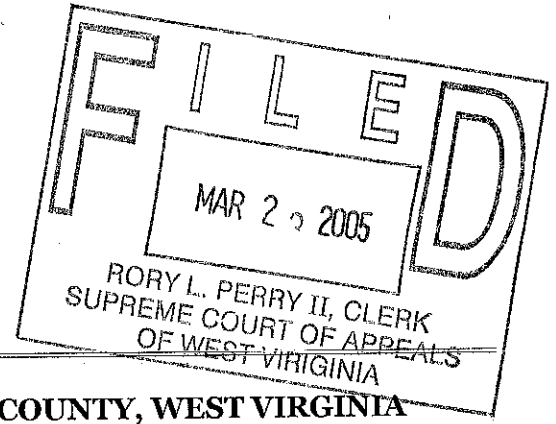


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**IN THE MATTER OF:  
A. W. and S. H.,  
Juveniles**

**SUPREME COURT CASE NO. \_\_\_\_\_  
Mineral County Circuit Court  
Case Nos.: 00-JA-37 & 38**

32520



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**FROM THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA**

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**RESPONSE ON BEHALF OF A. W., JUVENILE**

Guardian Ad Litem for A. W.  
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**RESPONSE TO APPEAL THE FROM CIRCUIT COURT OF  
MINERAL COUNTY, WEST VIRGINIA**

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**I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL**

This is an abuse and neglect case. The Circuit Court of Mineral County, West Virginia granted visitation to Robert H , to his daughter S. H., even though his parental rights had been terminated by the Court by Order dated May 1, 2002, entered by the Court on May 1, 2002.

On March 26, 2003 Robert H was convicted of six counts of Third Degree Sexual Abuse before the Circuit Court of Mineral County, West Virginia, against the step-daughter, A. W., who is a party in this case. On July 23, 2003, Mr. H was sentenced to ninety days incarceration on each of the six counts to be served consecutively to each other. Mr. H period of incarceration extended from August 4, 2003 through June 15, 2004. Upon his release, Robert H filed a Motion before the Circuit Court of Mineral County, West Virginia requesting visitation with S. H.

The Circuit Court of Mineral County, West Virginia granted the Motion for Visitation on August 17, 2004, with the Order being entered on September 1, 2004. The stay was entered on September 9, 2004, stopping any further visitation between Robert H and his daughter, S. H., and separate Guardians Ad Litem were to be appointed to represent the minor children's interests herein.

## II. STATEMENT OF FACTS

Robert H [redacted] perpetrated sexual acts upon his step-daughter, A. W., and was subsequently convicted of six counts of Third Degree Sexual Abuse before the Circuit Court of Mineral County, West Virginia. Mr. H [redacted] was incarcerated for ninety days for each count. Upon his release he filed a Motion to resume visitation with his biological daughter, S. H. As indicated in the Petitioner's Statement of Facts, it is clear that A. W. has maintained her story all throughout that her step-father, Robert H [redacted], had sexually abused her. A. W. was interviewed by Ruth Kiser, the DHHR social worker, on December 15, 2000; subsequently by Sherri Coleman, a licensed psychologist on February 6, 2001; and later a psychological evaluation was done by Chanin Kennedy of Fremouw Associates conducted on five separate occasions between January 30, 2001 and May 8, 2001, and all the interviewers have indicated that A. W. was found to be a credible and reliable reporter in the statement she made regarding sexual abuse by her step-father.

On April 11, 2002 the Adjudicatory Order was entered by the Circuit Court of Mineral County for the hearings held on May 23, July 5 and September 6, 2001. Within this April 11, 2002 hearing the Court found by clear and convincing evidence that Mr. Hays engaged in certain sexual acts with A. W., and were proven, and the Court further concluded that as a matter of law A. W. was an abused child as defined by West Virginia Code 49-6-2(c).

The interesting point about this April 11, 2002 hearing is the information the Court provides in the Order regarding the testimony presented by Chanin Kennedy of Fremouw Associates.

The Court made the following conclusions which were included in Ms. Kennedy's report as follows:

- 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.'s 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 describe 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.

Next the Court scheduled this matter for a dispositional hearing on May 1, 2002, in which the Department recommended that the parental rights of Robert H. be terminated to S. H. Argument was presented that Robert H. had sexually abused his step-daughter, A. W., and since the parties were half siblings in the same household pursuant to West Virginia Code Section 49-6-5, Robert H.'s parental rights should be terminated.

