

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**C.V.,
Respondent Below, Petitioner**

vs) **No. 11-1250** (Mingo County 11-CIGR-3)

**B.V. and W.V.
Petitioners Below, Respondents**

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner C.V.'s¹ appeal, filed by counsel Mark Hobbs, arises from the Circuit Court of Mingo County, wherein the circuit court awarded guardianship of C.V.'s children, J.V. and D.V., to respondents by order entered on July 28, 2011. Respondents B.V. and W.V., by counsel C. Christopher Younger, filed a response in support of the circuit court's order.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner is the mother of J.V. and D.V. J.V.'s father, R.V., and petitioner married in 2006. In April of 2010, R.V. filed a domestic violence petition against petitioner and the family court awarded custody of J.V. and D.V. to R.V. and granted supervised parenting to C.V. Throughout the duration of 2010, R.V.'s health deteriorated and he executed a consent to guardianship, naming respondents B.V. and W.V. as guardians of the infant children in the event that he would be unable to care for them. B.V. is the adult half-sibling to the infant children and W.V. is B.V.'s wife.

In February of 2011, respondents filed a petition for guardianship in circuit court that addressed petitioner's failure to use her parenting time awarded in April of 2010, her indiscretions and criminal record, and her inability to provide a stable environment and properly care for her children. Respondents further discussed that their assistance in caring for the children since April of 2010 included having custody of the children for nearly every weekend since April of 2010 and for the last six full weeks before they filed the petition. The family court awarded guardianship to respondents and petitioner filed a motion for reconsideration. Upon receiving the motion for reconsideration, the family court transferred the case over to the circuit

¹ Because this matter concerns infant children, we follow our traditional practice in cases involving sensitive facts and use only the parties' initials. *See State v. Edward Charles L.*, 183 W.Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

court for a full evidentiary hearing. Subsequently, the circuit court entered its final order that maintained the children's physical and legal custody with respondents. Petitioner appeals.

We use the following standard of review:

“[t]he exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal.” Syl. pt. 2, *Funkhouser v. Funkhouser*, 158 W.Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989).

In re Abbigail Faye B., 222 W.Va. 466, 472, 665 S.E.2d 300, 306 (2008). Further, “to the extent that the circuit court's decision involved the interpretation and application of the guardianship statute, W. Va.Code § 44–10–3, to the facts of this case, our review is plenary.” *Id.* ““Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).” *Id.* (internal citations omitted).

Petitioner argues that the circuit court abused its discretion when it failed to take into consideration the holding and rationale of *Dancy v. Dancy*, 191 W.Va. 682, 447 S.E.2d 883 (1994). In particular, petitioner argues that she has made great strides in correcting the deficiencies which led to losing her children. Respondents contend that petitioner fails to cite the basis upon which a circuit court hears and determines infant guardianship petition cases transferred from family court. *Dancy*, a per curiam decision, cited Syllabus Point 5 of *David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989), which states:

To be considered fit, the primary caretaker parent must: (1) feed and clothe the child appropriately; (2) adequately supervise the child and protect him or her from harm; (3) provide habitable housing; (4) avoid extreme discipline, child abuse, and other similar vices; and (5) refrain from immoral behavior under circumstances that would affect the child. In this last regard, restrained normal sexual behavior does not make a parent unfit.

Respondents reference to the circuit court's findings of fact and conclusions of law finding petitioner as unfit to care for the infant children.

Petitioner also argues that the respondents lacked standing to institute any petition involving custodial rights under West Virginia Code § 48-9-103. She argues that their attempt to circumvent the Code by filing a petition for guardianship under West Virginia Code § 44-10-3 fails because said Chapter 44, Article 10 was created primarily to manage estates and trusts for minors. In response, respondents contend that they correctly filed under the provisions of West Virginia Code § 44-10-3, citing footnote 11 of *In re Abbigail Faye B.*, which discusses the interchangeability of custodial and guardianship terminology in making custodial determinations.

Respondents further point out that the circuit court's order allows for petitioner to move for modification if she completes classes on parenting, anger management, and substance abuse.

Our review of the record reflects no error or abuse of discretion by the circuit court. Having reviewed the circuit court's thirty-two-page "Final Order Granting Petition for Guardianship" entered on July 28, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.²

For the foregoing reasons, we affirm the circuit court's order.

Affirmed.

ISSUED: November 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

² Consistent with our explanation in the first footnote of this memorandum decision, names in the circuit court order have been redacted to leave only their initials.

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

IN RE:

GUARDIANSHIP OF:

J [REDACTED] V [REDACTED] and
D [REDACTED] V [REDACTED]

B [REDACTED] V [REDACTED] and W [REDACTED]
V [REDACTED]

Civil Action No.: 11-CIGR-3
Honorable Michael Thornsbury

Petitioners.

FINAL ORDER GRANTING PETITION FOR GUARDIANSHIP

This matter is currently before the Court via a Transfer Order from the Family Court of Mingo County, West Virginia, ("Family Court"). The Family Court transferred the case after Respondent, C [REDACTED] V [REDACTED] filed a Motion For Reconsideration of the Family Court's Final Order of Guardianship. A hearing was held on the matter on the 13th day of July 2011 at which the parties appeared as follows: the Petitioners, B [REDACTED] V [REDACTED] and W [REDACTED] V [REDACTED] in person and through counsel, Christopher Younger; and Respondent, C [REDACTED] V [REDACTED] in person and through counsel, Mark Hobbs; and the children through their Guardian ad Litem, ("GAL"), Diana Carter Wiedel. After thorough consideration of the Motion For Reconsideration, the oral arguments relating thereto, the applicable legal authorities, and all evidence of record the Court FINDS that the Petition For Guardianship should be GRANTED. Thus, the Petition is GRANTED based on the following Findings Of Fact And Conclusions Of Law, to wit:

Findings Of Fact

- C
1. C [REDACTED] V [REDACTED] is the mother of the subject children.

