

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.

③ 32126

CIVIL ACTION NO. 04-JA-11  
JUDGE DAVID W. NIBERT  
CIRCUIT COURT OF ROANE COUNTY

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

Respondents below,

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

Petitioner below,

VS.

CIVIL ACTION NO. 04-JA-12  
JUDGE DAVID W. NIBERT  
CIRCUIT COURT OF ROANE COUNTY

RICHARD L. O'BRIEN, II, Infant;  
JOANN ASHBY, and RICHARD O'BRIEN,  
Adults,

Respondents below,

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

Petitioner below,

VS.

CIVIL ACTION NO. 04-JA-13  
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.

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FROM THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA

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BRIEF IN SUPPORT OF PETITION FOR APPEAL

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December 10, 2004

H. Beth Sears  
State Bar ID No. 4714  
*Guardian ad litem for the  
minor children, Richard L.  
O'Brien, II, and Kimberly  
O'Brien*  
P. O. Box 305  
Ravenswood, WV 26164

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

BRIEF IN SUPPORT OF PETITION FOR APPEAL

FACTS OF THE CASE

These children were alleged victims in a prior Roane County case, which is also before the court. All three of the children in this matter were placed in foster care following a preliminary hearing in 2002. On November 26, 2003, 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 Circuit Court did issue a stay on December 1, 2003, pending the filing of an appeal in that case. As a result of the stay, all three children remain in foster care to date.

While the appeal was pending in Roane County Circuit Court in 02-JA-28, 02-JA-29 and 02-JA-30, new allegations came to light. The eldest child, Elizabeth Ashby, by virtue of being out of the home and in counseling, recalled with specificity additional incidents of sexual abuse at the hands of her stepfather, the adult respondent Richard O'Brien. (The new allegations were obviously prior to the time the children were removed from the home the first time, since they have been in foster care ever since, and Elizabeth has had no contact with her stepfather.) New abuse and neglect proceedings were filed and identified on the docket as Civil Action No. 04-JA-11, 04-JA-12 and 04-JA-13.

Following a preliminary hearing on April 12, 2004, Judge David Nibert had the following motions pending before him: a motion to dismiss the petition, filed on behalf of the adult respondents, based on *res judicata* and *collateral estoppel* due to the prior petition; a motion to suppress any testimony from a third party of the victim's testimony under the holding of State v. Shrewsbury; motion to continue preliminary hearing to provide a fully signed original of report by Cheri Cowder, psychologist; and motion for forensic maltreatment evaluation, filed by the guardian ad litem for the minor children. The matter was continued to May 10, 2004, at 1:00 p.m., for further hearing. That hearing did not occur, due to the court continuing it.

On July 23, 2004, Judge Nibert issued a final order in this matter, which found NO PROBABLE CAUSE [emphasis appears in final order] and dismissed the case from the docket. The court found that "the testimony of Elizabeth Ashby was not credible and the standard of proof was not met. Specifically, Elizabeth Ashby testified that she did not relate the allegations set forth in this proceeding in the former proceeding and she merely forgot the event occurred. "It is not credible that the witness forgot..." (see page 1 of order).

The Circuit Judge dismissed this matter following a preliminary hearing, which commenced in this matter on April 12, 2004. The purpose of a preliminary hearing in an abuse and neglect case is to ascertain whether or not there exists imminent danger to

a child, when the children are removed pursuant to court order. In the case at bar, these children were already in the custody of the State Department of Health and Human Resources / Child Protective Services at the time the second petition was filed. This was pursuant to actions taken in the prior abuse and neglect case. A preliminary hearing was not required in this matter, since the children were in no danger and the matter should have been scheduled for a full dispositional hearing, rather than a preliminary hearing. It is the belief of the guardian ad litem herein that a preliminary abuse and neglect hearing is not a probable cause hearing, and that the court erred in finding "no probable cause" and dismissing the petition out of hand, prior to holding a full dispositional hearing in the matter, pursuant to 49-6-2 of the West Virginia Code. This action was not tried on the facts as required by law and, in fact, the preliminary hearing itself was never completed. The Circuit Judge ruled and dismissed the matter prior to the completion of the preliminary hearing.