The issue of visitation was broached by Mr. H. with his biological daughter. At the time, Petitioner Mildred H., reminded the Court that criminal proceedings against Mr. H. were still pending and that all the factors regarding this matter should be taken into consideration. It is apparent that Petitioner was reluctant to the visitation. The Guardian Ad Litem at the time also noted some reservations about the visitation. Nevertheless, it appears that some visitation did occur between Mr. H. and S. H. The Court granted Mr. H. visitation with S. H. three Saturdays per month from 3 p.m. to 6 p.m., supervised and same would be set for a period of six months, at which time the parties would come back for review. Both the Petitioner and the Guardian Ad Litem objected to the Court's ruling regarding the structuring of the visitation.

The record does not indicate that during these proceedings Mr. H. participated in any parenting classes, sexual offender therapy or counseling service, which would be available if one so desired to take those classes. Thereafter on March 26, 2003 Robert H. entered a plea to six counts of Third Degree Sexual Abuse in violation of West Virginia Code 61-8(b)-9, and was sentence to ninety days incarceration on each count.

Mr. H , after serving his time, then petitioned the Circuit Court to reinstate his visitation between S. H. On August 17, 2004 a hearing was held in which one of the issues that the Court wanted to resolve is what the effects of these visits between Robert H and S. H. would have on A. W. The Court noted that would be a factor but not the essential issue in making its determination.

A. W.'s psychologist, Sherri Coleman, was called as a witness and testified as to the experiences A. W. had suffered as a result of the sexual abuse she had received from her step-father. Ms. Coleman also testified that A. W. was very concerned for her sister's safety, and that this was a topic that was discussed throughout their counseling sessions up until visitation was stopped in July, 2003. Upon Mr. H being incarcerated, A. W.'s behavior appeared to improve, and in fact she was taken completely off her medication. See August 17, 2004 hearing transcript, pages 32 - 34. Ms. Coleman's testimony further indicated that A. W.'s symptoms worsened when the visitation were to resume between Robert H and S. H. See August 17, 2004 hearing transcript, pages 35 - 36.

Ms. Coleman also testified when questioned by the Court that A. W. could be adversely affected by further visitation between Robert H and S. H. based upon A. W.'s reactions to the visits that occurred between the parties. See August 17, 2004 hearing transcript, pages 84, 85, 89 - 92.

Even though the child psychologist, Sherri Coleman expressed her concern to resume visitation between S. H. and Robert H , the Court indicated that there was a weak showing of harm to be done to A. W. The Court ordered that visitation was to resume three times per month on Sundays beginning on September 12, 2004. It is from this August 17, 2004 Order that your Guardian Ad Litem would object to the Circuit Court's ruling to the recommencement of visitation between Robert H and S. H.

### III. STANDARD OF REVIEW

Although conclusions of law reached by a Circuit Court are subject to de novo review, when an action, such as abuse and neglect cases, is tried upon 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 a child is abused and/or neglected, and those findings will not be set aside unless clearly erroneous. West Virginia Department of Health and Human Resources v. Billy Lee C., 199 W.Va. 541, 484 S.E. 2d 710 (1997); In re: Billy Joe M., 205 W. Va. 1, 521 S.E. 2d 173 (1999).

### IV. ISSUE NUMBER ONE

The Circuit Court of Mineral County erred by not considering the emotional harm that could be done to A. W.'s emotional well being.

### DISCUSSION

It is apparent that the Circuit Court disregarded the testimony of the child psychologist, Sherri Coleman, inasmuch as in its Order dated August 17, 2004 it found that the evidence presented that day demonstrated a weak showing that any emotional harm could be done to A. W.

It is also apparent that the Circuit Court disregarded Mr. H's criminal conviction of six counts of Third Degree Sexual Abuse that he plead to with regard to A. W. It appears from the record that Mr. H did not take any parenting classes, sexual offender classes, or anything that would demonstrate to the Court that he had benefited from any counseling. To the contrary, it appears that Mr. H believes what occurred between he and his step-daughter is irrelevant to his relationship with his biological daughter.

At the May 1, 2002 dispositional hearing the Department recommended that the parental rights of Robert H be terminated to S. H. The Court, after hearing all of the evidence, did in fact terminate Robert H's parental rights to S. H.