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2. The father of the subject children was R [REDACTED] V [REDACTED] who died in February 2011.

J
3. The children are J [REDACTED] V [REDACTED] and D [REDACTED] V [REDACTED]

4. The subject children were both born during the course of the marriage between R [REDACTED] V [REDACTED] and C [REDACTED] V [REDACTED]

5. This case originated in the Family Court in February 2011, when the Petitioners filed a Petition For Guardianship. Petitioner, B [REDACTED] V [REDACTED], is the half-brother of the subject children and Petitioner, W [REDACTED] V [REDACTED], is his wife.

6. The Family Court had previously placed custody of the subject children with the R [REDACTED] V [REDACTED], the subject children's biological father, after he filed a Domestic Violence Petition against the Respondent mother C [REDACTED] V [REDACTED] on or about April 10, 2010. At the time of the filing of the Domestic Violence Petition, the Family Court awarded custody to R [REDACTED] V [REDACTED] and granted the Respondent supervised parenting time two times per week for one (1) hour at a time.

7. The Petition For Guardianship alleged that the Respondent failed to utilize the parenting time, at one point not participating in visitation for four (4) consecutive months. Additionally, the Petition For Guardianship noted that the Petitioners had been instrumental in caring for the children since April 2010. Further, the Petition For Guardianship asserted that the Respondent had been arrested for driving under the influence, carrying a concealed weapon, contributing to the delinquency of a minor, and operating a vehicle with no insurance. The Petition For Guardianship also stated that the Respondent's passenger in the aforementioned incident was charged with possession with intent to deliver a

controlled substance and three (3) counts of obstructing an officer. Finally, the Petitioners submitted an executed Consent To Guardianship from R [REDACTED] V [REDACTED] consenting to the Petitioners being named as Guardians of the subject children in the event of his disability or inability to care for the children.

8. A hearing was held in Family Court on February 10, 2011. R [REDACTED] V [REDACTED] died on February 12, 2011. The Family Court entered its Final Order on March 18, 2011, and found that the Petitioners were fit and competent to serve as Guardians. The Family Court noted that the Respondent mother C [REDACTED] V [REDACTED] and R [REDACTED] V [REDACTED] who at that time was also a Respondent, were properly served and given notice of the hearing. Regardless, the Respondent mother C [REDACTED] V [REDACTED] did not appear for the hearing. R [REDACTED] V [REDACTED] was unable to appear at the hearing due to health problems, and the Family Court stated that "C [REDACTED] V [REDACTED] has failed to appear despite proper notice, and due to the serious nature of the cause the Court finds it necessary to proceed." The Family Court further found that the Respondent, C [REDACTED] V [REDACTED] abandoned the subject children in April 2010. Based on the evidence presented, the Family Court found that "the respondent, C [REDACTED] V [REDACTED] is unfit to parent the infant children based on her abandonment of the children, her criminal history and the criminal history of the individual with whom she currently resides." As such, the Family Court found it was in the best interests of the subject children to name the Petitioners as their Guardians.
9. The Family Court Guardianship Order was entered on March 18, 2011, and the Respondent mother did not appeal the Guardianship Order to the Circuit Court.

10. Subsequently, the Respondent filed the current Motion For Reconsideration. The Motion For Reconsideration alleged that the Respondent was only served with a Notice Of Hearing. The Motion also asserted that the Respondent did not receive a full seven (7) days of notice prior to the hearing as required by the applicable rules. The Respondent also noted that her absence at the hearing is explained by her denied Motion For Continuance, which was based on the passing of her father four (4) days prior to the hearing and the desire to retain counsel. Finally, the Respondent argues that the Petitioners lacked standing to bring the Petition For Guardianship.
11. Following the filing of the Motion For Reconsideration, the Family Court entered a Transfer Order and this Court afforded the parties a full evidentiary hearing on July 13, 2011.
12. At the hearing, the Respondent [REDACTED] testified as follows:
- a. That she is the biological mother of the two subject children;
 - b. That she was married to [REDACTED] [REDACTED] on December 21, 2006;
 - c. That she and [REDACTED] [REDACTED] married in Belfry, Kentucky;
 - d. That she moved in with Mr. [REDACTED] at his residence in Mingo County, West Virginia, on January 1, 2007;
 - e. That [REDACTED] [REDACTED] had a son named [REDACTED] [REDACTED], but did not have any other prior children, nor did she;
 - f. That she was the primary caretaker of the subject children;
 - g. That she was twenty one years (21) old and [REDACTED] [REDACTED] was sixty one years (61) old when they married;

- h. That she bathed and cared for the subject children; Petitioner, B█████ V█████ did not care for the children;
- i. That the biological father of J█████ is R█████ V█████
- j. That R█████ V█████ passed away on February 12, 2011;
- k. That she had brought G█████ V█████ to the V█████ residence;
- l. That she had a sexual relationship with Mr. W█████ that started on March 14, 2009, the "day she met him;"
- m. That the younger subject child, D█████ was fathered by Mr. W█████;
- n. That she was the primary caretaker of D█████
- o. That she acknowledges that she was intoxicated and was arrested for DUI, contributing to the delinquency of a minor (Mr. W█████);
- p. That she was stressed out; R█████ V█████ was sick and she was working full time;
- q. That the subject children were not in the car, they were with R█████ V█████
- r. That she stayed in jail for thirty (30) hours;
- s. That R█████ V█████ told her she had to leave and would not let her take the subject children;
- t. That she went to the home of Mr. W█████ mother;
- u. That S█████ W█████ was the baby sitter hired by R█████ V█████ and cared for the subject children at Mr. V█████'s direction;
- v. That an emergency protective order was filed against her by Mr. V█████ and she could not see her children until June 16;

