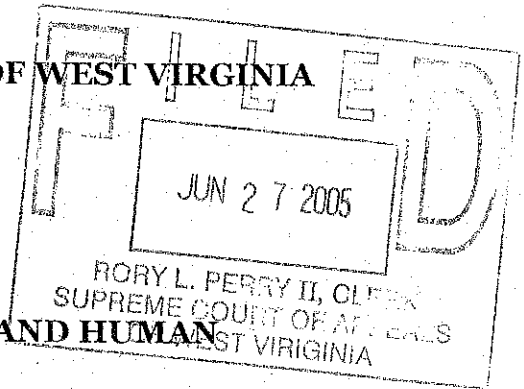


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

32697
No. 050448



IN RE THE CHILDREN OF KIMBERLY SMITH

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN
RESOURCES,
BUREAU FOR CHILD SUPPORT ENFORCEMENT,**

PETITIONER,

AND

**From the Circuit Court of Cabell County
Civil Action Number 04-D-0180**

KIMBERLY SMITH,

RESPONDENT.

**BRIEF OF THE BUREAU FOR CHILD SUPPORT ENFORCEMENT
REGARDING THE CERTIFIED QUESTION**

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STATEMENT OF FACTS AND PROCEEDINGS BELOW

In the present case, the child was removed from the custody of Kimberly Smith and placed in the custody of the State of West Virginia pursuant to Chapter 49 of the West Virginia Code in Civil Action Number 03-JA-065, 066, 067, and 068. A child support obligation was not established by the Circuit Court in the Chapter 49 proceeding.

Because there was no pre-existing child support obligation and none established by the Circuit Court, the BCSE filed a child support action in the Family Court to establish current and reimbursement child support obligations to be paid by Kimberly Smith.

By Order entered June 11, 2004, the Family Court dismissed the action holding that the Family Court lacks jurisdiction to establish child support and that jurisdiction lies wholly with the Circuit Court which removed the child from the custody of the parent, Kimberly Smith. The BCSE appealed the ruling of the Family Court and requested that certified questions be presented to this Court.

On October 26, 2004, the BCSE's Petition for Appeal was transferred to this Court pursuant to W. Va. Code § 51-2A-14(e) (2004). Thereafter, by Order of November 10, 2004, this Court remanded the matter to the Circuit Court to enter an order consistent with *SER Silver v. Wilkes*, 584 S.E.2d 548 (W. Va. 2003).

Thereafter, the Circuit Court entered an order granting the appeal of the BCSE and remanding the case to the Family Court to establish current and reimbursement support. The Circuit Court then certified the questions to this Court. On remand, the Family Court again ruled that it lacked jurisdiction to

establish support in the present action by Order of January 11, 2005.

The BCSE has previously appealed similar rulings of the Cabell County Family Court regarding jurisdiction in eleven other cases. In each of the eight appeals assigned to Circuit Court Judge Alfred E. Ferguson, the order of dismissal by the Family Court was affirmed. But the three appeals assigned to Circuit Court Judge Dan O'Hanlon were remanded to the Family Court for entry of a support order.

Although Circuit Court Judge Ferguson routinely remands to the Family Court for establishment of a support order, the Family Court continues to advocate that the jurisdiction lies in the Circuit Court and refuses to enter an order. The end result is the same – there is no support obligation established. While this may be the extreme, this is not atypical of the court decisions statewide; there is no consistent means to obtain a support order in the foster care cases.

CERTIFIED QUESTIONS PRESENTED

Question 1: Does the Family Court have jurisdiction to establish child support if the same child is also the subject of a pending proceeding or order under Chapter 49 of the West Virginia Code, when no order of the Circuit Court addresses child support?

Answer of the Circuit Court: Yes

Question 2: May the Circuit Court transfer jurisdiction to the Family Court to calculate child support in a proceeding under Chapter 49 of the West Virginia Code by administrative order en masse?

Answer of the Circuit Court: No

Question 3: May the Circuit Court transfer jurisdiction to the Family Court to calculate child support in a proceeding under Chapter 49 of the West Virginia Code by administrative order on a case by case basis?