At the time, Mr. H's criminal case was still pending and was not resolved until Mr. H plead to six counts of Third Degree Sexual Abuse, in violation of West Virginia Code 61-8b-9. West Virginia Code 49-6-11 provides that the Court "may find that the person is an abusing parent as to any child who resides in the same household as the victim, and the Court shall take further steps as are required by this article." Likewise, West Virginia Code 61-8b-11a uses the same language.

A. W. and S. H. are half sisters. Throughout the proceedings these two sisters lived with one another until A. W. was placed at the Elkins Mt. School. Currently A. W. has been returned to the household and upon interviewing her, she does not believe her step-father who sexually abused her should have any contact with her half sister, S. H.

It is evident that the Court had a difficult time in believing the sexual allegations that were leveled against Robert H. inasmuch as it was noted at the April 11, 2002 hearing that the Court's first reaction when hearing of the allegations was "I can't believe Bob would do that." As already stated, Mr. H plead to six counts of sexual abuse in the third degree. The Circuit Court failed to take into consideration as recognized in In re: Billy Joe M., 206 W. Va. 1, 521 S.E. 2d 173 (1999) in which it would "unreasonably interfere with the children's permanent placement."

The relationship between these two half-sisters should be paramount to the relationship that Mr. H is attempting to foster with his biological daughter, S.H. Mr. H was the adult. He perpetrated many heinous acts on A. W. The burden should not be on A. W. to present evidence that the relationship between S. W. and her father would be harmful to her well being. On the contrary, the burden should rest with the abusing parent. Clearly, Mr. H should at the bare minimum be required to submit to counseling, sexual therapy, and any other requirement that would demonstrate some acknowledgement of wrong doing on his part.

V. ISSUE NUMBER TWO

The Circuit Court of Mineral County erred by reinstating continued visitation between Robert H. and S. H, by not requiring Robert H. to demonstrate that he is not a threat to young children, and not requiring him to be financially responsible for A. W.'s counseling.

DISCUSSION

No child should be placed in a situation such as A. W. has faced, and now is faced with the possibility that her younger sister may have future visitations with the person who sexually abused her.

These visitations that have previously been ordered by the Circuit Court will have an impact on A. W. Therefore, the cost of the counseling for A. W. to deal with the possible visitation between her half-sister and step-father should be bore by the Respondent. Clearly the well being of this young child should be protected in order that she can have a normal childhood.

The relationship these two young sister will have will be affected by the relationship S. H. has with Robert H. A. W. has indicated her concerns for her younger sister, and it is understandable that an older sister would want to protect her younger sibling.

Not to beat a dead horse, but Mr. H is a convicted sexual offender. A. W. suffered as a result of his deliberate acts upon her.

Although the Circuit Court has discretion granting Respondent's request for visitation, it should be supervised by a trained professional, limited in its length and occurrence, and that A. W. would receive any and all necessary counseling to cope with the effects she may endure.

Therefore, your Guardian Ad Litem would respectfully assert that if visitation would be reinstated that the Court would address these issues in order to protect A. W.'s well being.

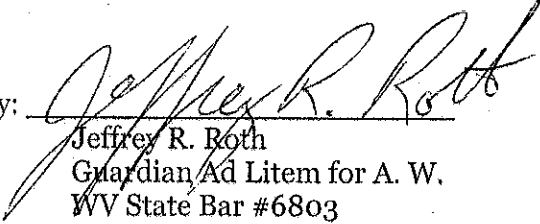
VI. CONCLUSION

Your Guardian Ad Litem would respectfully request that the Petition for Appeal be granted, that the August 17, 2004 Order of the Circuit Court as entered on September 1, 2004 be

reversed and that the request of the Respondent Robert H for visitation be hereby denied. Further, if visitation is granted, then and in that event the Court should require Mr. H to submit some evidence that he is not a threat to young children and that he be required to pay for A. W.'s counseling.

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By:

  
Jeffrey R. Roth  
Guardian Ad Litem for A. W.  
WV State Bar #6803

CERTIFICATE OF SERVICE

I, Jeffrey R. Roth, Guardian Ad Litem for A. W., do hereby certify that I have served a copy of the forgoing Petition, by first class mail, postage prepaid, this 21<sup>st</sup> day of March, 2005, upon the following:

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