- w. B. J. and J. V. interfered with her visitations with the subject children;
- x. That she acknowledges she took no action to file for custody;
- y. That in October and November Mr. V. had her transported to his residence and allowed her to visit with the children for six to eight hours;
- z. That she missed the February 2011 Family Court hearing because she thought a continuance would be granted due to her father's death on February 6, 2011;
- aa. That she acknowledges she knew the continuance was denied;
- bb. That her husband died on February 12, 2011;
- cc. The she is willing to submit to random drug screens;
- dd. That S. W. lived in the house with R. V.;
- ee. That she wants custody of the subject children, and stated that "maybe [I am] not a good wife but [I am] a good mommy;"
- ff. That she was not successful in getting visitation;
- gg. That she wants parenting time;
- hh. That she claims she did not abuse substances such as drugs or alcohol, but testified at length about drinking incidents and criminal problems due to intoxication;
- ii. That she first said her husband died on March 12, 2011, when he actually died on February 12, 2011;
- jj. That on a few nights she would "get drunk and crash" at Mr. W.'s mother, L. H., and that this occurred every other weekend;

kk. That L██████ H██████ would take care of her kids while she partied;

ll. That the emergency protective order was taken out against her in April 2010;

mm. That she started going to bars in February 2010, one month after D██████ was born;

nn. That she acknowledges the Petitioners have a great relationship with the children and have done a great job parenting them;

oo. That she drank alcohol and partied with her boyfriend who was underage;

pp. That her boyfriend was charged with contributing to the delinquency of a minor;

qq. That in May 2010, Mr. V██████ was arrested and intoxicated and he was 20 years of age at the time;

rr. That she provided alcohol to Mr. W██████ while he was underage;

ss. That she acknowledges she harassed the arresting officer;

tt. That she and Mr. W██████ had been smoking marijuana the night they were arrested;

uu. That Mr. W██████ was put on probation for possession of marijuana;

vv. That she drank alcohol and used marijuana, but never took pills;

ww. That Mr. W██████ was arrested for possession of drugs and obstruction;

xx. That Mr. W██████ was arrested a second time in November 2010, he was also arrested a third time and charged with possession of marijuana;

yy. That she is making a life with Mr. W [REDACTED] and claims that he does not have a drug problem now;

zz. That Mr. W [REDACTED] did not have "a drug problem" in 2010 even though she acknowledges he was arrested for illegal drugs in April and November of that year;

aaa. That she does not know if Mr. W [REDACTED] is working as an informant for the police, but acknowledged it would be dangerous for the children if he was;

bbb. That Mr. W [REDACTED] drank excessively, smoked marijuana, and possessed illegal pills;

ccc. She was worried about the results of the DNA test, because the children could be separated and R [REDACTED] V [REDACTED] could get custody;

ddd. R [REDACTED] V [REDACTED] is on D [REDACTED]'s birth certificate;

eee. That Mr. W [REDACTED] has done nothing to assert his rights as father;

fff. That she hired her attorney in April 2011 after the Family Court proceeding;

ggg. That Mr. W [REDACTED] never supported D [REDACTED];

hhh. That both children are receiving social security benefits through R [REDACTED] V [REDACTED];

iii. That despite a court order granting her visitation twice a week, she acknowledges she went for a three or four month period without seeing the children;

jjj. That she did not purchase or bring the children anything for their birthday because she had "no transportation;"

kkk. That she does not have a driver's license, she is taking DUI classes, and although she has a car it is illegal to operate on the highway;

lll. That she had transportation resources through other sources;

mmm. That R [REDACTED] V [REDACTED] filed for divorce in November 2010 and the emergency protective order was extended;

nnn. That R [REDACTED] V [REDACTED] told her to get help for her problems;

ooo. That she went to mental health;

ppp. That she "didn't believe in divorce;"

qqq. That the Petitioner B [REDACTED] V [REDACTED] had constant contact with his father;

rrr. That she had a pill problem in 2005;

sss. That she "gets even more depressed with pills;"

ttt. That she does not know how the Xanax got in her car;

uuu. That in 2007 she was prescribed Prozac;

vvv. That the medicine made her "loopy;"

www. That R [REDACTED] V [REDACTED] bought her a new car in April 2007, and three years later it had seventy thousand miles on it;

xxx. That R [REDACTED] V [REDACTED] drew three thousand two hundred dollars (\$3,200) a month in social security and one thousand five hundred and ninety five dollars (\$1,595) a month in miner's pension;

yyy. That R [REDACTED] V [REDACTED] was an alcoholic;

zzz. That they had between two thousand two hundred dollars (\$2,200) and two thousand three hundred dollars (\$2,300) worth of expenses each month;

aaaa. That R [REDACTED] V [REDACTED] pawned and sold some of his guns to support them;

bbbb. That R [REDACTED] V [REDACTED] sold three vehicles and a four wheeler to buy another car;

cccc. That she knew R [REDACTED] V [REDACTED] was ill and could not care for the children;

dddd. That every time she went to the V [REDACTED] home, S [REDACTED] W [REDACTED] was caring for the children;

eeee. That R [REDACTED] V [REDACTED] stayed for a period with J [REDACTED] V [REDACTED] and J [REDACTED] was with him;

ffff. That there were several periods of time that she was not available to care for the children;

gggg. That during Christmas, she acknowledges that a dog urinated on the child, and she did not change the child's clothes and she left the child there wearing the urine soaked clothes and unbathed;

hhhh. That she last snorted pills in 2005;

iiii. That she smoked marijuana in the V [REDACTED] home;

jjjj. That her employer told her to take time off of work because she could not sleep or eat and cried at work;

