to Sierra H. For that reason, the gravity of the abuse should not be viewed by itself as a reason to reduce frequency, but should be considered in conjunction with the fact that Robert H. did not receive sex offender treatment or any other intensive therapies or services during the pendency of this action or while he was incarcerated, and he never admitted any wrongdoing. Considering these factors leads your undersigned to agree with the Appellant that visitation should be reduced in frequency.

Second, when considering a balance of the interests of the two children, who reside together, and without conceding that Alyssa will suffer psychological harm which outweighs Sierra's interest in visiting with her father, if there is a perceived harm to Alyssa or the sibling relationship by permitting visitation between Sierra H. and Robert H., then reducing the frequency would, on its face, reduce the harm. Thus, a reduction in frequency would also address the issue of unreasonable interference with the permanent placement.

IV. Robert H. should be required to obtain an experienced visitation supervisor.

Kimberly Huff has been supervising visitations in this case since May of 2003. No objection was raised by any party as to Ms. Huff's qualifications nor was there an objection to the prior three-month relationship between she and Robert H. more tha13

years ago, when she took over for Vanessa Brooks. The first time there was an objection to her role as supervisor was at the hearing on August 17, 2004, after she had already supervised visitation in late May, June, July and early August of 2003.

Should this Honorable Court determine that a new visitation supervisor be obtained by the Appellee, despite the fact that the Appellant did not timely object to Ms. Huff's qualifications as supervisor, a change in the visitation supervisor is ultimately a minor issue when compared to whether visits should take place.

Although your undersigned does not believe that a the lower court committed reversible error by approving Ms. Huff as a proper visitation supervisor, your undersigned would recommend, out of an abundance of caution and for the sake of the child and the Appellee, that the Appellee be required to obtain the services of an experienced visitation supervisor who has never had any personal involvement with the instant case or the parties involved.


PRAYER FOR RELIEF

Based upon the discussion and law as set forth herein, your Guardian ad Litem for Sierra H. would respectfully request that this Court affirm the order of the Circuit Court of Mineral County, which placed the burden of proof with Mildred H. and reinstated the visitation between Robert H. and Sierra H. Your Guardian ad Litem would respectfully move that this Court remand the case back to the Circuit Court of Mineral County mandating a reduction in frequency in visitation and an order requiring Robert H. to obtain a qualified and experienced visitation supervisor who has never had any personal involvement with this case or with the parties involved.

Respectfully submitted this 21st day of March, 2005.

AMANDA H. SEE

**Guardian ad Litem for
SIERRA H**


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CERTIFICATE OF SERVICE

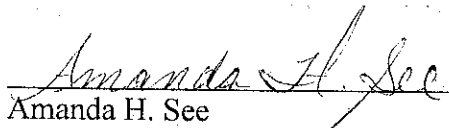
I, Amanda H. See, do hereby certify that I have filed an original and nine copies of the forgoing Brief on Behalf of Sierra H. with Rory Perry, Clerk of the Supreme Court of Appeals of West Virginia, at his address of State Capitol, Room E-317, 1900 Kanawha Boulevard, East, Charleston, WV 25305, and I have served true copies of the same upon the following by U.S. Mail postage prepaid, this 21st day of March, 2005:

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