Answer of the Circuit Court: No

POINTS AND AUTHORITIES

W. Va. Const. Art. VIII, § 16 (2004)

West Virginia Code § 9-3-4 (2005)

West Virginia Code § 48-11-101 (2005)

West Virginia Code § 48-13-101 (2005)

West Virginia Code § 49-5-13 (2005)

West Virginia Code § 49-6-5 (2005)

West Virginia Code § 49-7-5 (2005)

West Virginia Code § 49-7-6 (2005)

West Virginia Code § 51-2A-2 (2005)

West Virginia Rules of Practice and Procedure for Family Court Rule 47

In re Stephen Tyler R., 584 S.E.2d 581 (W. Va. 2003)

Lindsie D.L. v Richard W.S., 591 S.E.2d 308 (W. Va. 2003)

State ex rel Silver v. Wilkes, 584 S.E.2d 548 (W. Va. 2003)

ARGUMENT

Many Family Courts and Circuit Courts of West Virginia have wrestled with the question of jurisdiction in cases regarding the establishment of support in the context of a foster care case. Some of the relevant statutes allow for differing interpretations on which court should exercise jurisdiction to establish support in such cases.

The instant case is just one example of many cases around the State that have been shuffled between the Family Court and Circuit Court, thwarting the attempts of the BCSE to establish Federally-mandated child support obligations. While the BCSE does not take a position or preference, the BCSE does indeed seek a final resolution from this Court. The BCSE also seeks direction on the related issues of modification and enforcement of the foster care support obligations.

The Order of this Court entered on November 10, 2004, remanded the instant case to the Circuit Court to make a ruling on the BCSE's appeal based upon *State ex rel Silver v. Wilkes*, 584 S.E.2d 548 (W. Va. 2003). In *Silver*, the Court was asked to determine whether the Circuit Courts have authority to issue writs of prohibition and writs of mandamus against Family Court judges. The case involved the Berkeley County Circuit Court's refusal to address a writ of prohibition filed against the Family Court, stating that the Family Court was not an inferior court to the Circuit Court. The Circuit Court determined that it lacked jurisdiction and that this Court was the proper forum.

In its decision, this Court decided that the Family Courts are courts of limited jurisdiction and are inferior to the Circuit Courts. 584 S.E.2d at 552.

The Court stated, "Where circuit courts have concurrent original jurisdiction with the West Virginia Supreme Court of Appeals over matters arising in family court, the preferred court of first resort is the circuit court. Only after a party seeks and fails to receive relief from a family court order in circuit court may that party then petition this Court for relief." 584 S.E.2d at 552.

Thus, the Court deferred the matter at hand to the Cabell County Circuit Court. This Court did not give guidance to the Circuit Court as to the resolution of the matter.

In its Order of November 30, 2004, the Circuit Court cited West Virginia Code § 51-2A-2 (a) (10) to grant jurisdiction to the Family Court to establish the obligation in this foster care case. The cited law states that the Family Court has jurisdiction to "enforce an order of spousal or child support". W. Va. Code § 51-2A-2 (a) (10) (2005).

West Virginia Constitution Article VIII, section 16, grants Family Courts "original jurisdiction in the areas of family law and related matters as may hereafter be established by law. Family courts may also have such further jurisdiction as established by law." West Virginia Code § 51-2A-2 (d) further specifies that, "A family court is a court of limited jurisdiction. A family court is a court of record only for the purpose of exercising jurisdiction in the matters for which the jurisdiction of the family court is specifically authorized in this section and in chapter forty-eight [§ § 48-1-101 et seq.] of this code. A family court may not exercise the powers given courts of record in section one [§ 51-5-1], article five, chapter fifty-one of this code or exercise any other powers provided for courts of record in this code unless specifically authorized by the Legislature. A

family court judge is not a "judge of any court of record" or a "judge of a court of record" as the terms are defined and used in article nine [§ § 51-9-1 et seq.] of this chapter."