kkkk. That she took baby bottles to bed and put extra bottle beside bed, rather than in the refrigerator;

llll. That she acknowledges she is "not a parent like most of these people are;"

mmmm. That she called and told R [REDACTED] V [REDACTED] that she wanted to come home because her and Mr. W [REDACTED] had an argument and Mr. W [REDACTED] asked her to leave;

nnnn. That the divorce petition was pending when R [REDACTED] V [REDACTED] died;

oooo. That her father passed away on February 6, 2011, and the funeral was held on February 9, 2011, and was over before the Family Court proceedings;

pppp. That she was served with the Guardianship Petition on February 3, 2011;

qqqq. That she wanted an attorney for the Family Court proceedings;

rrrr. That she was aware R [REDACTED] V [REDACTED] consented to the Petitioners getting Guardianship;

ssss. That she "know[s] the children [are] well taken care of" by the Petitioners;

tttt. That she "honestly [doesn't] know what's in the best interests of the [] children;"

uuuu. That the children probably call W [REDACTED] V [REDACTED] mommy and J [REDACTED] calls her C [REDACTED]

vvvv. That she can take care of the children now;

wwww. That D [REDACTED] has not had a relationship with her since she was three months old;

xxxx. That she has only seen J [REDACTED] a few times in the past eighteen months;

yyyy. That she acknowledges that at age two J [REDACTED] was not potty-trained or bottle broken;

zzzz. That she never noticed any congenital physical defects on the child;

aaaaa. That she does not know about J [REDACTED]'s development;

bbbbbb. That she did not know that D [REDACTED] had development delays, but that she did not smoke during the pregnancy;

ccccc. That she did use drugs and tobacco prior to her pregnancy;

dddddd. That she does not know D [REDACTED]'s health status;

eeeee. That she smoked in the child's presence, and now D [REDACTED] has lung problems;

fffff. That she was not aware D [REDACTED] had developmental delays, defect in rear, or lung problems;

ggggg. That the children have a bond with the Petitioners;

hhhhh. That in March 2010, both children stayed with the D [REDACTED], including her uncle O [REDACTED] D [REDACTED];

iiiiii. That she acknowledges she had a sexual relationship with her uncle O [REDACTED] D [REDACTED] when she was fifteen years old and he was thirty

years old and despite that sexual abuse history, allowed Mr. D [REDACTED] to be the caretaker of the female children;

jjjj. That she was molested at a young age;

kkkkk. That the D [REDACTED] babysat while she was at work;

lllll. That she checked herself into Highlands Psychological Hospital for three days around November 2010;

mmmmm. That she did not follow up with Logan Mingo health;

nnnnn. That she has been "clean" for four or five months.

13. At the hearing, the Petitioner, R [REDACTED] V [REDACTED] testified as follows:

- a. That he had no custodial rights until the guardianship proceedings;
- b. That the subject children are his half-sisters;
- c. That the subject children have always called his wife W [REDACTED] V [REDACTED] mommy;
- d. That J [REDACTED] started calling him daddy, and she said that she "needed a daddy;"
- e. That J [REDACTED] never asks about C [REDACTED];
- f. That he knew C [REDACTED] had a history of substance abuse and was not happy when his father married her;
- g. That he would adopt the subject children if given the opportunity;
- h. That C [REDACTED] put herself out of her children's lives and the children are better off without her;
- i. That C [REDACTED] called a couple times in April 2011, the first time she called was about a recliner and television;

- j. C█████ told him she just wanted the right to visit;
- k. That his father is on the birth certificates of both children and both children were born during the course of the marriage;
- l. That it does not matter if her his father is not the biological father he has cared for the children for eight months;
- m. That he and his wife does not have any of their own children; his wife has had two miscarriages;
- n. That he saw Mr. W█████ at his father's residence;
- o. That he thought Mr. W█████ was a friend of C█████'s, and C█████ denied a sexual relationship;
- p. That he knew of C█████'s drug use;
- q. That he knew C█████ had a sexual relationship with her biological uncle, C█████ D█████
- r. That he has seen C█████ intoxicated, i.e. slurred speech, falling down;
- s. That he saw C█████ intoxicated about every day, at least fifty to seventy five times;
- t. That C█████ abused marijuana, Lortabs, and drank alcohol;
- u. That in April 2010 C█████ called to borrow three hundred and fifty dollars and he discussed her drug use;
- v. That he told C█████ she was going to be an adult protective case based upon her treatment of R█████ V█████ and a CPS case based upon her neglect of the children;

- w. That C[REDACTED] was hardly in the home during the last few years of his father's life;
- x. That he threatened to call CPS, but his father begged him not to and the children were not in C[REDACTED]'s care and were being cared for;
- y. That he did not call adult protective service because relatives were caring for his father;
- z. That he has had the children since November 2010;
- aa. That C[REDACTED] is a habitual user of drugs;
- bb. That C[REDACTED] never had an interested role in the children, she is the biological mother but has never parented the children;
- cc. That C[REDACTED] always let other people care for the children, such as her mother, him, and R[REDACTED] V[REDACTED];
- dd. That C[REDACTED] always "ran the roads;"
- ee. That R[REDACTED] V[REDACTED] was the primary caretaker of the children prior to his death not C[REDACTED] or S[REDACTED] W[REDACTED];
- ff. That from April 2010 through November 2010, the children spent every weekend with him and his wife;
- gg. That he and his wife took the children full-time in November 2010;
- hh. That in April 2010, at the time of the emergency protective order, R[REDACTED] V[REDACTED] was in very poor health;
- ii. That her vehicle was impounded after her DUI arrest, it had over one hundred thousand miles, and was damaged all over;

