

ADDENDUM TO ABUSE AND NEGLECT ARTICLE

The following cases should be taken into consideration by any practitioner. These are cases which have been decided by the West Virginia Supreme Court in the last three years:

In re Elizabeth A.
217 W.Va. 197, 617 S.E.2d 547
W.Va., 2005
June 10, 2005

The court held that the standard for reviewing abuse and neglect cases on appeal is a clearly erroneous standard. The court further held that although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children. Finally, the court held that where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parents, guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under West Virginia Code Section 49-1-3(a).

In re Randy H.
S.E.2d, 2006 WL 3455056
W.Va. 2006
November 30, 2006

The court held that under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the

amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions. The circuit court has the inherent authority to compel the department to amend its petition to encompass the evidence or allegations.

In re Amber Leigh J.
216 W.Va. 266, 607 S.E.2d 372
W.Va., 2004
November 01, 2004

Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, West Virginia Code 49-6-5, may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under West Virginia Code 49-6-5(b) that conditions of negligent or abuse can be substantially corrected. Courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened. Termination of parental rights of a parent of an abused child is authorized under West Virginia Code 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Termination is also authorized where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred but there is clear and convincing evidence that such version is inconsistent with the medical evidence.

In re Charity H.

215 W.Va. 208, 599 S.E.2d 631

W.Va. 2004

April 16, 2004

Termination of parental rights of a parent of an abused child is authorized under West Virginia Code 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. West Virginia Code 49-1-3(a) in part defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent. A child has a right to continue association with individuals who whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interest of the child.

In re Dejah P.

216 W.Va. 514, 607 S.E.2d 843

W.Va., 2004

December 01, 2004

No reasonable likelihood that conditions of neglect or abuse can be substantially corrected shall mean that based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse and neglect on their own or with help. Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive: (1) the abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or

drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning. The court, citing *In re: Emily B.*, 540 S.E.2d 542 (2000) further stated that where a court granted an improvement, scheduled to commence upon the mother's successful completion of a substance abuse treatment program was inappropriate because of the indefinite nature of such an improvement which contradicts the intent of the West Virginia legislature to expedite abuse and neglect proceedings in order to safeguard the welfare of the children.

Katherine B.T. v. Jackson
S.E.2d ----- 2006 WL 3456474
W.Va., 2006
November 30, 2006.

A Writ of Prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. West Virginia Code 53-1-1. In determining whether to entertain and issue the Writ of Prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous is a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifest persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's

order raises new and important problems or issues of law of first impression. Where the issue on appeal from the circuit court is clearly a question of law where involving an interpretation of a statute, de novo standard of review will apply.

State of West Virginia Dept. of Health and Human Resources v. Fox
218. W.Va. 397, 624 S.E.2d 834
W.Va., 2005
November 17, 2005

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this court will look to the adequacy of other available remedies such as appeal and to the overall economy of effort and money among litigants, lawyers and courts; however, this court will use prohibition in this discretionary way to correct only substantial, clear cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected and advanced. (This case involved a child whose father was responsible for the death of his sibling. The child was ordered to be returned to his parents and the department appealed.)

In re Michael S. Jr.
218 W.Va. 1, 620 S.E.2d 141
W.Va. 2005
July 06, 2005

Child abuse and neglect cases must be recognized as being among the highest priority for the court's attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. In reviewing challenges to

the finding and conclusions of the circuit court, the Supreme Court applies a two prong differential standard of review. The court reviews final orders and the ultimate disposition under an abusive discretion standard and the underlying factual findings under a clearly erroneous standard.

In re Skyelan H.
S.E.2d ---- 2006 WL 3359300
W.Va., 2006
November 17, 2006

The court in this case addressed an issue of after-required evidence. The court noted that after the entry of the court's dismissal order, the guardian ad litem proffered to the court evidence suggesting that three of the children may have been victims of sexual abuse. While the evidence, standing alone, proves nothing, the circuit court should have taken a more proactive role in compelling a further investigation of the evidence. In other words, the court believed that the circuit court was empowered to demand that the DHHR investigator report to the circuit court whether the evidence could or should be the basis of further action to protect the interest of the children. The court cited rules 3(a) and Rule 25(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.

In re Clifford K. v. Paul S.,
217 W.Va. 625, 619 S.E.2d 138
W.Va., 2005
June 17, 2005

A legal parent is an individual defined as a parent, by law, on the basis of biological relationship, presumed biological relationship, legal adoption or other recognized grounds. The phrase "other recognized grounds" refers to those individual

or entities who have been formally accorded parental status or the functional equivalent thereof by way of statute or judicial decree. Such parental status is comparable to the rights and responsibilities of a biological or adoptive parent and includes, but is not limited to, the right to care, control, and custody of the minor child; the right to consent or object to the child's adoption by another person; and the duty to support the child. See West Virginia Code 48-1-232. A psychological parent is a person who, on a continuing day to day basis, through interaction, companionship, interplay and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary duration, and must have begun with the consenting and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with the prior decision in *In re Brandon L.E.*, 183 W.Va. 113, 394 S.E. 2d 515 (1990), the case is expressly modified. In exceptional cases and subject to the court's discretion, a psychological parent may intervene in the custody proceeding brought pursuant to West Virginia Code 48-9-103.

**West Virginia Department of Health and Human Resources, Bureau
for Child Support Enforcement v. Kimberly Smith**
218 W.Va. 480, 624 S.E.2d 917
W.Va., 2005
December 02, 2005

When a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to chapter 49 of the West Virginia Code, the circuit court, and not the family court, has jurisdiction to establish a child's support obligation

for that child. When a circuit judge enters an order on an abuse and neglect petition filed pursuant to chapter 49 of the West Virginia code, and in so doing alters the custodial and decision making responsibility for the child and/or commits the child to the custody of the Department of Health and Human Resources, West Virginia Code 49-7-5 requires the circuit judge to impose a support obligation upon one or both parents for the support, maintenance, and education of the child. The entry of an order establishing a support obligation is mandatory; it is not optional.

In re Adoption of Jamison Nicholas C.
S.E.2d ---- 2006 WL 3359305
W.Va., 2006
November 13, 2006

The manner in which a state administers a federal assistance program must be consistent with federal law. Under the Federal Adoption Assistance and Child Welfare Act of 1980, the West Virginia Department of Health and Human Resources has an affirmative duty to notify prospective adoptive parents and prospective legal guardians of the availability of assistance for the care of a potentially special needs child in instances where the department has responsibility for placement and care of the child or is otherwise aware of the child.