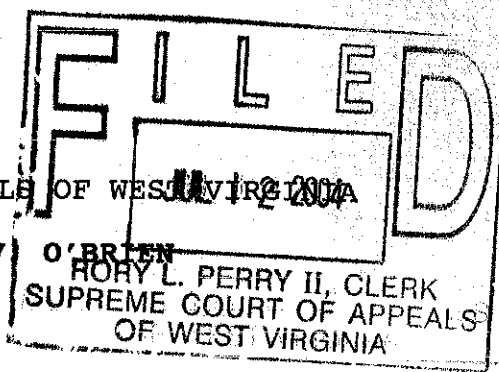


3761



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA DHHR V O'BRIEN

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES by DELORES LONGFELLOW,

Petitioner below,

VS.

CIVIL ACTION NO. 02-JA-28  
JUDGE DAVID W. NIBERT  
CIRCUIT COURT OF ROANE COUNTY

ELIZABETH A. ASHBY, Infant;  
JOANN ASHBY, and RICHARD O'BRIEN,  
Adults,

Respondents below,

\*\*\*\*\*

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES by DELORES LONGFELLOW,

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CIVIL ACTION NO. 02-JA-29  
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RICHARD L. O'BRIEN, II, Infant;  
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Adults,

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WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES by DELORES LONGFELLOW,

Petitioner below,

VS.

CIVIL ACTION NO. 02-JA-30  
JUDGE DAVID W. NIBERT  
CIRCUIT COURT OF ROANE COUNTY

KIMBERLY D. O'BRIEN, Infant;  
JOANN ASHBY, and RICHARD O'BRIEN,  
Adults,

Respondents below,

In re: the interest of minor children, Richard L. O'Brien, II and Kimberly D. O'Brien.

NO. 31761

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

BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR APPEAL FILED  
BY GUARDIAN AD LITEM FOR KIMBERLY AND RICHARD O'BRIEN, INFANTS

The issues before the court, as presented in the petition for appeal lodged by H. Beth Sears, guardian ad litem for Richard L. O'Brien, II, and Kimberly D. O'Brien and duly appointed pursuant to West Virginia Code 49-6-2(a) is as follows:

1. *Did the Circuit Court err by dismissing the abuse and neglect petition and ordering the return of the children to their natural parents, JoAnn Ashby and Richard O'Brien?*
2. *Did the Circuit Court err by failing to terminate JoAnn Ashby and Richard O'Brien's parental rights?*

FACTS OF THE CASE

This case was initiated by a report to Child Protective Services (hereinafter referred to as CPS) of allegations of sexual abuse made by a counselor. All three children were placed in foster care upon filing of the petition on 12/10/02. The initial adjudicatory hearing was set for 1/10/03. That hearing was continued for receipt of psychological examinations on the adults, which were never provided at any time. The adjudicatory hearing

commenced on 3/14/03 and continued all day. There being insufficient time to conclude the adjudicatory hearing, it was continued and again commenced on 5/15/03, but again could not be concluded due to time constraints. The adjudicatory hearing was finally completed on 5/22/03. The Court permitted counsel the option to submit written summations and tender them to the court and the court then took the case under advisement. The matter was set for a status conference on 11/26/03. At that hearing, the Court ruled from the bench and concluded that the infant children were not abused and neglected children and ordered the petition dismissed. Based upon a motion by this guardian ad litem, the Court did issue a stay on December 1, 2003, upon the grounds that the extended period of time that the children have been in foster care required a transitional period and further, the matter would be appealed. During the stay, the Judge ordered CPS to formulate a "transition plan" wherein the children would have increasing contact with their birth parents and ultimately begin to spend time with them unsupervised. A motion to reconsider the stay was set on January 14, 2004 and continued by the court for cause. Prior to a full hearing on the motion to reconsider the stay, new abuse and neglect allegations were filed, based upon additional and separate allegations made by Elizabeth Ashby. (These petitions were filed as new cases and therefor, not included in the current case file.) Following a hearing on the new allegations, the children were continued in their current foster placements and the issue of reconsidering the stay became moot.

### STANDARD OF REVIEW

In Syllabus point 1 of *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S. E. 2d 177 (1996), the Supreme Court set forth the standard of review for abuse and neglect cases:

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.