- C
- jj. That C [REDACTED] admitted problems with Lortab and she would take R [REDACTED] V [REDACTED]s Lortabs "as she needed;"
 - kk. That he paid his father's bills after his mother passed away;
 - ll. That his father had approximately five thousand dollars (\$5,000) a month in income and twenty two hundred dollars (\$2,200) a month in expenses;
 - mm. That after they married, R [REDACTED] and C [REDACTED] would run out of money by the 8th of the month;
 - nn. That C [REDACTED] would often seek to borrow money;
 - oo. That he would loan C [REDACTED] fifty dollars (\$50) to buy milk for the children, and then she would not use the money to purchase the milk;
 - pp. That R [REDACTED] V [REDACTED] sold several vehicles, guns, and four wheelers, so he and C [REDACTED] could live;
 - qq. That R [REDACTED] V [REDACTED] sold everything of value;
 - rr. That his father pawned a 1948 Gibson guitar, his favorite asset;
 - ss. That his father had gall bladder surgery;
 - tt. That he went to his father's home every day to care for the dogs;
 - uu. That he would observe drug paraphernalia and alcohol cans at his father's home, and his father was staying at his brother's after the surgery;
 - vv. That he carried between twenty five (25) and thirty (30) bags of garbage from his father's home after his death, the garbage accumulated by C [REDACTED] V [REDACTED];
 - ww. That he found a hidden pistol and germinated plants in Mr. W [REDACTED]'s bedroom;

- xx. That at Christmas 2009, a dog urinated on J [REDACTED] and C [REDACTED] did not bathe or change the child's clothes, and C [REDACTED] eventually left saying she was going to a party;
- yy. That D [REDACTED] was born in January 2010;
- zz. That fifty (50) or one hundred (100) dirty baby bottles were found in the sink and everywhere else, which the children could have accessed;
- aaa. That C [REDACTED] took three (3) or four (4) bottles to bed at night, which were not refrigerated, and the baby would have to "fish around" to find a bottle;
- bbb. That C [REDACTED] swore that D [REDACTED] was R [REDACTED] V [REDACTED]'s biological child;
- ccc. That he has been involved in his sisters' lives from the day they were born;
- ddd. That C [REDACTED] would get off work at six p.m. and not return home until midnight;
- eee. That C [REDACTED] was "high" a lot;
- fff. That D [REDACTED] has a birth defect on her bottom that his wife noticed the very first time she changed her diaper, and was never noticed or medically attended by C [REDACTED] V [REDACTED];
- ggg. That D [REDACTED] has asthma, is developmentally delayed, and did not reach milestones;
- hhh. That D [REDACTED] was very non-verbal when they got her;
- iii. That C [REDACTED] went about four (4) months without a telephone call;

- jjj. That D [REDACTED] does not even recognize C [REDACTED];
- kkk. That the children bonded with the Petitioners and calls them mom and dad;
- lll. That the children started referring to him and his wife as mom and dad on their own volition, he did not encourage them to do so;
- mmm. That J [REDACTED] has always referred to C [REDACTED] by her given name and his wife as mom;
- nnn. That the children recognize the Petitioners as their parents;
- ooo. That he believes the children are much better off without C [REDACTED];
- ppp. That C [REDACTED] excluded herself from the children's lives;
- qqq. That he has never said anything negative about C [REDACTED] to the children;
- rrr. That he believes the best interest of the children is to stay with him;
- sss. That C [REDACTED] continues to socialize with inappropriate people;
- ttt. That C [REDACTED] left her daughters in the care of her blood uncle with whom she had sexual relations with when she was a minor;
- uuu. That C [REDACTED]'s mom lived with R [REDACTED] V [REDACTED] around six (6) months after J [REDACTED] was first born;
- vvv. That his wife is a school teacher and he is employed by the Mingo County Health Department as a sanitarian;
- www. That the children receive three thousand dollars (\$3,000) monthly in social security benefits;

xxx. That he does not need the social security benefits to rear the children, it is "not about the money, its about love;"

yyy. That C [REDACTED] is not a fit mother, and she presents an excuse for everything;

14. At the hearing, M [REDACTED] D [REDACTED] testified as follows:

- a. That she is the mother of C [REDACTED] V [REDACTED] and, thus, the grandmother of the children;
- b. That she stayed with C [REDACTED] and R [REDACTED] from August to November 2007 when she got a place in Williamson, West Virginia, and some after J [REDACTED] was born;
- c. That C [REDACTED] took care of J [REDACTED] and kept the home and children clean;
- d. That while staying in the home she never observed C [REDACTED] to be under the influence;
- e. That J [REDACTED] was given two unrefrigerated bottles at night;
- f. That she got to use C [REDACTED]'s automobile for errands;
- g. That C [REDACTED] changed diapers and R [REDACTED] also helped care for J [REDACTED];
- h. That she was not in the home long after J [REDACTED] was born;
- i. That she did not know about her daughter's drug use until after her arrest;
- j. That she would not be surprised if C [REDACTED] had history of marijuana and pain pill abuse;
- k. That she does not know how long C [REDACTED] worked or the reason she quit;
- l. That O [REDACTED] D [REDACTED] watched the children;
- m. That O [REDACTED] is a "good guy";

- n. That she did not know C [REDACTED] had a sexual relationship with O [REDACTED] D [REDACTED];
- o. That with that disclosure she would now be concerned with O [REDACTED] watching her grandchildren;
- p. That if O [REDACTED] and C [REDACTED] had a sexual relationship then he would not be fit to be around the children;
- q. That she does not know much about Mr. W [REDACTED] and does not associate with him;
- r. That today is the first time she has seen C [REDACTED] in six (6) months and does not know much about her current lifestyle;
- s. That she would be concerned if C [REDACTED] let O [REDACTED] D [REDACTED] take care of the children if he sexually abused her;
- t. That she cannot say how much C [REDACTED] has seen her children since she and R [REDACTED] separated;
- u. If C [REDACTED] visited ten (10) times in eighteen (18) months that "would be making an effort;"
- v. That C [REDACTED] is not a good mother if she did not buy her children Christmas presents.