All subsections of West Virginia Code § 51-2A-2 relate to the jurisdiction of the Family Court. Subsection (a) (2) clearly states that the Family Court "shall exercise jurisdiction over... (2) All actions to obtain orders of child support brought under the provisions of articles eleven [§§ 48-11-101 et seq.], twelve [§§ 48-12-101 et seq.] and fourteen [§§ 48-14-101 et seq.], chapter forty-eight of this code...." But no subsection explicitly mentions the establishment of support in the context of the provisions of chapter forty-nine.

Subsection (c) mandates the stay of proceedings to address allocation of custodial and decision-making responsibility in divorce, annulment, or separate maintenance actions upon the filing of an abuse or neglect petition regarding the same children. W. Va. Code § 51-2A-2 (c) (2005). It does not, however, address the stay of an action for establishment of support or paternity when an abuse or neglect petition is filed. For this reason, some Family Courts interpret this section to continue the jurisdiction of the Family Court in the establishment of support or paternity, only causing a stay of proceedings on the allocation of custodial and decision-making responsibility. West Virginia Practice and Procedure Rule 47 (c) (2005) essentially mirrors § 51-2A-2 (c) (2005), but also states that "[t]he family court shall retain full jurisdiction of proceedings until an abuse and neglect petition is filed."

In *Lindsie D.L. v. Richard W.S.*, 591 S.E.2d 308, 314 (W. Va. 2003), the Court held that "the jurisdiction of family courts is limited to only those matters

specifically authorized by the Legislature, while circuit courts have original and general jurisdiction and other powers as set forth in Article VIII, § 6 of the Constitution of West Virginia.” The Court further determined that Circuit Courts have concurrent jurisdiction over the domestic and family law proceedings in all respects with the Family Court. Clearly addressing disputes of jurisdiction between the courts, the *Lindsie* Court held that “[a]ny ambiguity...should be resolved in favor of recognizing jurisdiction in the circuit courts.” *Id.* Other than Rule 47 (c) and § 51-2A-2 (c) (2005), the relevant statutes indicate jurisdiction lies with the Circuit Court for the establishment of support when an abuse and neglect action requires foster care of a child.

There is no dispute that child support is a legal duty owed by a parent to his child. W. Va. Code § 48-11-101 (a) (2005). To satisfy that legal duty, a proper support obligation should be established according to the support guidelines. W. Va. Code § 48-11-101 (b) (2005); W. Va. Code § 48-13-101 (2005). A parent is also required to pay support or reimbursement when payment of Federal or State money is expended for their child in foster care expenses. W. Va. Code § 9-3-4 (2005). Accordingly, the support guidelines are applied to foster care cases as well. W. Va. Code § 48-13-701 (2005).

The Court upheld the responsibility of a parent to continue supporting a child even after the termination of parental rights in an abuse and neglect proceeding. *In re Stephen Tyler R.*, 584 S.E.2d 581 (W. Va. 2003). Finding that this was a continuing obligation, the Court ruled that the duty of support does not

cease when parental rights are terminated.¹

The *Stephen Tyler R.* Court relied on § 49-6-5 (a) (5) which mandates that the lower court shall impose an appropriate order of financial support upon the parents when custody of the child is transferred to the West Virginia Department of Health and Human Resources. 584 S.E.2d at 598. Further, the Court cited West Virginia Code § 49-7-5 (2005) which states “[i]f it appears upon the hearing of a petition under this chapter that a person legally liable for the support of the child is able to contribute to the support of such child, the court or judge **shall** order the person to pay the state department, institution, organization or private person to whom the child was committed, a reasonable sum from time to time for the support, maintenance, and education of the child.” (*emphasis added*) By its ruling, the Court has shown that a child support obligation as established by the Circuit Court in *Stephen Tyler R.* is proper and conforms to the statute.