### JURISDICTION

From the date of the filing of the petition to the last order, the Department of Health and Human Resources took a strong position that there was sufficient evidence to proceed in this matter. Pursuant to W. Va. Code 58-5-1, "a party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court." In a proceeding to terminate parental rights pursuant to the W. Va. Code, a guardian ad litem who is appointed for minor children is charged with the duty of exercising due diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if in the reasonable judgment of the guardian, an appeal is necessary. *In re Scottie D.*, 185 W. Va.

191, 406 S. E. 2d 214, (1991). The guardian ad litem for the two youngest children herein, Richard O. and Kimberly O., is appealing from a final circuit court order, and thus, the Supreme Court has appellate jurisdiction in this case.

**FINDINGS OF ABUSE AND NEGLECT**

The assignments of error made by the guardian ad litem in this matter are set forth in the petition for appeal. She finds that the circuit court's findings and conclusions were contrary to the evidence in this case. In the final order, the circuit court stated:

8. *The testimony of two teenage girls was contradictory with one another that Court finds that the testimony is not worthy of belief.*

9. *The Mother of the third minor child made inquiry to the Infant Respondent Elizabeth Ashby's inquiry, and that no reasonable response and that two adult women actions of inquiry was reasonable.*

10. *The petitioner has failed by clear and convincing preponderance of evidence that the acts alleged in the petition occurred.*

The guardian ad litem firmly asserts that the court's findings that there was no evidence that these children were abused and neglected is clearly erroneous given the testimony by the stepsister Elizabeth and her cousin Melody during the adjudicatory hearing in this case.

From the testimony given in this case by the adult respondent JoAnn Ashby (mother), she became suspicious of sexual contact between the adult Richard O'Brien (her husband), Melody (a friend and cousin of Elizabeth's) and/or Elizabeth (JoAnn's daughter and Richard O'Brien's stepdaughter) beginning in the fall of 2000.

JoAnn admitted to finding condom wrappers and beer bottles in a tent where Richard O'Brien, Melody and Elizabeth had spent time together in November of 2000. JoAnn went so far as to question Melody and Elizabeth and discuss the matter with the mother's own sister and Melody's mother, Cinday Bradburry. Cinday also testified at the adjudicatory hearing. Cinday stated that she spoke to Richard alone and he denied doing anything but playing monopoly. Why she did not follow up on these allegations is unclear.

Later, after reading a sexually explicit letter which clearly indicated that improper sexual contact was occurring or about to occur between Richard and Elizabeth, JoAnn Ashby still did not confront Richard. JoAnn took the letter to a counselor, Janice Blake, for advice. The letter was provided to JoAnn by Richard for delivery to Elizabeth, according to Ms. Blake, who was one of the few truly independent witnesses in this case. When advised by Ms. Blake that she needed to report the alleged abuse to CPS, JoAnn stated that she did not have time to do so. Ms. Blake promptly reported the incident to CPS, as mandated by law. JoAnn later went back to Ms. Blake and tried to retract all that she had disclosed. At the adjudicatory hearing, however, JoAnn testified that she never saw the letter prior to the implementation of the protection plan. This testimony by JoAnn was not believable under the circumstance.

JoAnn did obtain a Domestic Violence Protective Order (DVPO) upon the recommendation of the CPS, but then she (JoAnn) made a

formal motion to dismiss it within 3 days. The computer, which could have been seized by the police and used to clarify the issues surrounding who drafted the letters in question, was sold by JoAnn and Richard within the same time frame. JoAnn's motion to drop the DVPO resulted in the removal of the children from her home, and Richard then appeared to be back in her life. They continue to live together to this date and are supportive of one another's actions.

Throughout the course of the hearing, Richard denied any improper contact and JoAnn engaged on a course of trying to appear supportive of her children, while still maintaining her relationship with Richard. She did admit that she was "concerned" that the letter might be true, when she first read it. She said that she found a letter from Elizabeth to Rachel, which implied that Elizabeth "set up" Richard. It was later taken to CPS. Interestingly, Richard O'Brien misspelled many of the same words in both letters and on the witness stand. He certainly appears to be the author of both letters to the guardian ad litem, however the court did not seem to take note of this fact.

JoAnn testified that she did not believe Elizabeth's accusations against Richard. She further testified that she did not know if Elizabeth was telling the truth or not. She also testified that she would "throw him [Richard] out" if he did the things alleged in the letter. She testified that she had not made a choice between Richard and her children and that she was trying to keep her family together.