15. At the hearing, G [REDACTED] M [REDACTED] W [REDACTED] testified as follows:

- a. That he was born on June 20, 1989;
- b. That he has known C [REDACTED] V [REDACTED] for two and one-half years (2 ½), he met her when he was twenty years old;
- c. That he met C [REDACTED] in 2009;

- d. That C [REDACTED] took him to R [REDACTED] V [REDACTED]'s;
- e. That the sexual relationship began shortly after he met in March 2009;
- f. That he is the biological father of D [REDACTED];
- g. That he wants DNA testing;
- h. That he and C [REDACTED] live together;
- i. That they rent a home from L [REDACTED] C [REDACTED];
- j. That he acknowledges he was arrested for obstruction of officer and possession of marijuana and Valium, but there were no kids in the car at that time;
- k. That he was arrested in another incident for obstruction and received unsupervised probation;
- l. That he works for carpentry repair and goes underground;
- m. That he has passed eleven employment drug screens;
- n. That he has been drug free for the past five (5) or six (6) months (since the Guardianship proceedings were instituted);
- o. That he has not had much contact with D [REDACTED] or J [REDACTED];
- p. That he observed the children with C [REDACTED] at R [REDACTED]'s house, at which time C [REDACTED] bathed and fed the girls;
- q. That he lived at R [REDACTED]'s residence for approximately one (1) year;
- r. That B [REDACTED] V [REDACTED] came by R [REDACTED] V [REDACTED]'s house on Sundays and once or twice through the week;
- s. That he and R [REDACTED] V [REDACTED] got along with each other;
- t. That he used drugs in the past;

- u. That he quit his job at Save-A-Lot to help R [REDACTED] V [REDACTED];
- v. That C [REDACTED] V [REDACTED] almost had a nervous breakdown but he "didn't see anything wrong with her;"
- w. That C [REDACTED] did not get any sleep with work and caring for the children and R [REDACTED] V [REDACTED];
- x. That he has no other children;
- y. That C [REDACTED] has been drug free for the last several months;
- z. That he has never thought C [REDACTED] had drug issues;
- aa. That he denies growing marijuana in the home;
- bb. That he hid his gun to keep it away from the kids;
- cc. That he earns twelve dollars (\$12) per hour;
- dd. That he and C [REDACTED] live in a two (2) bedroom house, which has five (5) rooms total;
- ee. That he would go to visits;
- ff. That he acknowledges a criminal history of other arrests but the charges were dismissed;
- gg. That he has not hit C [REDACTED], but that they did have domestic arguments and he told her to leave;
- hh. That he is now twenty two (22) years old and has been arrested three (3) times;
- ii. That his first arrest was for obstruction of a state trooper;
- jj. That his second arrests was for three counts of obstruction, possession of narcotic (marijuana), and that this arrest occurred with C [REDACTED] V [REDACTED];

- kk. That for his second arrest he pled guilty to obstruction for having lied to the officer;
- ll. That his third arrest was for three (3) charges of possession of marijuana;
- mm. That C [REDACTED] was served five (5) months ago with Guardianship papers and that is when they started trying to clean their act up;
- nn. That he and C [REDACTED] did not get high every other weekend and crash at his mother's house;
- oo. That he and C [REDACTED] smoked marijuana together;
- pp. That the Xanax in the car was not his (when questioned by the attorney further his response was "can you prove it?");
- qq. That he is aware that there was an allegation that C [REDACTED] stole fourteen dollars (\$14) at work;
- rr. That vodka and beer was regularly bought by R [REDACTED] V [REDACTED];
- ss. That the babysitter took care of the children when C [REDACTED] was working, and that he and R [REDACTED]'s brother were busy taking care of R [REDACTED] V [REDACTED];
- tt. That he did not try to change D [REDACTED]'s birth certificate or seek a determination of paternity or custody;
- uu. That he knew that C [REDACTED] was hospitalized in a mental institution;
- vv. That O [REDACTED] and R [REDACTED] D [REDACTED] were caretakers for the children;
- ww. That C [REDACTED] recently told him that her and O [REDACTED] had a sexual relationship ten (10) or eleven (11) years ago;
- xx. That if he knew O [REDACTED] and C [REDACTED] had sex in the past he "wouldn't let my little girl go there;"

yy. That he does not know if C is a good mother for allowing D to go to O's, but he would not let her go.

16. The Petitioners argue that the Family Court's Final Order was appropriate and is supported by the evidence. The Petitioner asserts that this type of case was intended to be heard as a Guardianship Petition, and that was the West Virginia Supreme Court of Appeal's intent. Additionally, the Petitioners argue that the Respondent abandoned the children and is an unfit mother. The Petitioners further assert that the Respondent has not mothered the children, nor has she protected them. Moreover, the Petitioners contend that this should have originally been an abuse and neglect case. Finally, the Petitioners argue that the purpose of this proceeding is to protect the children, and that evidence from the Respondent alone is sufficient to terminate her parental rights.
17. The Respondent argues that the Petitioners did not have standing to bring the Guardianship action in the Family Court, because they are not a parent and had no custodial rights prior to the Petition. Additionally, the Respondent argues that she is the biological mother, was the primary caretaker, and has rehabilitated herself; as such, she claims she is entitled to a presumption and should be granted custody. Finally, the Respondent asserts that in the alternative she should be granted the opportunity to form a bond with the children and have the possibility of reunification.
18. The GAL argued that the West Virginia Supreme Court of Appeals is aware that Guardianship proceedings are being used in this manner, i.e. as a private equivalent of abuse and neglect proceedings. Further, the GAL asserted that the

children do not know the Respondent, and that it is the Respondent's fault that the children do not know her. Additionally, the GAL noted that the Respondent could have taken action to exercise her rights with the children. Moreover, the GAL asserted that even before custody was awarded to the Petitioners, the Respondent did not act as a caretaker to the children. The GAL acknowledged that the Respondent has problems which can potentially be attributed to her childhood. However, the GAL opines that the children need stability. The GAL further argued that the Petitioners provide the subject children a safe home and the children think of them as their parents. As for Mr. W [REDACTED], the GAL argues that today is the first time that he has attempted to exercise any rights. Furthermore, the GAL noted that Mr. W [REDACTED] has been arrested, abuses substances, and that D [REDACTED] currently has social security benefits through her legal father, R [REDACTED] V [REDACTED].