The law further addresses the enforcement and possible “alteration” of the support obligation. W. Va. Code § 49-7-5 (2005); *see also* W. Va. Code § 49-7-6 (2005) (enforcement of support order). These statutes present the issue of whether the Family Court would have jurisdiction to modify a support obligation established by the Circuit Court in the context of an abuse or neglect proceeding. West Virginia Code § 51-2A-2 (a) (9) specifically states that the Family Court shall exercise jurisdiction over “[a]ll motions for modification of an order providing for... child support.”

The Court in *Stephen Tyler R.* referred to the possibility of modification of

¹The facts of *Stephen Tyler R.* indicate that Mr. R. was not listed on the birth certificate of the child prior to the abuse and neglect proceeding. A child support obligation would not have been established without a paternity determination. Thus, it does not appear that a child support obligation was established until following the termination of Mr. R.’s parental rights.

the disposition of the case. In that discussion, it stated that “a circuit court may, in the course of modifying a previously-entered dispositional order in an abuse and neglect case in accordance with W. Va. Code 49-6-6 (1977) (Repl. Vol. 2001), amend a parent’s continuing child support obligation or the amount thereof.” 584 S.E.2d at 599. In the corresponding footnote, the Court added that, “[p]ermitting a court to modify child support awards in abuse and neglect cases is consistent with the statutory law permitting such modification in other domestic matters.” 584 S.E.2d at 599, fn. 23. The Court also mentions the limitation “upon the circuit court’s ability to modify orders of support...” in another footnote. 584 S.E.2d at 600, fn. 24. Thus, it seems that the Circuit Court would have the jurisdiction of modifying its orders of support. But, it has not been clearly determined whether the Family Court can modify a support order issued by the Circuit Court.

Occasionally, the Circuit Court may enter an order of support in an abuse or neglect proceeding subsequent to an ongoing order of support established by the Family Court. It is also unclear which court would resolve such a conflict between support orders issued by the Family Court in a domestic action and those issued subsequently by the Circuit Court in an abuse or neglect proceeding.

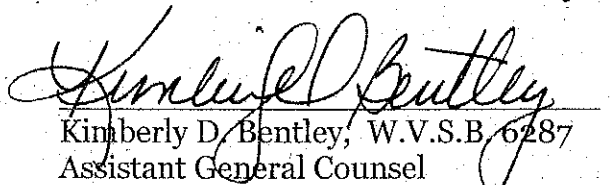
The BCSE has an established procedure to be followed when there is an existing support obligation which preceded the foster care placement order that didn’t address support. In those situations, the existing support obligation is assigned to the State of West Virginia during the period of foster care. W. Va. Code § 9-3-4 (2005); W. Va. Code § 48-18-114 (2005).

CONCLUSION

The BCSE is experiencing difficulty establishing the Federally-mandated child support obligation in Chapter 49 cases due the split of decision regarding jurisdiction which is typical across the State.

The BCSE is not a party to abuse and neglect proceedings. Furthermore, the BCSE is not requesting to become a party to abuse and neglect proceedings. But the BCSE does want to provide its Federally-mandated services in the best manner possible. Without resolution of the foster care questions, the BCSE is impeded from advising its client, State of WV, and assisting its customers.

**Bureau for Child Support Enforcement,
By Counsel**

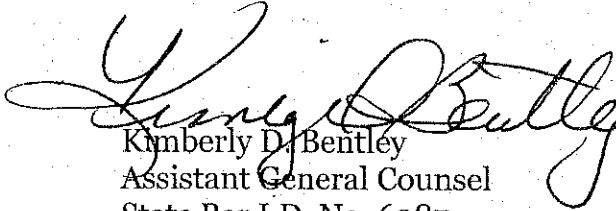

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CERTIFICATE OF SERVICE

I, Kimberly D. Bentley, Assistant General Counsel, for the State of West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement, do hereby certify that a true copy of the hereto BRIEF OF THE BUREAU FOR CHILD SUPPORT ENFORCEMENT REGARDING THE CERTIFIED QUESTION was duly serviced upon the parties by delivering a true and correct copy of the same to them by REGULAR FIRST CLASS MAIL, postage prepaid, on this 22ND day of June 2005, to the following addresses:

TO:

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