Following the final adjudicatory hearing, it clearly appeared to all counsel involved (other than counsel for the adult respondents, Teresa Monk and Dennis Curry) that Richard O'Brien was a sexual predator. Due to JoAnn's position, her own daughter (Elizabeth) refuses to visit with her. Richard's testimony was not believable. Your guardian ad litem believes that Melody was molested by Richard and that both she and Elizabeth attempted to cover it up due to embarrassment, behavior typical of victims. The extent of what Richard did in the tent may never be known, since the victims appear to reluctant and/or fearful to revisit the incident. Melody Bradburry was so afraid of Richard that she was granted permission to testify outside his presence in the Courtroom of the Family Judge and the testimony was then videotaped. Following the adjudicatory hearing, the guardian recommended termination of the parental rights of both parents, as did the following counsel: Anita H. Ashley, guardian ad litem for the infant respondent Elizabeth Ashby; Drew Patton, counsel for the adult respondent Dallas Ashby (Elizabeth's father); Mark Sergent, prosecuting attorney and counsel for the DHHR; and the Department of Health and Human Resources. To continue in the care of either of these parents would be contrary to the welfare and best interests of the children.

The two younger half-siblings of Elizabeth, who are the natural children of JoAnn Ashby and Richard O'Brien, are Richard O'Brien, II, and Kimberly. These are the children represented by the guardian ad litem, H. Beth Sears, in this case. Although there

was no evidence that Richard, II and Kimberly were physically or sexually abused, they must be considered abused children because they resided in the home where the abuse of Elizabeth occurred. *W. Va. Code 49-1-3(a)* and *In re Christina L.*, 194 W. Va. 446, 460 S. E. 2d 692 (1995).

It is the belief of the guardian ad litem at the close of the evidence, there was clear, cogent and convincing evidence that the children whom she represented were clearly at risk of imminent danger if returned to the custody of their parents, JoAnn Ashby and Richard O'Brien. The Court did not rule at the conclusion of the evidence (May 15, 2003), but gave all counsel present the opportunity to submit written summations to the court on or by June 5, 2003. After that time, the matter could be brought back on by notice. The court issued an order on November 26, 2003. On December 1, 2003, the guardian ad litem was issued a stay by the Circuit Court to permit Richard, II and Kimberly to remain in their foster care placement pending appeal.

#### **TERMINATION OF PARENTAL RIGHTS**

The guardian ad litem herein further contends that the circuit court erred by not terminating the parental rights of JoAnn Ashby and Richard L. O'Brien. The guardian acknowledges that there were no allegations that her clients were directly abused or injured. However, the evidentiary record establishes a classic case of failure to protect by a parent. In other words, Richard O'Brien's abuse coupled with JoAnn Ashby's refusal to acknowledge that Elizabeth was physically and sexually abused puts both of her young

clients at risk for further abuse, and thus, warrants the termination of JoAnn and Richard O'Brien's parental rights. This case closely parallels the recent Supreme Court decision *In re: Tyler D., Alexander A. and Nevaeh D.* No. 30908 (2003).

*In re: DHHR v. Doris S.*, 197 W. Va. 498, 475 S. E. 2d 874 (1996) explained that:

In order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.

Given JoAnn Ashby's persistent position that Elizabeth and Melody were not sexually abused by Richard, there is no reasonable likelihood that the conditions of abuse and neglect can be corrected. In the 1989 case *In the Matter of Jonathan P.*, 182 W. Va. 302, 387 S.E. 2d 537, the Supreme Court held that:


Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code 149-6-5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code that conditions of neglect or abuse can be substantially corrected.

#### CONCLUSION

Although parents have substantial rights that must be protected, the primary goal in cases of abuse and neglect, as in all matters of family law, must remain the health and welfare of the children. At the conclusion of the evidence, the trial judge

was faced with a difficult set of facts, complicated by the involvement of six attorneys who strongly argued for their respective clients. Nevertheless, the order of the circuit court should be reversed and the Supreme Court should enter an order terminating the parental rights of JoAnn Ashby and Richard O'Brien to all of their children and no further visitation or contact should be ordered between the O'Briens and the children. It would be appropriate to permit or fashion contact between the O'Brien children and their half-sister, Elizabeth Ashby, who is in a separate home.

Respectfully submitted:

  
H. Beth Sears, guardian ad litem  
State Bar ID #4714  
Counsel for the Respondent

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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that on the 9th day

of July, 2004, she served the attached Brief upon the other counsel  
by facsimile transfer as follows:

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