Conclusions Of Law

1. Pursuant to West Virginia Code, Rule 13 of Practice and Procedure for Minor Guardianship proceedings

(a) Removal by Family Court to Circuit Court of Minor Guardianship Cases Involving Child Abuse and Neglect. If a family court learns that the basis, in whole or part, of a petition for minor guardianship brought pursuant to W. Va. Code § 44-10-3, is an allegation of child abuse and neglect as defined in W. Va. Code § 49-1-3, then the family court before whom the guardianship proceeding is pending shall remove the case to the circuit court for hearing. Should the family court learn of such allegations of child abuse and neglect during the hearing, then the family court shall continue the hearing, subject to an appropriate temporary guardianship order, and remove the case to the circuit court for hearing to be conducted within 10 days, for determination of all issues. Once removed, the case (or any portion) shall not be remanded to family court. At the circuit court hearing, allegations

of child abuse and neglect must be proven by clear and convincing evidence. Immediately upon removal, the circuit clerk shall forthwith send the removal notice to the circuit court. Upon receipt of the removal notice, the circuit court shall forthwith cause notice to be served in accordance with W. Va. Code § 44-10-3 and to the Department of Health and Human Resources who shall be served with notice of the petition, including a copy of the petition, and of the final hearing to be conducted before the circuit court. Such notice to the Department of Health and Human Resources shall constitute a report by the family and circuit courts pursuant to W. Va. Code § 49-6A-2

I. Jurisdiction

2. Initially, the Court must decide the jurisdictional argument presented by the Respondent. The Respondent argues that pursuant to West Virginia Code § 48-9-103 the Petitioners lacked the standing to bring the Guardianship Petition in the Family Court. Thus, the question would then become – if the Family Court lacked jurisdiction to hear the case initially, would this Court have jurisdiction pursuant to the Transfer Order?
3. West Virginia Code § 48-9-103 provides that:
 - (a) Persons who have a right to be notified of and participate as a party in an action filed by another are:
 - (1) A legal parent of the child, as defined in section 1-232 of this chapter;
 - (2) An adult allocated custodial responsibility or decision-making responsibility under a parenting plan regarding the child that is then in effect; or
 - (3) Persons who were parties to a prior order establishing custody and visitation, or who, under a parenting plan, were allocated custodial responsibility or decision-making responsibility.
 - (b) In exceptional cases the court may, in its discretion, grant permission to intervene to other persons or public agencies whose participation in the proceedings under this article it determines is likely to serve the child's best interests. The court may place limitations on participation by the intervening party as the court

determines to be appropriate. Such persons or public agencies do not have standing to initiate an action under this article.

4. The Respondent argues that West Virginia Code § 48-9-103(1)-(3) provides the list of parties permitted to file the Petition for Guardianship and that West Virginia Code § 48-9-103(b) provides that any other party may act only as an Intervenor. However, West Virginia Code § 48-9-103(a) unambiguously states that West Virginia Code § 48-9-103(1)-(3) is the list of “[p]ersons who have a right to be notified of and participate as a party in an action filed by another.” Thus, this particular code section deals with a Guardianship Petition that has already been filed and, contrary to the Respondent’s assertion, does not provide the inclusive list of those permitted to file the Petition.
5. The Respondent did not cite or provide, nor has the Court independently been able to find, any statutory authority or case law, which prohibits the Petitioners in this action from having standing to initiate the action. The Petitioners, B [REDACTED] and W [REDACTED] V [REDACTED], had been the physical custodians of the children caring for all of their needs since November 2010, which gave them standing in this matter. Particularly in light of C [REDACTED] V [REDACTED]’s abandonment and the findings contained in the Family Court Order and herein.
6. Accordingly, the Family Court properly had jurisdiction to hear the case. As such, the transfer to this Court is proper and binding.
7. Thus, the Respondent’s Motion is **DENIED** as to this ground.

II. Notice

8. The Respondent also claims that the Motion should be granted because she was not given sufficient notice of the Family Court hearing. The Respondent asserts that she was served with notice of the hearing on February 3, 2011, and the hearing was held on February 10, 2011. The Respondent claims that she did not receive the required seven (7) days of notice because the day that she was served and the weekends do not count.
9. The Respondent's argument is moot because the Court granted her a full evidentiary hearing de novo, which she attended with counsel, on July 13, 2011.
10. Thus, the Motion is **DENIED** as to this ground.

III. Best Interests Of Subject Children

11. The Supreme Court of Appeals of West Virginia has, "repeatedly held that in contests involving the custody of infants the welfare of the child is of paramount and controlling importance and is the 'polar star' by which the discretion of the court will be guided." *West Virginia Department of Human Services v. La Rea Ann C. L.*, 175 W.Va. 330, 336, 332 S.E.2d 632, 637 (1985).
12. Tempered with the State's *parens patriae* interest is the court's obligation to consider the "best interests of the child [as] paramount." *See In re Jeffrey R.L.*, 190 W.Va. 24, 32, 435 S.E.2d 162, 170 (1993). *See also Carter v. Carter*, 196 W.Va. 239, 246, 470 S.E.2d 193, 200 (1996) (recognizing paramount importance is the best interest of the child).
13. The best interest and welfare of the children is the controlling consideration in determining custody. *See Suter v. Suter*, 128 W.Va. 511, 37 S.E.2d 474 (1946).