In the opinion of the guardian, the DHHR was wrongly denied a full and fair hearing in the circuit court, thereby making the dismissal order improper. In support of this argument, the guardian relies on *In the matter of George Glen, B., Jr.*, 205 W.Va. 435, 444 (1999). The court must allow both sides a meaningful opportunity to introduce substantive evidence in support of their respective positions, before a circuit court makes its final dispositional decision, and the guiding force behind such decision must be what was in the best interests of the children. This

theory was reiterated in the Supreme Court's recent decision, *In Re: Gordon G., III, and Nicholas G.*, No. 31609. As in that case, the circuit court here was premature in dismissing the petition. This court found in the *Gordon G., III and Nicholas G.* case, *supra*, that the court erred in believing that it ONLY had the authority to grant or deny the petition against the parents. There are many accommodations in West Virginia Code 49-6-12(a) for intermediate steps that can be taken, short of completely dismissing and abuse and neglect petition.

Additionally, at the time that the preliminary hearing commenced, the guardian ad litem had filed a "motion for forensic maltreatment evaluation." The purpose of the motion was to authorize the children to be evaluated and for the evaluation to be paid for by the State. The motion was necessary due to the fact that the birth parents were not cooperative and the funds to pay for the type of evaluation which the guardian and the professionals decided was required. However, this motion was not addressed by the court at any time. By ruling on the matter prior to the completion of a preliminary hearing, the guardian ad litem was not permitted the opportunity to address the need for the evaluation or to argue her position for the children, other than what was contained in her written motion. According to *In re Christina L.*, 194 W. Va. 446, 440 S.E. 2d 692 (1995), "Error of substantial proportion was committed when the guardian ad litem was not provided the opportunity to orally articulate his client's best interests." It was clearly erroneous for the court to dismiss,

without the opportunity to be heard, the guardian's written motion for forensic maltreatment evaluation. Her clients were too young to articulate what had or had not happened to them at home, at the time of the initial removal and placement into foster care. Due to their behaviors since that time, it was apparent to the guardian that they should be evaluated by a professional. The birth parents vehemently objected to this and the court declined to rule on the motion.

The fact that a child victim of sexual abuse was fearful or forgetful would not preclude the filing of this matter, nor would it make her testimony lack credibility. The court did not find that the matters were the same as in the prior case. The court merely found it unbelievable that the child would have forgotten what happened to her. The incidents were different than those contained in the first petition and should have been treated as separate incidents. The only relationship between the two cases appears to be copies of letters, purportedly written by the child and/or her stepfather, which were also introduced in the first case. The letters were included in the State's disclosure in the second case. This appears to have been an error on the prosecutor's part, since NO testimony went to those letters. If this had been a criminal proceeding, each incident would have been treated as a separate criminal act and would have been punishable separately.

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 O'Brien. 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 sexual 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 was the belief of the guardian ad litem at the close of the preliminary hearing in April, that there was not imminent danger to the children, due to the fact that they were already in the custody of the DHHR and had only supervised contact with their birth parents. The guardian believed that the court would merely schedule the matter for a full evidentiary hearing on the new allegations of sexual abuse and move forward. Counsel should have had the opportunity to review the report of Cheri Cowder (original not submitted) and prepare for a full dispositional hearing. At that time, the court would have been in a position to properly rule on what was in the best interest of the children. It appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving abused and neglected children was substantially disregarded or frustrated in both this case and the companion case currently pending before the court. It is in the best interest of the children that this particular case be remanded for a dispositional hearing. Also, the motion for forensic evaluation should be heard and properly ruled upon in the

court below. If it appears that the circuit judge cannot preside in this matter without prejudice, then it should be transferred to the other judge in the Fifth Judicial Circuit for full hearing. In the event the court terminates the parental rights of JoAnn Ashby and Richard O'Brien in connection with the companion case, as the guardian ad litem has urged, then this case would be moot.

H. Beth Sears

Respectfully submitted:



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IN THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA

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

Petitioner,

v.

Juvenile Case No. 02-JA-28

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

Respondents.

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

Petitioner,

v.

Juvenile Case No. 02-JA-29

RICHARD L. O'BRIEN, II, Infant;  
JOANN ASHBY, and DALLAS  
ASHBY, and RICHARD O'BRIEN,

Respondents.

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

Petitioner,

v.

Juvenile Case No. 02-JA-30

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

Respondents.

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that on the 10th day

of December, 2004, she served the attached Brief upon the other  
counsel by United States Mail, postage prepaid, as follows:

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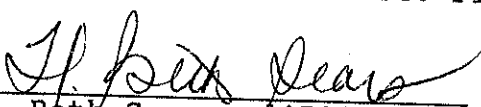
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