14. Pursuant to West Virginia Code, Rule 10 of Practice and Procedure for Minor Guardianship proceedings:

The court, when determining an appropriate guardianship appointment over the person of a minor, shall ascertain and consider, among other pertinent matters, whether any proposed guardian:

- 1) Is required to register as a sex offender under West Virginia Code, Chapter 15, Article 12;
- 2) Has a record of any misdemeanor or felony convictions;
- 3) Has ever been subject to a restraining order or final protective order;
- 4) Has ever been the subject of any substantiated report alleging child abuse, neglect, or molestation made to any child protection agency, other law enforcement agency, or court in any jurisdiction;
- 5) Habitually uses any illegal substances or abuses alcohol; or
- 6) Has another person living in the home that involves any of the matters stated above.

15. Pursuant to West Virginia Code, Rule 11 of Practice and Procedure for Minor Guardianship proceedings

At the conclusion of the hearing on the petition, the court shall make findings of fact and conclusions of law regarding the guardianship matters raised in the petition and proceedings. The court shall issue an order for entry by the clerk with respect to the matters determined, including the findings of fact and conclusions of law, within 10 days of the conclusion of the hearing. The order shall contain a provision in its final paragraph directing the clerk to provide certified copies to the parties and other interested persons or entities as identified by the court.

16. All findings are made by clear and convincing evidence.

17. All findings are in the best interests of the children.

18. The Court FINDS that C [REDACTED] V [REDACTED] and Mr. W [REDACTED] both have misdemeanor convictions.
19. The Court FINDS that C [REDACTED] V [REDACTED] and Mr. W [REDACTED] have habitually abused substances.
20. The Court FINDS C [REDACTED] V [REDACTED] has been the subject of a final protective order.
21. The Court FINDS that Mr. W [REDACTED] resides in the home with C [REDACTED] V [REDACTED] and he has habitually abused substances.
22. The Court FINDS in accordance with the opinion of the GAL that it is in the best interests of the subject children to GRANT the Petition For Guardianship.
23. The Court FINDS that the Respondent, C [REDACTED] V [REDACTED] is an inappropriate caregiver and Mr. W [REDACTED] is an inappropriate caregiver.
24. The Court FINDS that the Respondent, C [REDACTED] V [REDACTED], has engaged in at risk behaviors, including alcohol and drug abuse. Additionally, the Respondent resides with and is in a relationship with an inappropriate caregiver, [REDACTED] W [REDACTED], who has an extensive arrest record.
25. The Court FINDS that despite having the right to visit with her children, the Respondent went an extended period, approximately four months, without visiting the children and has had de-minimus contact with the children, has not supported the children emotionally or financially, and has otherwise abandoned the children.
26. Additionally, the Court FINDS that the Respondent has inappropriately allowed her biological uncle, O [REDACTED] D [REDACTED], with whom she had a sexual relationship while a minor and he was thirty (30) years old, to care for the subject children and

- still fails to recognize the risk to her children even though Mr. White and her own mother recognized that serious risk.
27. Further, the Court FINDS that when the children were in the Respondent's custody she did not act as an appropriate caregiver, often left the children in other's care, and failed to properly tend to the subject children.
28. The Court FINDS that the Petitioners are appropriate caregivers.
29. The Court FINDS that the Petitioners, B [REDACTED] and W [REDACTED] V [REDACTED], are not sexual offenders, do not have criminal records, do not abuse alcohol or drugs, do not have past allegations of abuse or neglect of children, and do not have any one in the household with such issues.
30. The subject children consider the Petitioners to be their parents, and the Petitioners have acted as such for an extended period of time. Additionally, R [REDACTED] V [REDACTED] executed a Consent Of Guardianship in which he stated his desire for the Petitioners to be vested with the responsibility of caring for the children in the event that he is unable.
31. In light of the foregoing, the Court FINDS that it is in the best interests of the children that the Petition For Guardianship be GRANTED. Petitioners are appointed conservators and guardians of the children
32. The findings and orders herein are in the best interests of the child and the least restrict alternative. Remaining with the Respondent mother is contrary to the best interest of the children.

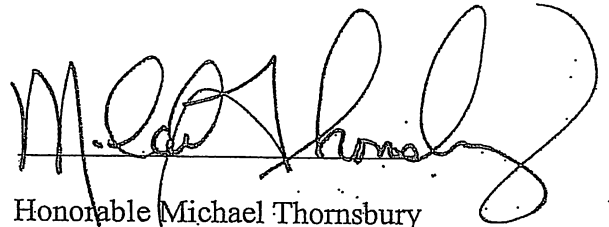
33. The Petitioners shall post a conservators bond in the amount of one thousand dollars (\$1000), take any required oath and education, and file annual financial accountings.
34. The Respondent may petition for modification and/or visitation upon completion of parenting, anger management, and substance abuse classes.
35. The Respondent mother shall pay child support in the amount of fifty dollars (\$50) per month.

Judgment

Wherefore, based on the foregoing Findings Of Fact And Conclusions Of Law, the Petitioner's Petition For Guardianship is hereby **GRANTED**. Physical and legal custody of the subject child is to remain with the Petitioners.

The Clerk is **DIRECTED** to send an attested copy of this Order to all parties of record.

Entered: this the 28th day of July 2011.



Honorable Michael Thornsbury
Chief Judge, 30th Judicial Circuit

A COPY TESTE

CIRCUIT CLERK MINGO COUNTY, W.VA.